EXPLANATORY MEMORANDUM TO

THE CORPORATE INSOLVENCY AND GOVERNANCE (CORONAVIRUS) (EXTENSION OF THE RELEVANT PERIOD) REGULATIONS 2020

2020 No. 1031

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.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

This instrument makes provision to extend the duration of some of the temporary measures introduced by the Corporate Insolvency and Governance Act 2020 (CIG Act) beyond their current expiration date of 30 September 2020. This instrument: extends the relaxation of company annual general meeting (AGM) requirements to 30 December 2020; extends the restrictions on use of statutory demands and winding up petitions to 31 December 2020; extends the modifications to moratorium provisions and temporary moratorium rules to 30 March 2021; and, extends the small supplier exemption from termination clause provisions to 30 March 2021.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The instrument is made using the powers to extend temporary provision in the CIG Act given by paragraph 2 of Schedule 14 (AGM measure) and section 41 (all other measures) of the CIG Act and is subject to the made affirmative procedure. These powers are being used to amend primary legislation.

3.2 The power to extend the insolvency measures under section 41(1)(b) CIG Act includes a condition which must be met for the relevant measures to be extended. The condition requires the Secretary of State to consider it reasonable to prolong the relevant period of the temporary measures to mitigate an effect of coronavirus.

3.3 This instrument is one of a package of two regulations being laid in respect of the extension of the temporary insolvency measures within the CIG Act. The Corporate Insolvency and Governance (Coronavirus)(Early Termination of Certain Temporary Provisions) Regulations 2020 ("The Early Termination Regulations") is subject to the negative procedure and will be laid after this instrument. The Early Termination Regulations provide that certain provisions of Part 2 of Schedule 4 to the CIG Act will cease to have effect from 1st October 2020, rather than being extended; in effect, it is intended that the legal effect of this instrument will be disapplied in respect of those provisions. These provisions relax the conditions for obtaining a moratorium as well as modifying how it is to be monitored and extended. This will ensure that whilst the Government's plans are to wind down the package of financial support the requirements for obtaining a moratorium begin to revert to the original legislative intention that only business deemed to be rescuable by the monitor are able to access a moratorium.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.4 The territorial application of this instrument includes Scotland.

3.5 The powers under which this instrument is made cover England, Wales and Scotland (see section 48 CIG Act) and the territorial application of this instrument is not limited by the Act or the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England, Wales and Scotland.

4.2 The territorial application of this instrument is England, Wales and Scotland.

5. European Convention on Human Rights

5.1 The Minister for Climate Change and Corporate Responsibility, Lord Callanan, has made the following statement regarding Human Rights:

"In my view the provisions of Corporate Insolvency and Governance (Coronavirus) (Extension of the Relevant Period) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The CIG Act makes provision about corporate insolvency as well as changes to the law relating to the governance and regulation of companies and other entities. The provisions concerning corporate governance, and some of the provisions concerning corporate insolvency, are intended to be temporary. These temporary provisions are designed to help UK companies and other entities during the difficult time caused by coronavirus. The CIG Act provides that the temporary provisions will automatically expire on 30 September 2020 unless regulations are made to prolong the period within which some or all of the temporary provisions have effect.

6.2 The powers to prolong the duration of the temporary provisions are given by section 41(1)(b) of, and paragraph 2(1)(b) of Schedule 14(meetings of companies and other bodies) to, the CIG Act. The power given by section 41 is exercisable in respect of four provisions specified in section 41(2). Section 41(1) provides that the maximum period of any single extension must not exceed 6 months, and the power can only be exercised if the Secretary of State considers it reasonable to mitigate an effect of coronavirus. Section 41(10) provides that regulations made under that section may make different provision for the purposes of different temporary provisions.

