

EXPLANATORY MEMORANDUM TO
THE INSOLVENCY (SCOTLAND) (COMPANY VOLUNTARY ARRANGEMENTS
AND ADMINISTRATION) (AMENDMENT) RULES 2021

2021 No. 1026

AND

THE INSOLVENCY (SCOTLAND) (RECEIVERSHIP AND WINDING UP)
(AMENDMENT) RULES 2021

2021 No. 1025

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Insolvency (Scotland) (Company Voluntary Arrangements and Administration) (Amendment) Rules 2021 (“the CVAA Amendment Rules”) amends The Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 (“the CVAA Rules 2018”). The Insolvency (Scotland) (Receivership and Winding up) (Amendment) Rules 2021 (“the RWU Amendment Rules”) amends the Scottish statutory instrument The Insolvency (Scotland) (Receivership and Winding Up) Rules 2018 (“the RWU Rules 2018”). The CVAA Amendment Rules and the RWU Amendment Rules provide permanent procedural rules in Scotland for the company moratorium procedure introduced into the Insolvency Act 1986 (“the Act”) by the Corporate Insolvency and Governance Act 2020 (“the CIG Act”). The moratorium allows companies in financial distress a breathing space in which to explore rescue and restructuring options free from creditor action.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of these instruments is Scotland.
4.2 The territorial application of these instruments is Scotland.

5. European Convention on Human Rights

- 5.1 As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The CIG Act included essential temporary rules for the moratorium in Scotland in Part 4 of Schedule 4 so that the moratorium procedure could be operational on commencement of the CIG Act without the need for secondary legislation. Those temporary rules have been extended on two occasions: firstly, by The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period Regulations) 2020 SI 2020/1031 to 30 March 2021 and latterly by The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021 SI 2021/375 to 30 September 2021.
- 6.2 These instruments will replace the temporary moratorium rules for Scotland by incorporating permanent rules for the moratorium into the CVAA Rules 2018 and the RWU Rules 2018. The power to make both instruments is s.411(1)(b) of the Act. The CVAA Amendment Rules also removes references in the CVAA Rules 2018 to the little used Schedule A1 moratorium procedure, which was repealed by the CIG Act.

7. Policy background

What is being done and why?

- 7.1 The CIG Act introduced a new Part A1 moratorium into the Act, with an authorised insolvency practitioner appointed as monitor to oversee the procedure. The aim of the moratorium is to facilitate a rescue of the company and a return to profitable trading. The moratorium will also encourage companies in financial distress to act earlier to restructure debt and improve their chances of success. Procedural rules are required for the moratorium to operate effectively and to provide certainty to users of the moratorium, such as companies, directors, creditors and insolvency practitioners.
- 7.2 The CIG Act included essential temporary rules for Scotland so that the moratorium procedure could be operational on commencement of the CIG Act. Those temporary rules are currently set to expire on 30 September 2021.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.3 The CIG Act included essential temporary rules for Scotland so that the moratorium procedure would be operational on commencement of the CIG Act. Those temporary rules are currently set to expire on 30 September 2021.

Why is it being changed?

- 7.4 Procedural rules for the (reserved) corporate insolvency procedures in Scotland of company voluntary arrangements and administration are contained in the CVAA Rules 2018, and for the (devolved) procedure of receivership and the (mixed competence) procedure of winding up are contained in the RWU Rules 2018. It is more efficient for users for the rules relating to the new moratorium procedure to be incorporated into those 2018 rules. In addition, the temporary rules only included those rules essential for the moratorium to be operational on commencement of the CIG Act as that Act included measures which were designed to assist businesses impacted by the Coronavirus pandemic and it was important to get the moratorium operational quickly.

What will it now do?

- 7.5 The CVAA Amendment Rules incorporate comprehensive procedural rules for the moratorium within the existing framework of the CVAA Rules 2018. This will reduce duplication and provide a single set of rules for the corporate insolvency procedures in Scotland of the moratorium, company voluntary arrangements and administration.
- 7.6 The policy of the CVAA Amendment Rules follows closely that of the temporary rules in Part 4, Schedule 4 to the CIG Act. Following feedback from users of the temporary rules the opportunity has been taken to improve the operation of the moratorium by making some policy changes. For example, many of the notice periods relating to the moratorium are expressed in the CVAA Amendment Rules as “business days” to align with the convention used in the CVAA Rules 2018 for other insolvency procedures. Also, for the purpose of deciding whether to bring a moratorium to an end, the CVAA Amendment Rules provide that the monitor must disregard debts they have reasonable grounds for thinking are likely to be paid or compounded to the satisfaction of the creditor within 5 days of the monitor’s decision. This will provide additional flexibility for companies to explore rescue and restructure of their businesses.
- 7.7 The Act provides that where a company goes into winding up within a short time of a moratorium ending that certain debts incurred both prior to and during the moratorium have priority over other debts and expenses in the winding up. The temporary rules made provision for the order in which these debts must be paid, and similar provision is made in the RWU Amendment Rules to the RWU Rules 2018. As a result of the changed order of priority in the winding up in the circumstances described above, consequential changes are made to the RWU Rules 2018 regarding information to be shown in the statement of affairs of the company subject to the winding up and the obligations of the liquidator when distributing funds. The RWU Amendment Rules also make provision for notification by liquidators (voluntary and provisional) to be given to the monitor where a moratorium is in force.

8. European Union Withdrawal and Future Relationship

- 8.1 These instruments do not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 These instruments amend the CVAA Rules 2018 and the RWU Rules 2018 to provide that permanent rules for the moratorium are contained within those rules.

10. Consultation outcome

- 10.1 There has been no public consultation in relation to these instruments.

11. Guidance

- 11.1 The Insolvency Service issues regular bulletins to interested parties and these will be used to raise awareness of these instruments before commencement.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for these instruments because no, or no significant, impact on the private, voluntary or public sector is foreseen as the instruments largely incorporate the policy of the temporary rules in the CIG Act into the existing CVAA Rules 2018 and the RWU Rules 2018.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to mitigate the regulatory burden on small businesses.

14. Monitoring & review

14.1 These instruments do not include a statutory review clause. However, the CVAA Rules 2018, which the CVA Amendment Rules amend, do include a provision that the Secretary of State must publish a review of those rules within 5 years of them coming into force (6 April 2019) and afterwards at intervals not exceeding 5 years.

15. Contact

15.1 Mike Chapman at the Insolvency Service Telephone: 0300 3048533 or email: mike.chapman@insolvency.gov.uk can be contacted with any queries regarding the instrument.

15.2 Angela Crossley, Director for Strategy, Policy and Analysis at the Insolvency Service can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister for Business, Energy and Corporate Responsibility, Lord Callanan at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.