

EXPLANATORY MEMORANDUM TO
THE INSOLVENCY PROCEEDINGS (FEES) (AMENDMENT) ORDER 2009

2009 No. 645

1. This explanatory memorandum has been prepared by the Department for Business, Enterprise and Regulatory Reform and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The instrument changes fees charged by The Insolvency Service (“The Service”) in respect of its services for Insolvency Case Administration, Estate Accounting and Insolvency Practitioner Regulation. In particular the order introduces a new fee following on from the introduction of debt relief orders into the Insolvency Act 1986, which are due to come into force on 6 April 2009.

3. Matters of special interest to the Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 In respect of Insolvency Case Administration, (including from 6 April 2009 Debt Relief Orders), the Regulation of Insolvency Practitioners and Estate Accounting, The Service must recover the full cost of delivering these services from customers. Fees and charges must be reviewed annually to ensure that full cost recovery can be achieved.

4.2 The Fees Order is made to effect changes in fees in accordance with HM Treasury’s Fees and Charges guidance. The Case Administration fees have increased in line with inflation. Although in respect of cases where a bankruptcy order or winding up order was made before 1 April 2005 (“Year 1, 2004-2005 cases”) the fees have been reduced to avoid a surplus being made on those cases. The Estate Accounting fees and the Regulation of Insolvency Practitioner fees have increased to ensure the full recovery of costs.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 The new financial regime implemented on 1 April 2004 for The Service and provided for by the coming into force of the Enterprise Act 2002, included a new fee regime that was intended to be simpler, fairer and more transparent and to match income to costs in line with the Treasury Fees and Charges Guide.

7.2 The Service operates on a net funded regime. In respect The Service's functions of Case Administration, the Regulation of Insolvency Practitioners and Estate Accounting, The Service must recover the full cost of delivering these services from customers.

Case Administration

7.3 This Fees Order amends the Insolvency Proceedings (Fees) (Amendment) Order 2004 (S.I. 2004/593) ("the principal Order"). The Service aims to recover the costs of Case Administration by setting Case Administration fees which are matched to costs. Whilst a Case Administration fee is charged in every case, the recoverability of that fee is determined by 3 elements:

- i. The deposit payable prior to an insolvency order being made,
- ii. Assets realisations in the individual case
- iii. A Secretary of State fee which is charged on realisations

7.4 The fee structure introduced on 1 April 2004 required that creditors should bear the cost of official receiver administration through a combination of deposits, an administration fee and a general (Secretary of State) fee. The levels of petition deposits were increased to provide for inflation in April 2007 and April 2008 and are now further increased with inflation. In agreeing to increases limited to inflation The Service remains committed to a policy of reducing the gap between the administration fee and the deposit over time and reducing the reliance on the general (Secretary of State) fee.

7.5 Section 273 of The Insolvency Act 1986 provides for an Insolvency Practitioner (IP) to be appointed by the Court, in order to investigate and report whether a viable proposal for a voluntary arrangement could be constructed. A fee is payable to an IP appointed in these circumstances and in setting the fee, it has always been directly linked to the debtor's petition deposit. This link has been maintained.

7.6 The Secretary of State fee is set at a rate that will achieve the estimated shortfall on case administration. There is now a likelihood that the fees earned on "Year 1 2004-2005 cases" will result in a surplus, based on The Service's current cost predictions. Therefore, the Secretary of State fee for any asset realisations made on a "Year 1 2004-2005 case" on or after 6 April 2009 has been revoked.

7.7 The Order introduces a new fee following on from the introduction of debt relief orders into the Insolvency Act 1986 (c.45) by the Tribunals, Courts and Enforcement Act 2007 (c.15). Section 251B of the Insolvency Act 1986 (making of application for a debt relief order) provides for payment of a fee in connection with an application for a debt relief order. Section 415 of the Insolvency Act 1986 permits the charging of fees in respect of the costs of persons acting as approved intermediaries and the costs of the performance by the official receiver of functions in relation to such orders under Part 7A of the Insolvency Act 1986. The Order makes an application for a debt relief order subject to the payment of a fee of £90.