6.3 The power given by paragraph 2(1) of Schedule 14 may only be exercised to prolong the duration of temporary measures for the purposes of that Schedule. Paragraph 2(4) provides that the power may not be exercised by the Secretary of State in respect of certain entities for which responsibility is devolved to the Department of the Economy in Northern Ireland and the Scottish Ministers. Paragraph 2(2)(b) provides that the maximum period of any single extension must not exceed 3 months, and, in any case, cannot be later than 5 April 2021.

6.4 This instrument is the first exercise of the powers given by sections 41(1)(b) of, and paragraph 2(1)(b) to, the CIG Act. The instrument prolongs the duration of three of the four temporary provisions specified in section 41(2), specifically: section 15(2) (temporary exclusion for small suppliers: Great Britain), paragraph 1 of Schedule (moratoriums in Great Britain: temporary provision) and paragraph 1(3) and 21(1) of Schedule 10 (winding-up petitions: Great Britain). The remaining temporary provision specified in section 41(2) is section 12(2) (suspension of liability for wrongful trading: Great Britain); that provision is not being extended and will, accordingly, expire automatically on 30 September 2020. In addition, this instrument also prolongs the duration of the temporary provisions for the purposes of Schedule 14 (meetings of companies and other bodies). The instrument provides that the temporary provisions to which it applies are to expire on one of three dates: the temporary provision for the purposes of Schedule 14 expires on 30 December 2020, paragraph 1(3) and 21(1) of Schedule 10 expires on 31st December 2020, and section 15(2) and paragraphs 1(3) and 21(1) of Schedule 10 expire on 30th March 2021.

7. Policy background

What is being done and why?

7.1 This instrument extends three temporary insolvency measures and the company and other bodies meeting measures. The insolvency measures that are extended are: a restriction on the use of statutory demands and winding-up petitions, a small-supplier exemption from the scope of the prohibition on termination clauses in supply contracts, and temporary modifications to the operation of the company moratorium procedure as well as temporary administrative rules for the operation of that procedure.

7.2 The reason for extending the duration of the temporary insolvency measures is to continue to provide breathing space to companies whilst coronavirus related restrictions remain in place (including social distancing and regional lockdowns). This extension ensures that the measures remain available to companies that may be in financial difficulties during this difficult and unprecedented time and whilst the Government's plans are to wind down the package of financial support. The duration of the extension for each measure has been determined having regard to the nature of the measure in question.

7.3 The restrictions placed on the use of statutory demands and winding-up petitions are extended to 31 December 2020. These restrictions help to protect companies from aggressive creditor action during the period when companies are continuing to be financially impacted by coronavirus. The extension of these measures mean creditors cannot rely on statutory demands to bring winding-up petitions, and are prohibited from filing winding-up petitions where the company's inability to pay is due to coronavirus. It is nevertheless recognised that this temporary measure is a significant intervention into the normal working of insolvency law, in particular the rights of creditors and consequently, any single extension of this measure should be of a shorter duration.

7.4 The small-supplier exemption from the termination clause prohibition, and the temporary modifications to the operation of the company moratorium are extended to 30 March 2021.

7.5 The termination clause provisions in the CIG Act prohibit contractual terms that allow contracts to be terminated if a customer enters an insolvency procedure. To help support small business suppliers who are more likely to experience a greater impact from the effects of coronavirus, the CIG Act included a temporary carve-out which excludes small suppliers from the scope of the termination clause measure. Extending this measure provides certainty to small suppliers that whilst they attempt to recover from any financial impact coronavirus has had on their business they can continue to rely on contractual termination clauses where their customer has entered a formal insolvency procedure.

7.6 The moratorium procedure, introduced in the CIG Act provides companies in financial difficulty with breathing space from creditors whilst they consider a rescue solution. The temporary modifications to moratoriums being extended by this instrument relax the normal eligibility criteria to enter into a moratorium which recognises the extraordinary and temporary difficulties being caused by coronavirus, in order to make the moratorium as widely available as possible. These are being extended until 30th March 2021. The extension of six months is the maximum possible at any one point.

