

2002 No. 1990

**INSOLVENCY
COMPANIES**

**The Insolvency Act 1986 (Amendment) (No. 3) Regulations
2002**

Made - - - - - 25th July 2002

Coming into force in accordance with Regulation 2

Whereas a draft of these Regulations has been approved by a resolution of each House of Parliament pursuant to paragraph 45(5) of Schedule A1 to the Insolvency Act 1986(a).

Now, therefore, the Secretary of State, in exercise of the powers conferred upon her by paragraphs 5 and 45 of Schedule A1 to the Insolvency Act 1986, hereby makes the following Regulations:

Citation

1. These Regulations may be cited as the Insolvency Act 1986 (Amendment) (No. 3) Regulations 2002.

Commencement

2. These Regulations come into force on the day on which section 1 of the Insolvency Act 2000(b) comes into force for the purpose of giving effect to paragraph 4 of Schedule A1 to the Insolvency Act 1986, as that Schedule is set out in paragraph 4 of Schedule 1 to the Insolvency Act 2000.

Amendment of Schedule A1 to the Insolvency Act 1986

3.—(1) Schedule A1 to the Insolvency Act 1986 is amended as follows.

(2) After paragraph 3(3) (qualifying conditions) insert—

“(4) A company does not meet the requirements of this paragraph if it is a holding company of a group of companies which does not qualify as a small group or a medium-sized group in respect of the financial year of the company which ended last before the date of filing.

(5) For the purposes of sub-paragraph (4) “group” has the meaning given by section 262 of the Companies Act 1985 (c. 6) (definitions for Part VII) and a group qualifies as small or medium-sized if it qualifies as such under section 249 of the Companies Act 1985 (qualification of group as small or medium-sized).”.

(a) 1986 c. 45; Schedule A1 is inserted into the Act by paragraph 4 of Schedule 1 to the Insolvency Act 2000 (c. 39). The power exercised to make these Regulations was brought into force by the Insolvency Act 2000 (Commencement No. 2) Order 2001, S.I. 2001/1751; paragraphs 1, 2 and 12 of Schedule A1 are amended by the Financial Services and Markets Act 2000 (Consequential Amendments) Order 2002, S.I. 2002/1555, articles 28, 29 and 30.

(b) 2000 c. 39.

(3) After paragraph 4 insert—

“Capital market arrangement

4A. A company is also excluded from being eligible for a moratorium if, on the date of filing, it is a party to an agreement which is or forms part of a capital market arrangement under which—

- (i) a party has incurred, or when the agreement was entered into was expected to incur, a debt of at least £10 million under the arrangement, and
- (ii) the arrangement involves the issue of a capital market investment.

Public private partnership

4B. A company is also excluded from being eligible for a moratorium if, on the date of filing, it is a project company of a project which—

- (i) is a public-private partnership project, and
- (ii) includes step-in rights.

Liability under an arrangement

4C.—(1) A company is also excluded from being eligible for a moratorium if, on the date of filing, it has incurred a liability under an agreement of £10 million or more.

(2) Where the liability in sub-paragraph (1) is a contingent liability under or by virtue of a guarantee or an indemnity or security provided on behalf of another person, the amount of that liability is the full amount of the liability in relation to which the guarantee, indemnity or security is provided.

(3) In this paragraph—

- (a) the reference to “liability” includes a present or future liability whether, in either case, it is certain or contingent,
- (b) the reference to “liability” includes a reference to a liability to be paid wholly or partly in foreign currency (in which case the sterling equivalent shall be calculated as at the time when the liability is incurred).

Interpretation of capital market arrangement

4D.—(1) For the purposes of paragraph 4A an arrangement is a capital market arrangement if—

- (a) it involves a grant of security to a person holding it as trustee for a person who holds a capital market investment issued by a party to the arrangement, or
- (b) at least one party guarantees the performance of obligations of another party, or
- (c) at least one party provides security in respect of the performance of obligations of another party, or
- (d) the arrangement involves an investment of a kind described in articles 83 to 85 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (options, futures and contracts for differences).

(2) For the purposes of sub-paragraph (1)—

- (a) a reference to holding as trustee includes a reference to holding as nominee or agent,
- (b) a reference to holding for a person who holds a capital market investment includes a reference to holding for a number of persons at least one of whom holds a capital market investment, and
- (c) a person holds a capital market investment if he has a legal or beneficial interest in it.

(3) In paragraph 4A, 4C, 4J and this paragraph—

“agreement” includes an agreement or undertaking effected by—

- (a) contract,
- (b) deed, or
- (c) any other instrument intended to have effect in accordance with the law of England and Wales, Scotland or another jurisdiction, and

“party” to an arrangement includes a party to an agreement which—

- (a) forms part of the arrangement,
- (b) provides for the raising of finance as part of the arrangement, or
- (c) is necessary for the purposes of implementing the arrangement.