Regulation of Insolvency Practitioners

A Fee of £10 is payable on the registration of an individual voluntary arrangement (IVA) by the Secretary of State. The Service maintains the Individual Insolvency Register which includes details of current IVAs and fast track voluntary arrangements. The Register is publicly available and on-line searches can be carried out via The Service's web site. There has been an increase in the cost of administering this part of the insolvency register to maintain its accuracy. The Service recorded a small deficit of £68,000 in respect of the Regulation of Insolvency Practitioners in 2007/2008. Since 2004 the IVA registration fee has been reduced from £35 to £10 but it will now increase to £15. This rate should enable The Service to recover the deficit for 2007/2008 and ensure we can meet the financial objective of full cost recovery.

Estate Accounting

The Order modifies the fee structure in respect of the purchase and sale of government securities made by trustees in bankruptcy and by liquidators.

The Order introduces a new fee which becomes payable upon the sale of government securities. Where insolvency practitioners maintain estate accounts in the ISA they are able to purchase government stocks. Interest rates since 2004 have been at a level which has made the purchase of stocks unattractive in most cases and the activity covered by the current £50 investment fee has been negligible. Since 2004 The Service has had to change its provider in relation to stock purchases and the current fee no longer reflects the charges made by the provider. Additionally, the purchase of stocks is now increasing. The Investment Fee will be increased to ensure the recovery of costs.

- ***Consolidation***

7.8 The principal order has been amended by four earlier statutory instruments, some because of the need to modify fees and charges in line with the requirements of the regime referred to in 7.1. The Service intends to produce a consolidated version of the fees order as part of its current project to consolidate all insolvency secondary legislation.

8. Consultation outcome

8.1 An impact assessment has been prepared in relation to debt relief orders which may be consulted on the website: www.dca.gov.uk/consult/debt/debt.htm and www.insolvency.gov.uk/htm. No other impact assessment has been prepared for this Order.

8.2 The Enterprise Act 2002 modernised the financial regime of The Service by simplifying the fee structure and ensuring increased transparency. The principles of the new financial regime included that Case Administration, Insolvency Practitioner Regulation and Estate Accounting would be fully funded from fees. The Enterprise Act 2002 was preceded by an extensive consultation exercise and the provisions relating to insolvency reform were generally welcomed. A Regulatory Impact Assessment was prepared for the Enterprise Act 2002. The changes proposed by this statutory instrument are designed to ensure the principles of the financial regime which came into force in April 2004 are being maintained. In particular, that fees are set to match cost.

9. Guidance

9.1 The Order brings about an increase in the deposit payable as security for the payment of fees in insolvency proceedings. When a bankruptcy or a winding up petition is presented to the court, a deposit must have been paid to the court or if the petitioner is a regular petitioner, the Secretary of State may have given notice to the court that the petitioner has made suitable alternative arrangements for the payment of the deposit to the Official Receiver.

9.2 The Service tries to ensure that the proposed changes are notified to users and stakeholders before the commencement of the Order. In particular we try to ensure that the petitioning creditor's solicitors who present petitions on behalf of their clients are aware of the deposit increases. Failure to do this would result in petitions and paperwork being returned to the solicitors by the courts, with requests for the correct payment. It would also result in unnecessary costs being incurred by both the petitioners and the courts.

9.3 The Service has a National Consultative User Group which provides a forum for national user representative organisations to discuss user issues and needs in relation to delivery of services by The Service. Its members include representatives from:

- The Bankruptcy Advisory Service
- The Court Service
- Citizens Advice Agency
- The Institute of Credit Management
- Consumer Credit Counselling Service
- Federation of Small Business
- Royal Courts of Justice Advice Bureau

9.4 The Service has communicated the changes in deposit levels to the above organisations. The Service has written to the court clerks in all the High Courts and County Courts in England and Wales to notify them of the new deposit levels.

9.5 The Service has prepared an article to be published in its “Dear IP” newsletter. This publication aims to notify and explain to The Services’ users, specifically Insolvency Practitioners, the detail and background to legislative changes.

9.6 A copy of the draft order has been made available at The Service’s website at www.insolvency.gov.uk

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is that fees charged will more accurately reflect cost.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The changes in the fee structure aim to achieve full cost recovery of Case Administration, Regulation of Insolvency Practitioners and Estate Accounting functions. The fees will continue to be subject to annual review and the legislation may be further amended accordingly.

13. Contact

Lesley Beech at The Insolvency Service Tel: 0207 291 6704 or email: lesley.beech@insolvency.gsi.gov.uk can answer any queries regarding the instrument.