

Draft Regulations laid before the Scottish Parliament under section 72(2) of the Bankruptcy (Scotland) Act 1985 for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2010 No.

BANKRUPTCY

**The Protected Trust Deeds (Scotland)
Amendment Regulations 2010**

Made - - - - 2010

Coming into force - - 15th November 2010

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 72 of, and paragraph 5(1) of Schedule 5 to, the Bankruptcy (Scotland) Act 1985(1) and all other powers enabling them to do so.

In accordance with section 72(2) of the Bankruptcy (Scotland) Act 1985, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation and commencement

1. These Regulations may be cited as the Protected Trust Deeds (Scotland) Amendment Regulations 2010 and come into force on 15th November 2010.

Amendment of the Protected Trust Deeds (Scotland) Regulations 2008

2. The Protected Trust Deeds (Scotland) Regulations 2008(2) are amended in accordance with regulations 3 to 13.

3. In regulation 2 (interpretation), in the definition of “notified creditors” after “Regulations” insert “(and does not include a secured creditor who has consented in terms of regulation 5A(c))”.

4. After regulation 5 (qualifications of trustee), insert—

“Exclusion of a secured creditor

5A. Where a secured creditor is excluded from a trust deed under section 5(4A)(b)(ii) of the Act, prior to the debtor granting the trust deed—

(1) 1985 c.66. Section 72 was amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) (“2007 Act”), section 35 and by the Home Owner and Debtor Protection (Scotland) Act 2010 (asp 6) (“2010 Act”), section 13(1). Paragraph 5 of Schedule 5 was amended by the 2007 Act, section 20(1) and by the 2010 Act, section 13(2).

(2) S.S.I. 2008/143.

- (a) the trustee must provide the debtor and the secured creditor with a valuation made by a third party of the debtor’s dwellinghouse (or part thereof) which is to be excluded from the trust deed under section 5(4A)(b)(i) of the Act;
 - (b) the debtor must consent in terms of Part 1 of Form A1 set out in Schedule 1 to these Regulations; and
 - (c) the secured creditor must consent in terms of Part 2 of Form A1 set out in Schedule 1 to these Regulations.”.
5. In regulation 6 (statement of trustee and debtor)—
- (a) for the heading substitute “Statements in relation to trust deed”;
 - (b) for paragraph (1), substitute—
 - “(1) The trust deed must state—
 - (a) subject to any exclusion under section 5(4A)(b) of the Act, that all the debtor’s estate (other than property listed in section 33(1) of the Act or which would be excluded from vesting in a trustee of a sequestrated estate under any other provision of that Act or other enactment) is conveyed to the trustee; and
 - (b) that the debtor agrees to convey to the trustee for the benefit of creditors generally any estate, wherever situated, which—
 - (i) is acquired by the debtor after the trust deed is granted and before the debtor’s discharge in terms of regulation 19; and
 - (ii) would have been conveyed to the trustee if it had been part of the debtor’s estate on the date on which the trust deed was granted.”;
 - (c) after paragraph (1), insert—
 - “(1A) Where a debtor’s dwellinghouse is excluded from a trust deed under section 5(4A)(b)(i) of the Act, the trust deed must also state—
 - (a) details of any secured creditor who has agreed not to claim under the trust deed under section 5(4A)(b)(ii) of the Act; and
 - (b) details of the debt in respect of which a secured creditor has agreed not to claim.”;
 - (d) at the beginning of paragraphs (2)(a)(iii) and (iv), insert “subject to any exclusion under section 5(4A)(b) of the Act.”; and
 - (e) after paragraph (2), insert—
 - “(3) A statement in terms of paragraph (1)(b) is not required for any trust deed granted before 15th November 2010.”.
6. In regulation 8 (documents to be sent to creditors)—
- (a) after “the trustee” in the second place where it occurs insert “(other than a secured creditor who has consented in terms of regulation 5A(c))”;
 - (b) for sub-paragraph (c)(vi) substitute—
 - “(vi) a statement by the trustee, on the basis of the information then available—
 - (aa) whether the creditors are likely to be paid a dividend; and
 - (bb) what, in the case where a secured creditor is excluded from a trust deed under section 5(4A)(b)(ii) of the Act, is the effect on the dividend of that exclusion.”;
 - (c) the word “and” following sub-paragraphs (c)(vii) and (c)(viii) is omitted; and
 - (d) after sub-paragraph (c)(viii), insert—

