

**2007 No. 2537 (S.5)**

**INSOLVENCY, SCOTLAND**

**COMPANIES**

**The Insolvency (Scotland) Amendment Rules 2007**

<i>Made</i> - - - -	<i>29th August 2007</i>
<i>Laid before Parliament</i>	<i>31st August 2007</i>
<i>Coming into force</i> - -	<i>1st October 2007</i>

The Secretary of State makes the following Rules in exercise of the powers conferred by section 411 of the Insolvency Act 1986(a):

**Citation and commencement**

1. These Rules may be cited as the Insolvency (Scotland) Amendment Rules 2007 and shall come into force on 1st October 2007 (“the commencement date”).

**Transitional provision**

2. Rule 4.80 of the Insolvency (Scotland) Rules 1986(b) as it stands before the commencement date shall, in relation to any arrangements referred to in paragraph (1) of that Rule which have been completed before that date, continue to apply to a person who was a director or shadow director of the insolvent company the whole, or substantially the whole, of whose business is acquired.

**Substitution of Rule 4.80**

3.—(1) The Insolvency (Scotland) Rules 1986 are amended as follows.

(2) For Rule 4.80 substitute—

**“4.80 First excepted case**

(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;
- (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

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(a) 1986 c.45. Section 411 was amended by S.I. 2002/1037 and the Constitutional Reform Act 2005 (c.4), Schedule 1, paragraph 188.  
(b) S.I. 1986/1915, to which there are amendments not relevant to these Rules.

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 voluntary arrangement under Part 1 of the Act.

(2) The person will not be taken to have contravened section 216 if prior to his 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 him; or
  - (ii) is ascertainable by him on the making of such enquiries as are reasonable in the circumstances; and
- (b) published in the Edinburgh 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 that completion;
- (b) must state–
  - (i) the name and registered number of the insolvent company;
  - (ii) the name of the person;
  - (iii) that it is his 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; and
  - (iv) the prohibited name or, where the company has not entered 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; and
- (c) must in the case of notice given to each creditor of the company be given using Form 4.32(Scot).

(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 voluntary arrangement (whether or not at the time of the giving of the notice the director is a director of that other company); or
- (b) at a time where 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.”.

(3) After Form 4.31(Scot)(a) in Schedule 5 insert Form 4.32(Scot) as set out in the Schedule to these Rules.

*Pat McFadden*  
Minister of State for Employment Relations and Postal Affairs  
Department for Business, Enterprise and Regulatory Reform

29<sup>th</sup> August 2007

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(a) Form 4.31 was inserted by S.I. 2003/2108.

SCHEDULE

Rule 3(3)

FORM 4.32(Scot)

<p><b>Form 4.32(Scot)</b></p>	<p><b>WARNING – THIS FORM MAY NOT BE USED IF YOU HAVE ALREADY ACTED IN BREACH OF SECTION 216 OF THE INSOLVENCY ACT 1986</b></p>
<p><u>Notes for Completion</u></p>	<p><b>Rule 4.80 of the Insolvency (Scotland) Rules 1986</b> <b>Notice to the creditors of an insolvent company of the re-use of a prohibited name</b></p>
<p>*delete as applicable.</p>	<p>[Redacted] (a)</p>
<p>(a) Insert name of insolvent company.</p>	<p>Registered number [Redacted] (b)</p>
<p>(b) Insert registered number of insolvent company then complete <b><u>either section A or section B.</u></b></p>	<p><b>SECTION A – COMPANY IN ADMINISTRATION, RECEIVER APPOINTED, OR COMPANY SUBJECT TO VOLUNTARY ARRANGEMENT(c)</b></p>
<p>(c) Complete this section where the company has entered administration, a receiver has been appointed in respect of the company or the company is subject to a voluntary arrangement under Part 1 of the Insolvency Act 1986. <b><u>This section should not be completed if the company is in insolvent liquidation. In that case complete section B.</u></b></p>	<p>On [Redacted] (d) , [*the above-named company entered administration] [*a receiver was appointed in respect of the above-named company.] [*a voluntary arrangement under Part 1 of the Insolvency Act 1986 was approved in respect of the above-named company.]</p>
<p>(d) Insert date. In cases where the company has been subject to different insolvency procedures which immediately follow each other e.g. administration followed by a voluntary arrangement the date of the first proceedings should be entered.</p>	<p>I, [Redacted] (e)</p>
<p>(e) Insert name of director.</p>	<p>of [Redacted] (f)</p>
<p>(f) Insert address of director.</p>	<p>was a director of the above-named company on the day it [*entered administration] [*the receiver was appointed] [*the voluntary arrangement under Part 1 of the Insolvency Act 1986 was approved.]</p>
<p>(g) The director in question may already be acting in relation to a successor company that has adopted a name which in the event that the insolvent company enters insolvent liquidation would be a prohibited name. Alternatively he may be proposing so to act. The appropriate deletion should accordingly be made.</p>	<p>I give notice that (g) [*I am acting and intend to continue to act in one or more of the ways to which section 216(3) of the Insolvency Act 1986 would apply if the above-named company were to go into insolvent liquidation] [*it is my intention to act in one or more of the ways to which section 216(3) of the Insolvency Act 1986 would apply if the above-named company were to go into insolvent liquidation] in connection with, or for the purposes of, the carrying on of the whole or substantially the whole of the business of the above-named company under the following name:</p>
<p>(h) Insert name which would be a prohibited name if the company were to enter insolvent liquidation.</p>	<p>[Redacted] (h)</p>

