

EXECUTIVE NOTE

THE HOME OWNER AND DEBTOR PROTECTION (SCOTLAND) ACT 2010 (TRANSITIONAL AND SAVING PROVISIONS) ORDER 2010 (S.S.I. 2010/316)

The above instrument is made in exercise of the powers conferred by section 15(1)(b) and (2) of the Home Owner and Debtor Protection (Scotland) Act 2010 (“the 2010 Act”). The instrument is subject to negative resolution procedure.

Policy Objectives

The purpose of the Home Owner and Debtor Protection (Scotland) Act 2010 (Transitional and Saving Provisions) Order 2010 is to make provisions in respect of the transitional and savings arrangements that are to apply for the purposes of implementation of the 2010 Act.

The Order sets out in detail when the new provisions will apply and the situations in which the existing provisions will continue to apply after commencement. In particular the Order provides;

- Where a creditor has made an application to court under section 5 of the 1894 Act or section 24(1) of the 1970 Act before the date when the provisions of the 2010 Act are commenced (“the relevant date”), the provisions of Part 1 of the 2010 Act shall not apply to that court action, which will continue under the provisions of existing legislation.
- Where the provisions of Part 1 of the 2010 Act do not apply, any provision of the Mortgage Rights (Scotland) Act 2001 in force immediately before the relevant date will continue to have effect in relation to a pre commencement calling-up notice or notice of default or other court action. This will permit the debtor (or any other entitled persons under the 2001 Act) to make a court application under the 2001 Act to suspend the rights of the creditor, without having to wait for the creditor to initiate court action. However, if the creditor does initiate court action after the relevant date, that action will proceed under the new arrangements introduced by the 2010 Act.
- Article 2(4) of the Application by Creditors (Pre-Action Requirements) (Scotland) Order 2010 provides that certain information a creditor must provide before raising a court action is to be provided as soon as is reasonably practicable after the debtor commits the relevant default. Where a debtor has defaulted before the relevant date and the new provisions of the 2010 Act are to apply, this is modified so that the information must be provided as soon as is reasonably practicable after the relevant date, rather than after the default, if it has not already been provided. This modification is to avoid difficulties where a lender has not complied with the new requirements before the

commencement of the provisions of the 2010 Act, while ensuring that the debtor gets the requisite information prior to the raising of any court action.

- In Article 7(1), in respect of debtor applications with creditor concurrence, that these are still competent by the creditor concurrence route provided the creditor concurrence is prior to the repeal of that route and that the application is received by the Accountant in Bankruptcy within 30 days after the repeal.
- In Article 7(2), that where a trust deed is entered into before the amendments to trust deeds come into force, they are not affected by the amended law.
- Where sequestrations are awarded prior to the commencement of section 12 of the Act, Article 7(3) clarifies that these awards still require to be advertised in the Edinburgh Gazette.

Consultation

There was no statutory requirement to consult on this Order. However, the following bodies have been consulted during the preparation of the instrument via correspondence, in order to ensure that the transitional arrangements work in practice and the transition is as smooth as possible for all concerned:

Aberdein Considine & Company Solicitors
Anderson Fyfe Solicitors
Building Societies Association
British Bankers Association
Castlemilk Law Centre
Citizens Advice Scotland
Consumer Focus
COSLA
Council of Mortgage Lenders
Dunfermline Building Society
Finance and Leasing Association
Homeloan Management Limited
ICAS
Irwin Mitchell Solicitors
Law Society for Scotland
Lloyds Banking Group
McClure Naismith Solicitors
Money Advice Scotland
Nationwide Building Society
R3
RBS
Scottish Court Service
Scottish Legal Aid Board
Shelter

Financial Effects

The Order does not have any new financial effects that were not anticipated when the 2010 Act was enacted.

A Business Regulatory Impact Assessment was prepared for the Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010 and the Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010, where full details of the costs and benefits of the new provisions are set out. These costs and benefits were indicated when those Orders were laid before Parliament in June. A Business Regulatory Impact Assessment was also prepared for Protected Trust Deed (Scotland) Amendment Regulations 2010 and the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010, where full costs and benefits of the new provisions are set out.

The purpose of this Order is to set out circumstances in which existing legislation will continue to apply after the coming into force of the 2010 Act, and to make transitional provision for the application of provisions of the 2010 Act in certain circumstances. There are no separate financial effects other than those already outlined in the Business Regulatory Impact Assessments prepared for those Orders. The Order has been prepared to ensure the smoothest possible transition from the old to the new system. It therefore has no additional financial impact on the Scottish Executive, local government or on business. As a result a Regulatory Impact Assessment is not required.