- “(ix) details of any protected trust deed under which, in the preceding 6 months, the debtor has been discharged in terms of regulation 19(1) or refused a discharge in terms of regulation 19(5); and
 - (x) where a secured creditor’s consent has been obtained in terms of regulation 5A(c), a statement containing—
 - (aa) a valuation made by a third party of the debtor’s dwellinghouse (or part thereof) which is excluded from the trust deed under section 5(4A)(b)(i) of the Act; and
 - (bb) the amount of the debt owed, in respect of the security held, to any secured creditor of that dwellinghouse who has been excluded from the trust deed under section 5(4A)(b)(ii) of the Act; and”.
- 7. In regulation 10 (registration of protected status)—
 - (a) after “relevant period” where it first occurs, insert “(and in any event no later than 4 weeks after the expiry)”; and
 - (b) after paragraph (1)(a), insert—
 - “(aa) either—
 - (i) a copy of every secured creditor’s consent form required in terms of regulation 5A(c); or
 - (ii) a statement by the trustee that no secured creditor is excluded from the trust deed;”;
 - (c) in paragraph (2) for “the documents listed in” substitute “every document which the trustee must send under”.
- 8. In regulation 11 (effect of protected status), after paragraph (2) insert—
 - “(3) Where a secured creditor has consented to be excluded from a trust deed in terms of regulation 5A(c) and the trust deed becomes protected, that creditor is not entitled—
 - (a) to make a claim under the protected trust deed in respect of any of the debt in respect of which the security is held;
 - (b) to do diligence against the assets conveyed to the trustee under the protected trust deed; nor
 - (c) to petition for the sequestration of the debtor during the subsistence of the protected trust deed.”.
- 9. In regulation 18 (remuneration payable to trustee), after paragraph (1) insert—
 - “(1A) The trustee is entitled to remuneration for work done in seeking to comply with regulation 5A, whether or not a secured creditor is excluded from a trust deed.”.
- 10. In regulation 19 (discharge of the debtor)—
 - (a) after paragraph (1), insert—
 - “(1A) Either of the following is not to be treated as a failure to meet the debtor’s obligations for the purpose of paragraph (1)(a):—
 - (a) a refusal by the debtor to consent to the sale of the debtor’s dwellinghouse which is excluded from a trust deed in accordance with section 5(4A)(b) of the Act; or
 - (b) a refusal to give a relevant consent in terms of section 40(1)(a) of the Act.”;
 - (b) for paragraph (2), substitute—
 - “(2) A letter of discharge does not—

- (a) discharge the debtor from any liability arising after the date on which the trust deed was granted;
- (b) discharge the debtor from any liability for any debt which would be excluded from a discharge under section 55(2) of the Act;
- (c) discharge the debtor from any liability for any debt in respect of which a security is held where the secured creditor consented in terms of regulation 5A(c);
- (d) affect the rights of secured creditors.”.

11. In regulation 21(discharge of trustee), after paragraph (1) insert—

“(1A) For the purposes of paragraph (1) the date of the final distribution is deemed to be the date on which all of the estate which is to be distributed amongst the creditors has been placed beyond the control of the trustee.”.

12. In the heading to regulation 22 (action after discharge), for “trust” substitute “trustee”.

13. In Schedule 1 (forms), before Form 1 insert the form set out in the Schedule to these Regulations.

Authorised to sign by the Scottish Ministers

SCHEDULE

Regulation 13

“FORM A1 Protected Trust Deeds (Scotland) Regulations 2008, regulation 5A Consents required for exclusion of a secured creditor from a Protected Trust Deed

Regulation 5A

Part 1 (to be completed by debtor)

Insolvency Practitioner’s details

	Insert insolvency practitioner’s name
	Insert insolvency practitioner’s address
	Town
	County
	Postcode

Debtor’s dwellinghouse to be excluded in terms of section 5(4A)(b) of the Bankruptcy (Scotland) Act 1985

	Insert debtor’s name
	Address
	Town
	County
	Postcode

I, (insert debtor’s name) authorise (insert insolvency practitioner’s name) to act on my behalf with creditor(s) holding security over the above dwellinghouse in order to obtain the secured creditor’s consent to exclude the dwellinghouse from my draft trust deed attached.

Signature of debtor _____ Date _____

Part 2 (to be completed by secured creditor)

Creditor's details

	Insert creditor's name
	Insert creditor's address
	Town
	County
	Postcode

Description of security

Description	
Reference	

Particulars of debt to be excluded

Amount	£
Description	
Reference	

I confirm that the above described debt is the whole debt in respect of which I hold security over the debtor's dwellinghouse described in Part 1.

