

**EXPLANATORY MEMORANDUM TO
THE INSOLVENCY PROCEEDINGS (FEES) (AMENDMENT) ORDER 2011**

2011 No. 1167

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills 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 Insolvency Proceedings (Fees) (Amendment) Order 2011 (the “Order”) makes amendments to the Insolvency Proceedings (Fees) Order 2004 (S.I 2004/593) (the “principal Order”). The instrument amends the petition deposit payable to The Insolvency Service (“the Service”) in respect of its services for insolvency case administration. The change is made as part of an annual fees review, to ensure more of the case administration fee is recovered earlier in the process and to maintain a balance in the share of the cost of the regime between debtors and creditors. Overall, the cost of case administration has not increased in real terms and therefore the fees themselves have not been increased.

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

- 3.1 Creditors or debtors that petition for bankruptcy or winding-up are required to pay a deposit into the court towards the cost of the administration of the case. This deposit is returned if sufficient assets are recovered. Changes to deposit levels mean debtors will pay £75 more for their deposit to file a petition for bankruptcy, which represents a 16.5% increase. Creditors will pay £100 more for their petition deposit to put an individual into bankruptcy and £165 more to put a company into compulsory liquidation, both also represent a 16.5% increase on current deposit levels.
- 3.2 The deposit only represents a proportion of the case administration fee (£1,715 bankruptcy and £2,235 Company). The balance of the fee is payable when assets are realised. The process for recovering the case administration fee is set out in section 7, Policy background below. Asset levels and values have worsened in the current economic climate and the current fee structure means that the Service can no longer ensure that the case administration fees will be recovered.
- 3.3 Given these lower asset levels, greater certainty for fee recovery can only be achieved by either increasing the deposit significantly and/or bringing

forward increased Secretary of State fees. The Service has proposed an increase to the deposit after considering the impact of both on debtors and creditors. The Service has used the information available on current cases and the level of fee recoveries over recent years

- 3.4 The increases in deposits will ensure that the cost of case administration is paid partly by the debtor and partly by creditors. For the most vulnerable in society who are struggling with relatively modest levels of debt, Debt Relief Orders are a low-cost alternative option to bankruptcy.

4. Legislative Context

- 4.1. The power to make the Order is contained within sections 414 and 415 of the Insolvency Act 1986 and with the sanction of the Treasury. Those powers are exercised by the Lord Chancellor by statutory instrument.
- 4.2. This Order makes provision for the charging of fees in relation to insolvency proceedings in England and Wales under the Insolvency Act 1986.
- 4.3. In article 2 it is provided that the deposits payable on presentation of a petition for the winding-up of a company and for a bankruptcy order against an individual are increased by the amounts specified.
- 4.4. In respect of insolvency case administration, the Service must recover from customers the full cost of delivering these services. Fees and charges must be reviewed annually to ensure that full cost recovery can be achieved. The instrument is made to effect changes in fees in accordance with HM Treasury's fees and charges guidance contained within Managing Public Money.

5. Territorial Extent and Application

- 5.1. This instrument applies to England and Wales only.

6. European Convention on Human Rights

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

7. Policy background

- What is being done and why

- 7.1 The Service operates on a net funded regime. In respect of insolvency case administration the Service must recover the full cost of delivering these services from customers. Fees and charges are reviewed annually to ensure that full cost recovery can be achieved and fees must be set to match cost.

- 7.2** This instrument amends the Insolvency Proceedings (Fee) (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. While 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. asset realisations in the individual case
 - iii. a Secretary of State fee which is charged on realisations
- 7.3** 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 fee policy ensures that those who benefit from the insolvency regime, rather than the taxpayer, should fund the cost. In setting the fees, the Service ensures that a balance is found between the interests of both debtors and creditors. The levels of petition deposits were increased to provide for inflation in April 2006, April 2007, April 2008, April 2009 and above inflation in April 2010. However, only a small proportion of the fee is recovered at the outset of a case from the deposit. The Service then has to wait for assets to be realised before recovering the remainder of the fee. The economic downturn has reduced asset levels and values (especially property). This has led to a greater proportion of cases which do not generate enough money to cover the fee in the first place and a lessening of the effectiveness of the Secretary of State fee as a safety net. The Service therefore needs to move to a model in which the cash generated by the fees is both more certain and is realised earlier in the process. This will be achieved by increasing the level of the cash deposit (beyond inflation) that is paid by the petitioner seeking the court order.
- 7.4** The new deposit level will ensure greater recovery fees at the outset of each case where insolvency orders are made on or after 1st June 2011.
- Consolidation
- 7.5** The principal Order has been amended by six earlier statutory instruments, partly because of the need to modify fees and charges in line with the requirements of the regime referred to in 7.1. In the explanatory memorandum to the Insolvency Proceedings (Fees) Amendment Order 2009 (2009/645) the Service stated that it intended to produce a consolidated version of the fees order as part of its current project to consolidate all insolvency secondary legislation. However, The Service was then unable to consolidate the S.I.s relating to fees, as expected, in the consolidation project. In view of an ongoing cost cutting programme, The Service has not been able to allocate resources to consolidate in this financial year but intends to review this in its annual fees review for 2011/2012.

- *Commencement Date*

The commencement date for this instrument is 1 June 2011. Normally Departmental policy is that instruments should come into force on one of two Common Commencement Dates, 6 April or 1 October. However changes in the way that Impact Assessments are scrutinised and the need to provide adequate notice of imminent changes to stakeholders meant that Ministerial agreement was obtained for this instrument to come into force on 1 June 2011.

8. Consultation Outcome

- 8.1.** No formal consultation has been undertaken, although informal discussions about the changes to the debtor petition deposit have taken place with the advice sector.

9. Guidance

- 9.1.** Guidance will be issued to stakeholders via leaflets issued to the courts, by notification to insolvency practitioners and to all other interested parties via The Insolvency Service website.

10. Impact

- 10.1.** An impact assessment has been produced for this instrument and will be available on The Insolvency Service website.

11. Regulating small business

- 11.1.** No specific impact on small businesses is foreseen.

12. Monitoring and Review

- 12.1.** The Insolvency Service monitors the efficient working of the insolvency framework and evaluates legislative changes to the insolvency legislation. In view of the fact that these regulations make only minor changes of an administrative nature no specific monitoring of these changes will be undertaken.

13. Contact

- 13.1.** Stephen Parcej at The Insolvency Service (Tel: 0207 291 6761 or e-mail: Stephen.parcej@insolvency.gsi.gov.uk) can answer any queries regarding the Regulations.