7.7 The temporary modifications to moratoriums also provide temporary procedural rules to enable the operation of the moratorium. It was necessary to provide temporary moratorium rules in the CIG Act to ensure the procedure was operational as soon as the legislation came into force. These temporary rules need to remain in place to allow time for permanent rules to be drafted (requiring further secondary legislation) and consulted on with the Insolvency Rules Committee (for those rules covering England and Wales). It would also be undesirable to require business to adjust to new procedural rules at a time of great economic uncertainty such as having to adapt to Government fiscal support being withdrawn and other regulatory changes as a result of coronavirus.

7.8 The company meetings measures are extended to 30 December 2020. The reason for extending this measure is due to the continued prevalence of coronavirus, Government-enforced social distancing measures continue, (albeit to a reduced level), making it difficult to hold a physical AGM.

7.9 During July and August 2020, the Government received representations from across the business community urging for the extension of the measures until the end of the calendar year. Research showed that some 120 companies would be negatively impacted should the extension not be granted. While there is potential for an extension to be seen as damaging in the interests of shareholders, the Government in fact received a great deal of active support for the extension from a range of shareholder representatives groups.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 Not applicable

10. Consultation outcome

10.1 There has been no public consultation in relation to this instrument, although the Government has engaged informally with a range of stakeholders, including business representative organisations and investor groups on these matters.

11. Guidance

11.1 The Government plans to produce best practice guidance on holding AGMs flexibly and electronically.

12. Impact

12.1 The impact on business, charities or voluntary bodies of the restrictions on statutory demands and winding up petitions limits a creditors options for enforcing a debt, which therefore increases risks when doing business. However, the Government assesses the rebalancing of risks described above is an appropriate temporary intervention also with the Government's wider interventions. The small supplier exemption to the termination clause provisions will assist small businesses, which represents 99% of the business community, although 63% of turnover is through businesses that do not fall within the definition of a small business. The temporary moratorium measures will make the procedure more accessible to companies during this difficult period, which therefore provides breathing space for companies to consider rescue and restructuring options, which ultimately could lead to the rescue of more companies impacted by coronavirus. Shareholders' and members' rights to vote are unaffected by measures which allow corporate bodies to hold general meetings flexibly.

12.2 The impact on the public sector is in relation to the restrictions on statutory demands and winding up petitions, namely public sector creditors. However, the Government has assessed that any impact is an appropriate temporary intervention also with the Government's wider interventions.

12.3 An impact assessment has not been prepared for this instrument as it is out of scope of the better regulation framework, due to the temporary aspects of the measures. The legal effects produced by this instrument will automatically expire within a period of less than 12 months. A full impact assessment was carried out for the CIG Act which considered costs & benefits in a steady state economy: https://publications.parliament.uk/pa/bills/cbill/58-01/0128/IA200519.pdf

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 minimise the regulatory burdens on small businesses.

13.3 The basis for the final decision on what action to take to assist small businesses is that the instrument is itself a temporary relaxation, or removal, of requirements that would otherwise apply under legislation. One of the effects of this measure is to prolong the duration of an exemption specifically intended to benefit small businesses. No further action is required to assist small business beyond that for which the instrument already provides.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause; however, the Government will continue to monitor the need for these measures. The legal effect of the various provisions in this instrument will automatically expire on various dates that are specified in the instrument itself. At the time that the various provisions are due to expire it will be necessary to review whether the provision made by this instrument continues to be necessary and whether to re-exercise the power so as to further prolong the duration of the temporary provision.

15. Contact

15.1 Aisling Morgan at the Department for Business, Energy and Industrial Strategy (tel: 020 7215 0441 or email: Aisling.Morgan@beis.gov.uk) can answer questions about the AGM measure in these regulations. Ann Newson at the Insolvency Service (Telephone: 0300 3045798 or email: ann.newson@insolvency.gov.uk) can answer questions about the insolvency measures in these regulations.

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

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