I agree not to claim under the trust deed for any of the debt in respect of which my security is held ("the excluded debt").

I understand that if the excluded debt is excluded from a trust deed granted by the debtor in terms of the draft trust deed attached:

- The terms of repayment of the excluded debt are not affected.
- I will not vote in, or in respect of, the trust deed in relation to the excluded debt. Nor will I receive a dividend under the trust deed in relation to the excluded debt. But my voting and dividend rights in relation to a debt other than the excluded debt are not affected.
- If the trust deed achieves protected status, I am not entitled to—
 - (a) make a claim under the trust deed in respect of any of the excluded debt;
 - (b) do diligence against the assets covered by the trust deed; nor
 - (c) during the subsistence of the protected trust deed, petition for the sequestration of the debtor.
- Any discharge of the debtor after the trust deed achieves protected status does not discharge the debtor in respect of the excluded debt.

My agreement applies to a trust deed entered into by the debtor in terms of the draft trust deed attached, provided the trust deed achieves protected status within 3 months of today's date.

Signed _____ (creditor in respect of excluded debt)

Date _____

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Protected Trust Deeds (Scotland) Regulations 2008 (“the 2008 Regulations”), principally making changes in consequence of the amendments in section 10 of the Home Owner and Debtor Protection (Scotland) Act 2010 (“the 2010 Act”), allowing a dwellinghouse to be excluded from a trust deed.

Regulation 3 amends the definition of “notified creditors” in regulation 2 of the 2008 Regulations to make clear, for the purposes of regulation 9 of the 2008 Regulations, that a secured creditor of an excluded dwellinghouse cannot vote on a trust deed becoming protected.

Regulation 4 inserts a new regulation 5A into the 2008 Regulations. It prescribes additional conditions for protected status for a trust deed which excludes a dwellinghouse. The conditions are that the trustee has provided the debtor and the secured creditor with a valuation, that the debtor has consented to the trustee dealing with the secured creditor in terms of the new consent Form A1 and that the secured creditor has also consented in terms of that Form.

Regulation 5 amends the statement of the trustee and debtor required by regulation 6 of the 2008 Regulations. The new paragraph (1)(b) of regulation 6 requires the debtor to have agreed in the trust deed to estate acquired after the grant of the trust deed (i.e. acquirenda) going to the trustee. In terms of the new regulation 6(3), this is not required for trust deeds already granted. Separately, new regulation 6(1A) provides further required details where a debtor’s dwellinghouse is excluded from a trust deed.

Regulation 6 amends regulation 8 of the 2008 Regulations so that, where a dwellinghouse is excluded, other creditors receive additional information: on the effect of an exclusion on any dividend, on any trust deeds in the previous 6 months, on the value of the excluded dwellinghouse and on the debt owed to the secured creditor of that dwellinghouse.

Regulation 7 amends regulation 10 of the 2008 Regulations so that information on any exclusion is sent to the Accountant in Bankruptcy. It also imposes a 4 week time limit on all information to be provided on all trust deeds.

Regulation 8 amends regulation 11 of the 2008 Regulations setting out the consequences of a trust deed becoming protected for a secured creditor who has consented to the exclusion.

Regulation 9 amends regulation 18 of the 2008 Regulations to allow a trustee to recover remuneration for work done in seeking a secured creditor’s consent, prior to a trust deed becoming protected.

Regulation 10 amends regulation 19 of the 2008 Regulations to make clear in the context of a possible discharge of a debtor that a refusal to sell a dwellinghouse as defined in section 5(4AA) of the 1985 Act or a family home as defined in section 40(4) of the 1985 Act is not to be treated as a failure to meet a debtor’s obligations. It also clarifies the effect of a discharge where a dwellinghouse has been excluded.

Regulation 11 amends regulation 21 of the 2008 Regulations to define the date of the final distribution, only for the purposes of regulation 21. It makes clear that a trustee can still seek a discharge where a creditor has not yet collected the funds of the distribution, provided that the funds have been placed beyond the control of the trustee.

Regulation 12 makes a minor amendment and regulation 13 introduces the Schedule containing the new Form A1.

Draft Legislation: This is a draft item of legislation. This draft has since been made as a Scottish Statutory Instrument: The Protected Trust Deeds (Scotland) Amendment Regulations 2010 No. 398

A Business and Regulatory Impact Assessment has been prepared for these Regulations. Copies can be obtained from the Accountant in Bankruptcy's website: <http://www.aib.gov.uk>.