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Our ref: ICAEW Rep 09/14

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Dear Ms Tranter

Insolvency Rules 1986 – modernisation of rules relating to insolvency law

ICAEW welcomes the opportunity to comment on the consultation paper *Insolvency Rules 1986 – modernisation of rules relating to insolvency law* published by the Insolvency Service on 26 September 2013, a copy of which is available from this link.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 142,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and ICAEW is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing around 700 practitioners. ICAEW's Insolvency Committee is a technical committee made up of Insolvency Practitioners working within large, medium and small practices. The Committee represents the views of ICAEW licence holders.

We understand that a number of our members, including member firms, will be making their own detailed submissions and we are therefore commenting in general terms on what we consider to be the main issues of principle, covering only the selected questions noted below.

Q1. Do you agree that replacing the current instruments with a single set of rules will make the legislation;

- **less confusing?**
- **easier to use?**

1. It is likely to be easier for users to read consolidated texts rather than an original with numerous separate amending instruments and it would be helpful if Government could generally produce consolidated versions of text when making (or proposing) amendments. In practice, however, consolidated versions of the main texts are produced commercially and users will rely upon these for routine purposes. No doubt further changes will be required in the future, so that, to maintain the benefit of consolidation, the Insolvency Service would need to ensure that revised consolidated versions are produced and made available upon any revision.

2. Any change can result in difficulties for users in knowing which version of the rules applies at any given time (eg, cases which commence before the new Rules come into force will still be subject to the old Rules). The extent of the changes proposed could make this a particular challenge in this case.

Q2. Do you think that all of the definitions included are clear?

Q3. Are there any further definitions that should be included?

3. We welcome the introduction of definitions in Part 1, although we think there could be more consistency, and some additional definitions. For example, the expression ‘insolvent and compulsory winding up’ is used throughout the Rules but we cannot see that ‘insolvent winding up’ is defined. We are not sure why ‘creditors' voluntary liquidation’ isn't used instead. Other definitions which could be included are ‘creditors’ to make it clear whether or not this includes people who have been paid in full and whether that means 100p in the £, or 100p in the £ plus statutory interest, and ‘principal’ (for the purposes of rule 15.38).

4. Where a term is not defined in Part 1, but in the particular rule where the term is used, it would be preferable if the definition could be given at the beginning of the rule rather than the end – eg, see the definition of ‘other proceedings’ in rule 15.29(3).

Q5. Do you agree that grouping processes common to different types of insolvency procedures (common parts) is helpful to users?

Q6. Do you find the way that liquidation parts have been set out helpful.

Q7. Do you agree that the structure of the rules as drafted is clearer and more logical?

Q8. Do you think that the draft rules are easier to follow than the existing Rules?

5. We welcome the decision to have separate parts, written out in full, for the 3 different forms of liquidation.

6. We agree that the creation of common parts is logical, and the choice of common parts seems sensible. However, it will now be necessary to look at more parts on any particular case, so that the net result is not necessarily easier to follow. Also the common parts still have some variations between procedures so will need to be read carefully.

Q9. Is the plainer, modern language used easy to understand?

Q10. Are there any examples where you believe that the language used could be made simpler?

7. We welcome the more modern language (such as use of 'must' instead of 'shall') and greater consistency but more could still be done. There are still examples of very obscure drafting and/or overly complex sentence structures – eg, rule 15.40(7).

Q13. Do you agree that prescribing content instead of the form on which that information must be provided will make it easier to use electronic forms of communication?

Q14. Do you find the write–out of the contents requirements in the rules to be helpful?

8. One of the main proposed changes is for requirements of notices and other documents to be specified rather than relying on reference to a statutory form. We do not believe that this is likely to be helpful for IPs or their staff. It is typically quicker and cheaper to complete a prescribed form than having to check that all the necessary requirements have been included in a document. In practice, IPs can be expected to establish their own templates which comply with the requirements and is not clear why this would be considered preferable to providing statutory forms.

Q20. Do you have any other suggestions or comments on the structure or content of the rules?

9. Many of the content changes stem from the proposals set out in the Red Tape Challenge consultation on which we, or our members, have already responded. The areas of particular concern include:
   - that creditors' meetings should no longer be the default position (except in receiverships)*;* and
   - that creditors can opt out of receiving communications.

   We do not consider these changes to be in the best interests of creditors. We do, however, agree with the abolition of final meetings.

10. The Supreme Court decision in the Nortel and Lehman cases on the ranking of liability under an FSD or contribution notice has provided some welcome clarification on the nature of administration expenses but it has not dealt with all the issues, and although further guidance may be given in the forthcoming appeal in the GAME administration, we are disappointed that the opportunity has not been taken to clarify the relevant rule. Not only is it not always sufficiently clear whether a particular liability is an expense, but even when that is clear, it is not always obvious which paragraph of the current rule 2.67(1) the liability falls under. In particular judicial opinion has varied as to the liabilities which fall under paragraph (a).

11. We would also have welcomed clarification/amendment surrounding the rules on fee approval and other consents by creditors in administration, in particular as to whether, when a statement has been made under paragraph 52(1)(b), the approval of the preferential creditors is required when they have received a dividend of 100p in the £. We believe that approval should not be required from all secured creditors, but only from those who respond to an invitation to approve.

12. We would like to see a change in the Rules relating to the requirement for progress reports to be issued when one of joint office holders ceases to act, and the subsequent resetting of the schedule for future progress reports. This causes unnecessary work and cost, particularly when the office holder is retiring or leaving the firm and ceasing to act on a number of cases at once. This has led to the practice of the court to disapply these requirements when making block transfer orders, and it

would therefore be preferable for the original reporting schedule to be retained, at least when there is at least one office holder remaining from the same firm.

13. Similarly in an administration which proposes to move to CVL, it should be clear that where the proposals name the administrators (or one or more of them) as proposed liquidators, and there has been a transfer of appointment prior to the move to CVL, the incoming administrator will become the liquidator instead of the original one who has ceased to act, or alternatively it should be clear that it is permissible to provide for that in the proposals.

14. The Insolvency Act and existing Rule 4.49B(7) state that the report has to be sent to the registrar, to the members of the company and to the creditors. We query whether there is any need for the report to be sent to members.

Yours sincerely

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