
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision about how voluntary trust deeds entered into by debtors for the benefit of their creditors become protected from action by creditors, the consequences of a trust deed being granted that status, the rights of creditors, the discharge of the debtor and trustee from the trust deed, and the administration of trust deeds.

Trust deeds can be protected under paragraph 5 of Schedule 5 to the Bankruptcy (Scotland) Act 1985 as amended by the Bankruptcy and Diligence etc (Scotland) Act 2007 and section 10 of the Home Owner and Debtor Protection (Scotland) Act 2010.

Regulation 3 provides that a trust deed has protected status from the date when it is registered in the Register of Insolvencies by the Accountant in Bankruptcy, who must record the deed following receipt of certain documents from the trustee (regulation 11). Before registration certain conditions require to be met, set down in regulations 4 to 10—

- Regulation 4 states who can and cannot be a debtor under a trust deed and regulation 5 states who can be a trustee under such deeds.
- Regulation 6 prescribes additional conditions for a trust deed which excludes a dwellinghouse: the trustee must provide the debtor and secured creditor with a valuation, the debtor consent to the trustee dealing with the secured creditor and the secured creditor consent, using consent Form 1A.
- After the trust deed is signed by the debtor a statement must be signed by the trustee and the debtor (regulation 7(3)(c)) confirming that the trustee provided the debtor with advice about the effect of the trust deed and that the debtor agreed in the trust deed to estate acquired after the grant of the trust deed (i.e. *acquirenda*) going to the trustee (regulation 7(1)(b)). The trust deed must contain further details if a debtor's dwellinghouse is excluded (regulation 7(2)).
- Where a contribution from the debtor's income is taken, under regulation 8 it must be payable under the trust deed for the "payment period" of 48 months unless that period is varied.
- The creditors must be notified through publication by registration in the Register of Insolvencies (regulation 9).
- Not later than 7 days after the notice is published, the trustee must send certain documents to the creditors who have 5 weeks to object, and unless the majority in number (or not less than one third in value) do not so object, they are deemed to accede to the trust deed (regulation 10). The definition of "notified creditors" in regulation 2 makes clear with regulation 10(2) that a secured creditor of an excluded dwellinghouse cannot vote for these purposes. 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.

Regulation 11 provides that the trustee must send information on all trust deeds, including on any dwellinghouse excluded, to the Accountant in Bankruptcy, within 4 week time limit. It also provides for when the Accountant in Bankruptcy must register the trust deed as protected.

Regulations 12 to 18 provide for the consequences of a trust deed becoming protected, including the consequences of a trust deed becoming protected for a secured creditor who has consented to the exclusion (regulation 12(3)), the circumstances in which a qualified creditor can petition for sequestration (regulation 17) and which creditors can apply to the courts (regulation 18).

Draft Legislation: This is a draft item of legislation and has not yet been made as a Scottish Statutory Instrument. This draft has been replaced by a new draft, *The Protected Trust Deeds (Scotland) Regulations 2013* ISBN 978-0-11-102156-9

Regulations 19 to 23 deal with the administration of the trust deed. Regulation 19 gives the Accountant in Bankruptcy power to give directions to the trustee as to how the administration should be conducted, with intimation of the terms of the direction to the debtor and creditors. Regulation 20 requires the trustee to provide information to the trustee and the Accountant in Bankruptcy as required and the trustee can be reported to the sheriff for failures, and subject to censure or other orders. Under regulation 21, the trustee is required to send statements of account to the debtor, creditors and the Accountant in Bankruptcy. The trustee is also required to send a report on the management of the trust deed to the Accountant in Bankruptcy. The trustee cannot take any contribution from income from social security benefit (regulation 21(4)). Regulation 22 stipulates documents the trustee must retain for 12 months after the trustee's discharge.

Regulation 23 deals with the trustee's remuneration. The remuneration must consist of a fixed fee and an additional fee based on a percentage of assets realised together with outlays, subject to unforeseen circumstances. The fee can include remuneration for work done in seeking a secured creditor's consent prior to a trust deed becoming protected. The Accountant in Bankruptcy may, at any time, audit the trustee's accounts and fix the outlays of the trustee in the administration of the trust.

Regulation 24 sets out the conditions which must be met for a debtor to be discharged of debts and obligations under the protected trust deed. If they have been met, the trustee must send a letter of discharge to the debtor. 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 treated as failure to meet a debtor's obligations. Once the Accountant in Bankruptcy receives a copy of the letter, the debtor's discharge must be recorded in the Register of Insolvencies and the discharge is effective from that date. If the trustee decides a debtor is not discharged, the debtor may appeal to the sheriff. Student loans cannot be discharged under a protected trust deed.

Regulation 25 deals with the discharge of the trustee and defines the date of the final distribution (only for the purposes of regulation 25) including what actions must be carried out by the trustee once discharged. A trustee can still seek discharge where a creditor has not yet collected the funds of the distribution, provided the funds have been placed beyond the control of the trustee.

Regulation 26 provides for electronic delivery of notices and other documents and a presumption for when electronic delivery is taken to have occurred.

Regulation 27 allows inter alia appeals to be made by the debtor, creditor or trustee to the sheriff by way of summary application against any refusal by the Accountant to register a trust deed on the ground that the Accountant is not satisfied that expenditure allowed or a contribution from income is appropriate under regulation 11(2)(c). Appeal is also allowed against any determination by the Accountant in Bankruptcy fixing the remuneration payable to the trustee, or any direction by the Accountant to the trustee as to the conduct of the administration of the trust deed.

Regulation 28 provides for a general direction-making power of the sheriff on the application of any interested party.

Regulation 29 amends fees payable under the Bankruptcy Fees etc. (Scotland) Regulations 2012 in respect of protected trust deeds.

Regulation 30 revokes the Protected Trust Deeds (Scotland) Regulations 2008 and an amending instrument, which these Regulations replace, subject to the saving in regulation 31(1) under which those Regulations will continue to apply to trust deeds granted before 28th November 2013 and a transitional modification in regulation 30(2) which corrects an error in those Regulations as they will continue to apply to those trust deeds.

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>.