**Form 4.32(Scot)**

**Cont.**

**SECTION B - COMPANY IN INSOLVENT LIQUIDATION**

Notes for completion

(i) Insert date.

On [ ] (i) the above-named company went into insolvent liquidation.

(j) Insert name of director.

I, [ ] (j)

(k) Insert address of director.

of [ ] (k)

was a director of the above-named company during the 12 months ending with the day before it went into liquidation.

(l) Insert name under which the business is to be carried on.

I give notice that it is my intention to act in one or more of the ways specified in section 216(3) of the Insolvency Act 1986 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 under the following name:

[ ] (l)

Notes:

Section 216(3) of the Insolvency Act 1986, which is referred to above, lists the activities that a director of a company that has gone into insolvent liquidation may not undertake without the court giving leave or the application of an exception created under Rules made under the Insolvency Act 1986. (This includes Rule 4.80 of the Insolvency (Scotland) Rules 1986.) 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 period of 12 months ending on the day 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 in pursuance of Rule 4.80 of the Insolvency (Scotland) Rules 1986 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 the giving of 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 using this form may be given where the director giving the notice is already the director of a company which proposes to adopt a prohibited name.

## EXPLANATORY NOTE

*(This note is not part of the Rules)*

These Rules amend the Insolvency (Scotland) Rules 1986 (“the Rules”) by substituting a new version of Rule 4.80. Section 216 of the Insolvency Act 1986 (“the Act”) prohibits a person who was a director (or shadow director) of a company within 12 months prior to its entering into insolvent liquidation from being a director of another company which has the same name or a name which is so similar as to suggest an association with the insolvent company (such a name is referred to as “a prohibited name”). Section 216 of the Act also contains prohibitions against such a director acting in connection with the promotion, formation or management of a company known by a prohibited name or carrying on a business under a prohibited name otherwise than by a company.

The prohibitions in section 216 are subject to leave being granted by the court and to such exceptions as may be prescribed by Rules made under section 411 of the Act. The Rules contain a number of exceptions to the section 216 prohibition that are contained in Rules 4.78 to 4.82. The former version of Rule 4.80 allowed a director to act as the director of a company or otherwise in connection with its management where—

- (a) the company used a prohibited name; and
- (b) the company acquired the whole or substantially the whole of the insolvent company’s business; and
- (c) a notice was given to the insolvent company’s creditors.

There is transitional provision for the former version of Rule 4.80 to continue to apply in certain circumstances (Rule 2).

In *First Independent Factors and Finance Limited v Churchill* [2006] EWCA Civ 1623 the Court of Appeal in England and Wales ruled that such a notice could not be given where an individual was already a director of the successor company that wished to acquire the business of the insolvent company and adopt the prohibited name.

The new Rule 4.80 makes provision for a director of a company that enters insolvent liquidation to act as a director of a company (or otherwise be involved in the formation, promotion or management of that company) where that company—

- (a) uses a prohibited name; and
- (b) acquires the whole or substantially the whole of the insolvent company’s business.

Notice must be published in the *Edinburgh Gazette* and given to all creditors known to the director or whose names and addresses could be ascertained by the director by making reasonable enquiries. The Rule further allows a person to carry on the business of the insolvent company using a prohibited name other than through a limited company where the relevant notice is given. The Rule provides that the prescribed notice may be given before the company enters insolvent liquidation (where, for example, the insolvent company is in administration and it is likely (or possible) that it will subsequently go into insolvent liquidation). In cases where the insolvent company is not in insolvent liquidation and also in cases where the acquiring company has not yet adopted a prohibited name, notice can be given where the director of the insolvent company is already a director of the acquiring company. However notice must always be given before a director acts in a way that would be prohibited by section 216.

No Regulatory Impact Assessment has been prepared in relation to these Rules, as they will not impose any significant burdens on business.



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