Capital market investment

- 4E.—(1) For the purposes of paragraphs 4A and 4D, an investment is a capital market investment if—
- (a) it is within article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) (debt instruments) and
 - (b) it is rated, listed or traded or designed to be rated, listed or traded.
- (2) In sub-paragraph (1)—
- “listed” means admitted to the official list within the meaning given by section 103(1) of the Financial Services and Markets Act 2000 (c. 8) (interpretation),
 - “rated” means rated for the purposes of investment by an internationally recognised rating agency,
 - “traded” means admitted to trading on a market established under the rules of a recognised investment exchange or on a foreign market.
- (3) In sub-paragraph (2)—
- “foreign market” has the same meaning as “relevant market” in article 67(2) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (S.I. 2001/1335) (foreign markets),
 - “recognised investment exchange” has the meaning given by section 285 of the Financial Services and Markets Act 2000 (recognised investment exchange).
- 4F.—(1) For the purposes of paragraphs 4A and 4D an investment is also a capital market investment if it consists of a bond or commercial paper issued to one or more of the following—
- (a) an investment professional within the meaning of article 19(5) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001,
 - (b) a person who is, when the agreement mentioned in paragraph 4A is entered into, a certified high net worth individual in relation to a communication within the meaning of article 48(2) of that order,
 - (c) a person to whom article 49(2) of that order applies (high net worth company, &c.),
 - (d) a person who is, when the agreement mentioned in paragraph 4A is entered into, a certified sophisticated investor in relation to a communication within the meaning of article 50(1) of that order, and
 - (e) a person in a State other than the United Kingdom who under the law of that State is not prohibited from investing in bonds or commercial paper.
- (2) For the purposes of sub-paragraph (1)—
- (a) in applying article 19(5) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 for the purposes of sub-paragraph (1)(a)—
 - (i) in article 19(5)(b), ignore the words after “exempt person”,
 - (ii) in article 19(5)(c)(i), for the words from “the controlled activity” to the end substitute “a controlled activity”, and
 - (iii) in article 19(5)(e) ignore the words from “where the communication” to the end, and
 - (b) in applying article 49(2) of that order for the purposes of sub-paragraph (1)(c), ignore article 49(2)(e).
- (3) In sub-paragraph (1)—
- “bond” shall be construed in accordance with article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544), and
 - “commercial paper” has the meaning given by article 9(3) of that order.

Debt

- 4G. The debt of at least £10 million referred to in paragraph 4A—
- (a) may be incurred at any time during the life of the capital market arrangement, and

- (b) may be expressed wholly or partly in a foreign currency (in which case the sterling equivalent shall be calculated as at the time when the arrangement is entered into).

Interpretation of project company

- 4H.—(1) For the purposes of paragraph 4B a company is a “project company” of a project if—
- (a) it holds property for the purpose of the project,
 - (b) it has sole or principal responsibility under an agreement for carrying out all or part of the project,
 - (c) it is one of a number of companies which together carry out the project,
 - (d) it has the purpose of supplying finance to enable the project to be carried out, or
 - (e) it is the holding company of a company within any of paragraphs (a) to (d).
- (2) But a company is not a “project company” of a project if—
- (a) it performs a function within sub-paragraph (1)(a) to (d) or is within sub-paragraph (1)(e), but
 - (b) it also performs a function which is not—
 - (i) within sub-paragraph (1)(a) to (d),
 - (ii) related to a function within sub-paragraph (1)(a) to (d), or
 - (iii) related to the project.
- (3) For the purposes of this paragraph a company carries out all or part of a project whether or not it acts wholly or partly through agents.

Public-private partnership project

- 4I.—(1) In paragraph 4B “public-private partnership project” means a project—
- (a) the resources for which are provided partly by one or more public bodies and partly by one or more private persons, or
 - (b) which is designed wholly or mainly for the purpose of assisting a public body to discharge a function.
- (2) In sub-paragraph (1) “resources” includes—
- (a) funds (including payment for the provision of services or facilities),
 - (b) assets,
 - (c) professional skill,
 - (d) the grant of a concession or franchise, and
 - (e) any other commercial resource.
- (3) In sub-paragraph (1) “public body” means—
- (a) a body which exercises public functions,
 - (b) a body specified for the purposes of this paragraph by the Secretary of State, and
 - (c) a body within a class specified for the purposes of this paragraph by the Secretary of State.
- (4) A specification under sub-paragraph (3) may be—
- (a) general, or
 - (b) for the purpose of the application of paragraph 4B to a specified case.

Step-in rights

- 4J.—(1) For the purposes of paragraph 4B a project has “step-in rights” if a person who provides finance in connection with the project has a conditional entitlement under an agreement to—
- (i) assume sole or principal responsibility under an agreement for carrying out all or part of the project, or
 - (ii) make arrangements for carrying out all or part of the project.
- (2) In sub-paragraph (1) a reference to the provision of finance includes a reference to the provision of an indemnity.

“Person”

4K. For the purposes of paragraphs 4A to 4J, a reference to a person includes a reference to a partnership or another unincorporated group of persons.”.

Melanie Johnson,
Parliamentary Under-Secretary of State for Competition, Consumers and Markets,
25th July 2002 Department of Trade and Industry

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the eligibility criteria and qualifying conditions for a company obtaining a moratorium under the new CVA moratorium procedure set out in Schedule A1 to the Insolvency Act 1986 (c. 45). Schedule A1 was inserted into the Act by paragraph 4 of Schedule 1 to the Insolvency Act 2000 (c. 39). The eligibility criteria and qualifying conditions are set out in paragraphs 2, 3 and 4 of Schedule A1.

Three new eligibility criteria are introduced. The first makes a company ineligible to obtain a moratorium under that procedure if the company is a party to a capital market arrangement. An arrangement will be a capital market arrangement if it meets the criteria set out in paragraph 4A and one or more of those in 4D.

The second criterion set out in paragraph 4B will make a company ineligible if it is a project company of a public-private partnership (PPP) project which includes step-in rights. The expression “project company” is defined in new paragraph 4H and the expression “step-in rights” is defined in new paragraph 4J.

The third criterion will make a company ineligible if it has incurred a liability under an agreement of £10 million or more.

The qualifying conditions set out in paragraph 3 of Schedule A1 are amended to exclude a company which is a holding company of a group which is not a small or medium-sized group as defined by the Companies Act 1985 (c. 6).

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