

EXECUTIVE NOTE

THE BANKRUPTCY (SCOTLAND) REGULATIONS 2008 SSI/2008/82

The above instrument was made in exercise of the powers conferred by sections 5(4C), 6(7), 7(1)(d), 8(2), 11(1), 15(6), 19(1), 22(2)(a) and (6), 23(1)(a), 25(6)(b), 45(3)(a), 48(7), 49(3), 51(7)(a), 54(2), 67(8), 69, 73 and 74 of the Bankruptcy (Scotland) Act 1985, as amended (“the 1985 Act”) and section 225(1) of the Bankruptcy and Diligence (Scotland) Act 2007 (“the 2007 Act”). The instrument is subject to negative resolution procedure.

Policy Objectives

This instrument replaces the current Bankruptcy (Scotland) Regulations 1985. The instrument reproduces the current provisions for claims in a foreign currency, conversion of foreign currency claims, interest on claims in sequestration, and preference to remuneration to former employees. It also reproduces conditions for the premium bond of caution and the definition of associate with some modifications.

The instrument also introduces changes to support the process of debtor applications to the Accountant in Bankruptcy (“AiB”), including the process by which awards are made by the AiB rather than through the courts. It outlines the timescale in which the Debt Advice and Information Pack (“DAIP”) may be issued by a creditor considering petitioning for bankruptcy and changes the amount of debt required to establish apparent insolvency by a Statutory Demand in debtor applications. It also creates a schedule of forms created in accordance with the provisions of the 1985 Act as amended by the 2007 Act.

New Regulations in light of bankruptcy reform

Bankruptcy reform has made significant changes in the way individual bankruptcies are administered. All bankruptcies are currently conducted by petition to the courts, and many debtors are excluded from the process because they are unable to prove apparent insolvency. Some debtors have found that their creditors are unwilling to take the legal action required to bring about their sequestration because of the administrative and legal costs incurred, often without receiving any dividend at the end of the sequestration. This means that many of the poorest debtors, who are most in need of debt relief, are unable to apply to make themselves bankrupt.

The amendments to the 1985 Act give power to AIB to award all debtor applications, with or without the concurrence of creditors. The Regulations lay out the processes whereby debtors who can prove apparent insolvency can apply for their own bankruptcy and an individual who is on low income and has minimal assets can apply for their own bankruptcy without being apparently insolvent, known as Low Income Low Assets (“LILA”).

Specific Provisions in this Instrument

Regulations 4, 5 and 6 re-enact Regulations 6, 7 and 8 of the 1985 Regulations and relate to claims in foreign currencies. Regulation 4 defines what types of claims are acceptable in a foreign currency. There are two types of claim that can be made. These are claims made in a foreign currency if constituted by a decree or other order made by a court ordering the debtor

to pay a sum expressed in a foreign currency, and a claim arising from a contract or bill requiring the debtor to make payment in a foreign currency. Regulation 5 defines that any claim made in a foreign currency is to be converted into sterling at the mean buying rate at the close of business on the day of the bankruptcy. Regulation 6 defines that the interest rate on foreign currency claims is to be set at 8 percent per annum from the date of bankruptcy to the date of payment.

Regulation 7 re-enacts Regulation 10 of the 1985 Regulations where a premium of any bond of caution or other security is required to be given by an insolvency practitioner when he is acting as trustee in a bankruptcy. This Regulation states that the amount of the premium bond may be taken into account as part of his outlays in the bankruptcy. The text has been changed in the 2008 Regulations to omit reference to the “interim” and “permanent” trustee on account of the amalgamation of the roles of interim and permanent trustee in section 6 the 2007 Act.

Regulation 8 re-enacts Regulation 11 of the 1985 Regulations, where it amends the definition of a person, or group of persons who can be an “associate” in section 74 of the 1985 Act by substituting the words in subsection (3) “and the husband or wife of any individual with whom he is in partnership” with the words “and of any person who is an associate of any person with whom he is in partnership”. The Regulation also inserts subsections (5A) defining a company who is an associate of another company, (5B) defining a company who is an associate of another person, and (5C) defining a person who can be taken to have control of a company.

Regulation 9 makes amendment to the application of the 1985 Act to limited partnerships. Any reference to a partnership in the 1985 Act shall be assumed to include a reference to a limited partnership. The Regulation also makes provision that the sheriff has jurisdiction in the bankruptcy of a partnership if it is registered in Scotland and makes provisions as to the criteria whereby a petition or debtor application may be made for a limited partnership. The Regulation also makes a rule that the AiB shall send a copy of every court order mentioned in section 14(1A) of the 1985 Act to the Registrar of Limited Partnerships in Scotland. The Regulation mainly re-enacts Regulation 12 in the 1985 Regulations, but has been modified to bring it into line with amendments made by the 2007 Act.

Regulation 10 sets the maximum amount which can be claimed as a preferred debt by an employee or a person under the Reserve Forces as £800. This Regulation re-enacts Regulation 14 of the 1985 Regulations.

