

BANKRUPTCY AND DEBT ADVICE (SCOTLAND) ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Application for sequestration

23. Sections under this heading make provision in relation to the process by which a debtor may apply for sequestration, in order to ensure that the debtor is fully aware of the requirement for them to cooperate with their trustee during the bankruptcy process. They also make changes to the administration of debtor applications to improve the overall efficiency of the process.

Section 9 – Statement of undertakings

24. Subsection (1) of this section inserts a new section 2(8) of the 1985 Act. It imposes an obligation on the trustee to provide to a debtor sequestrated on a court petition with a ‘statement of undertakings’, to be signed by the debtor. The Scottish Government intends that the statement of undertakings will make clear to the debtor that failure to sign or comply with the requirements in place under the 1985 Act as set out in the terms of the statement of undertakings could mean a delay in the debtor’s discharge from bankruptcy.
25. Subsection (2) provides that the debtor in a debtor application must give a statement of undertakings including an undertaking to pay any contribution the debtor might be required to make after a determination using the common financial tool to be provided for under new section 5D of the 1985 Act added by section 3 of the Act. This undertaking must be submitted with the application, in a form to be prescribed by regulations (under the power added by section 36 of the Act). Both forms under this section have been prescribed in Bankruptcy (Scotland) Regulations 2014¹.

Section 10 – Debtor application: incomplete or inappropriate application

26. This section amends the 1985 Act by inserting two new sections, section 11A (‘Debtor application: incomplete application’) and section 11B (‘Refusal of debtor application: inappropriate application’). They apply where AiB either finds that a debtor’s application has not been fully completed or considers that an award of sequestration may not be appropriate in the circumstances of the case. They effectively restate provision in regulation 14 of the Bankruptcy (Scotland) Regulations 2008—the opportunity is being taken to put these provisions on the face of the primary legislation. They require AiB either to notify the debtor of any further information which may be required or of any fee not submitted within 21 days (or such longer period as may be specified) or to notify the debtor of the reason why AiB considers the application to be inappropriate.

¹ S.S.I. 2014/225, Form 1 and part of Form 14 (in Form 14 amended by regulation 2(5)(d)(xi) of S.S.I. 2015/80).

Section 11 – Sequestration: application by executor

27. This section amends sections 5, 6B, 8A and 12 of the 1985 Act to remove from the Sheriff Court the process whereby an executor of a debtor’s estate, aware that the debtor was insolvent, would petition the Court to make the deceased debtor’s estate bankrupt. It transfers that process to AiB, with the effect that the process will be altered to a debtor application to AiB.
28. A new subsection 8A(2B) clarifies that the period of time by the end of which the executor will become liable for the deceased debtor’s debts, should be 12 months from the day on which the executor knew or ought to have known that the estate was absolutely insolvent and likely to remain so.

Section 12 – Concurrent proceedings for sequestration: recall

29. This section amends section 10A of the 1985 Act to insert, after subsection (3), four new subsections in order to create a power, in the narrow circumstances where a sheriff has directed AiB to dismiss a debtor application under section 10A(3) of the 1985 Act, for AiB to recall that debtor application (i.e. where sequestration has been awarded on the debtor application). This section also makes provision for the consequences of such a recall.

Section 13 – Debtor’s bank account

30. **Section 13** provides for when the trustee knows, or becomes aware, of any estate vested in the trustee which comprises funds held by a bank, defined as an “appropriate bank or institution” (i.e. the banks or institutions defined in section 73 of the 1985 Act as able to take deposits for certain purposes under the 1985 Act). The trustee must serve a notice on the appropriate bank or institution and provide sufficient information to them to identify the debtor and the funds held, e.g. the relevant account/s. The effect is to inform the bank or institution of the sequestration, which may be relevant to the effect on the bank or institution of section 32(6) and (8) of the 1985 Act respectively on vesting the debtor’s property in the debtor’s trustee and questions over dealings of or with the debtor. The trustee is not however entitled to a remedy against transactions made on relevant funds in those accounts before receipt of the notice.