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SCOTTISH STATUTORY INSTRUMENTS

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**2018 No. 347**

**The Insolvency (Scotland) (Receivership  
and Winding up) Rules 2018**

**PART 12 S**

**PERMISSION TO ACT AS DIRECTOR ETC. OF  
COMPANY WITH A PROHIBITED NAME (SECTION 216)**

[Note: a document required by the Act or these Rules must also contain the standard contents required as set out in Part 1.]

**Preliminary S**

**12.1.** The rules in this Part—

- (a) relate to permission required under section 216 (restriction on re-use of name of company in insolvent liquidation) for a person to act as mentioned in section 216(3) in relation to a company with a prohibited name;
- (b) prescribe the cases excepted from that provision, that is to say, in which a person to whom the section applies may so act without that permission; and
- (c) apply to all windings up to which section 216 applies.

**Application for permission under section 216(3) S**

**12.2.** At least 14 days' notice of any application for permission to act in any of the circumstances which would otherwise be prohibited by section 216(3) must be given by the applicant to the Secretary of State, who may—

- (a) appear at the hearing of the application; and
- (b) whether or not appearing at the hearing, make representations.

**Power of court to call for liquidator's report S**

**12.3.** When considering an application for permission under section 216, the court may call on the liquidator, or any former liquidator, of the liquidating company for a report of the circumstances in which the company became insolvent and the extent (if any) of the applicant's apparent responsibility for its doing so.

**First excepted case S**

**12.4.—(1)** This rule applies where—

- (a) a person (“the person”) was within the period mentioned in section 216(1) a director, or shadow director, of an insolvent company that has gone into insolvent liquidation; and
- (b) the person acts in all or any of the ways specified in section 216(3) in connection with, or for the purposes of, the carrying on (or proposed carrying on) of the whole or substantially

the whole of the business of the insolvent company where that business (or substantially the whole of it) is (or is to be) acquired from the insolvent company under arrangements—

- (i) made by its liquidator, or
- (ii) made before the insolvent company entered into insolvent liquidation by an office-holder acting in relation to it as administrator, receiver or supervisor of a CVA.

(2) The person will not be taken to have contravened section 216 if prior to that person acting in the circumstances set out in paragraph (1) a notice is, in accordance with the requirements of paragraph (3),—

- (a) given by the person, to every creditor of the insolvent company whose name and address—
  - (i) is known by that person, or
  - (ii) is ascertainable by that person on the making of such enquiries as are reasonable in the circumstances; and
- (b) published in the Gazette.

(3) The notice referred to in paragraph (2)—

- (a) may be given and published before the completion of the arrangements referred to in paragraph (1)(b) but must be given and published no later than 28 days after their completion;
- (b) must contain—
  - (i) identification details for the company,
  - (ii) the name and address of the person,
  - (iii) a statement that it is the person's intention to act (or, where the insolvent company has not entered insolvent liquidation, to act or continue to act) in all or any of the ways specified in section 216(3) in connection with, or for the purposes of, the carrying on of the whole or substantially the whole of the business of the insolvent company,
  - (iv) the prohibited name or, where the company has not entered into insolvent liquidation, the name under which the business is being, or is to be, carried on which would be a prohibited name in respect of the person in the event of the insolvent company entering insolvent liquidation,
  - (v) a statement that the person would not otherwise be permitted to undertake those activities without the leave of the court or the application of an exception created by Rules made under the Insolvency Act 1986,
  - (vi) a statement that breach of the prohibition created by section 216 is a criminal offence, and
  - (vii) a statement as set out in rule 12.5 of the effect of issuing the notice under rule 12.4(2);
- (c) where the company is in administration, has a receiver appointed or is subject to a CVA,—
  - (i) the date that the company entered administration, had a receiver appointed or a CVA approved (whichever is the earliest), and
  - (ii) a statement that the person was a director of the company on that date; and
- (d) where the company is in insolvent liquidation,—
  - (i) the date that the company entered insolvent liquidation, and
  - (ii) a statement that the person was a director of the company during the 12 months ending with that date.

(4) Notice may in particular be given under this rule—

- (a) prior to the insolvent company entering insolvent liquidation where the business (or substantially the whole of the business) is, or is to be, acquired by another company under arrangements made by an office-holder acting in relation to the insolvent company as administrator, receiver or supervisor of a CVA (whether or not at the time of the giving of the notice the person is a director of that other company); or
  - (b) at a time when the person is a director of another company where—
    - (i) the other company has acquired, or is to acquire, the whole, or substantially the whole, of the business of the insolvent company under arrangements made by its liquidator, and
    - (ii) it is proposed that after the giving of the notice a prohibited name should be adopted by the other company.
- (5) Notice may not be given under this rule by a person who has already acted in breach of section 216.

#### **Statement as to the effect of the notice under rule 12.4(2) S**

**12.5.** The statement as to the effect of the notice under rule 12.4(2) must be as set out below—

“Section 216(3) of the Insolvency Act 1986 lists the activities that a director of a company that has gone into insolvent liquidation may not undertake unless the court gives permission or there is an exception in the Insolvency Rules made under the Insolvency Act 1986. (This includes the exceptions in Part 12 of the Insolvency (Scotland) (Receivership and Winding up) Rules 2018.) These activities are—

- (a) acting as a director of another company that is known by a name which is either the same as a name used by the company in insolvent liquidation in the 12 months before it entered liquidation or is so similar as to suggest an association with that company;
- (b) directly or indirectly being concerned or taking part in the promotion, formation or management of any such company; or
- (c) directly or indirectly being concerned in the carrying on of a business otherwise than through a company under a name of the kind mentioned in (a) above.

This notice is given under rule 12.4 of the Insolvency (Scotland) (Receivership and Winding up) Rules 2018 where the business of a company which is in, or may go into, insolvent liquidation is, or is to be, carried on otherwise than by the company in liquidation with the involvement of a director of that company and under the same or a similar name to that of that company.

The purpose of giving this notice is to permit the director to act in these circumstances where the company enters (or has entered) insolvent liquidation without the director committing a criminal offence and in the case of the carrying on of the business through another company, being personally liable for that company's debts.

Notice may be given where the person giving the notice is already the director of a company which proposes to adopt a prohibited name.”

#### **Second excepted case S**

**12.6.—(1)** Where a person to whom section 216 applies as having been a director or shadow director of the liquidating company applies for permission of the court under that section not later than 7 business days from the date on which the company went into liquidation, the person may, during the period specified in paragraph (2) below, act in any of the ways mentioned in section 216(3), notwithstanding that the person does not have the permission of the court under that section.

(2) The period referred to in paragraph (1) begins with the day on which the company goes into liquidation and ends either on the day falling 6 weeks after that date or on the day on which the court disposes of the application for permission under section 216, whichever of those days occurs first.

### Third excepted case **S**

**12.7.** The court's permission under section 216(3) is not required where the company there referred to though known by a prohibited name within the meaning of the section—

- (a) has been known by that name for the whole of the period of 12 months ending with the day before the liquidating company went into liquidation; and
- (b) has not at any time in those 12 months been dormant within the meaning of section 1169(1), (2) and (3)(a) of the Companies Act <sup>M1</sup>.

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#### Marginal Citations

**M1** 2006 c.46; section 1169 is modified for Limited Liability Partnerships by S.I. 2008/1911, regulation 53.

**Changes to legislation:**

There are currently no known outstanding effects for the The Insolvency (Scotland) (Receivership and Winding up) Rules 2018, PART 12.