Regulation 11 specifies the information that must be included in a notice to the Edinburgh Gazette following the award of bankruptcy. This Regulation re-enacts Regulation 16 of the 1985 Regulations, but is amended because of the amalgamation of the roles of the interim and permanent trustee in section 6 the 2007 Act.

Regulation 12 prescribes a time limit for the Debt Advice and Information Package (DAIP) to be issued to a debtor by a creditor prior to petitioning for their bankruptcy. The 2007 Act requires that a petitioning creditor must provide a debtor with a DAIP containing information regarding the availability of money advice in their locality. The time limit prescribed by this Regulation is that the DAIP should be sent by a creditor to the debtor not less than 14 days before the presentation of the petition, and not more than 12 weeks before the presentation of

the petition. This is a new Regulation made in accordance with section 5(2D) of the 1985 Act.

Regulation 13 states that the sum prescribed for the minimum threshold for apparent insolvency on the basis of a Statutory Demand in debtor applications is £1,500. This is a new Regulation. This brings the debt threshold for a Statutory Demand in line with the threshold for a debtor application for sequestration.

Regulation 14 is a new Regulation that defines the process of debtor applications to the AiB, in accordance with section 5 of the 1985 Act where application is to be made to the AiB. The Regulation specifies the form that a debtor should use to apply, whether the application is being made with or without the concurrence of a creditor, or application by a trust/partnership/corporate or unincorporated body/limited partnership (Forms 9,10 and 11 respectively). The Regulation also prescribes forms for the statement of assets and liabilities (Form 12), nomination of an insolvency practitioner as trustee (Form 13), a daily schedule of awards of sequestration (Form 14), the refusal of sequestration (Form 15), and copies of the award to the Keeper of the Registers of Scotland (Form 16). The Regulation also defines the time in which debtor should provide further information or payment if an application is presented incomplete as 21 days.

Regulation 15 relates to applications made under the LILA scheme. When an application has been made to the AiB and the debtor meets the criteria for an award under the LILA scheme, the debtor is required to sign a statutory declaration confirming that they meet the necessary criteria. The Regulation prescribes a form for this statutory declaration (Form 17). The Regulation also sets a rule whereby the LILA bankruptcy should be advertised in the Edinburgh Gazette in accordance with section 15(6) of the 1985 Act and that the notice should state that creditors are not invited to make a claim in the sequestration. This is a new Regulation.

Regulation 16 relates to trustees other than the AiB. Section 21B(1) of the 1985 Act requires that the trustee reports to AiB if they have not called a statutory meeting. The Regulation prescribes a form for this procedure (Form 18). This is a new provision inserted in the 1985 Act as the requirement for a trustee to call a statutory meeting has been repealed by section 11(1) of the 2007 Act.

Regulation 17 is a new Regulation that prescribes a form (Form 19) for the use of a trustee who is applying to resign under section 28(1) of the 1985 Act. A trustee in bankruptcy must apply to the AiB for the authority to resign from the post and the AiB must be satisfied that the trustee is unable to act, or has conducted himself in such a way that he is no longer fit to act.

Regulation 18 prescribes a form for the income payment agreement (“IPA”) as provided in section 32(4B) of the 1985 Act. The IPA is a formal arrangement between the trustee and the debtor to pay an amount from their income, or for a third party to pay a portion of the debtor’s income. The form outlines the methods of collection available and is completed by the debtor to specify how they will pay. This is a new Regulation.

Regulation 19 prescribes Forms 20 and 21 for use when the AiB or any other trustee abandons any interest they have in a heritable property by trustee. This is a new provision in section 32(9A) of the 1985 Act.

Regulation 20 prescribes a form (Form 23) on which the debtor must provide his current state of affairs under a new provision in section 43A(2) of the Act. The form will be issued every six months to any undischarged debtor or any debtor currently paying under an IPA.

Regulation 21 revokes the 1985 Regulations.

Regulation 22 confirms that the 1985 Regulations will remain in force for bankruptcies awarded prior to 1 April 2008.

Consultation

A public consultation on bankruptcy reform was carried out during 2005 and there has been continued liaison with stakeholders during the development of policy. Although there has been broad support regarding the changes in bankruptcy, there were some issues regarding reforms that these Regulations support. It was highlighted that one year discharge is intended to reduce the stigma of bankruptcy and that there was a risk that this may be interpreted as making bankruptcy too easy. It was also noted that the LILA scheme will allow a large number of currently excluded debtors access to bankruptcy and that this is likely to significantly increase the number of awards made during 2008/09 compared with 2007/08.

Funding

The main funding implications for the new Regulations are with regard to Regulation 15 about debtor applications by LILA. It is intended that the £100 application fee will cover the ongoing cost of administering LILA cases.

A regulatory impact assessment has not been prepared.

Accountant in Bankruptcy
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