

## EXECUTIVE NOTE

### THE BANKRUPTCY (SCOTLAND) AMENDMENT REGULATIONS 2010

#### SSI 2010/367

The above instrument was made in exercise of the powers conferred by section 72(1), 5(4C)(b) and 40(3B) of the Bankruptcy (Scotland) Act 1985 (as amended) (“the 1985 Act”), section 11(2)(b) of the Debt Arrangement and Attachment (Scotland) Act 2002 (“the 2002 Act”) and section 15(1)(b) of the Home Owner and Debtor Protection (Scotland) Act 2010 (“the 2010 Act”). The instrument is subject to negative resolution procedure.

#### **Policy Objective**

These Regulations amend and supplement the Bankruptcy (Scotland) Regulations 2008 to facilitate provisions introduced by the Home Owner and Debtor Protection (Scotland) Act 2010, introduce changes required in consequence of that Act and make changes to a number of forms contained in schedule 1 of those Regulations.

The Edinburgh Gazette is a biweekly newspaper published by the Stationery Office. It contains official notices regarding matters such as road closures and public finance and currently also contains notices of insolvency proceedings. It is not often read by the general public but credit reference agencies and most large creditors are subscribers. The Edinburgh Gazette is available online at <http://www.edinburgh-gazette.co.uk/>.

All awards of bankruptcy are also recorded in the Register of Insolvencies which is a public record. The contents of the Register of Insolvencies are prescribed by Act of Sederunt in Appendix 2 to the Sheriff Court Bankruptcy Rules and Form 72.6A of the Rules of the Court of Session. The Register of Insolvencies is available online at <http://roi.aib.gov.uk/ROI/>.

Section 15(6) of the Bankruptcy (Scotland) 1985 Act as amended (the 1985 Act) requires notice of an award of bankruptcy to be advertised in the Edinburgh Gazette and section 25(6) of the 1985 Act requires a replacement trustee to advertise their appointment in the Edinburgh Gazette. This is intended to ensure that there is a public notice for the benefit of creditors and to invite claims. Historically, the Edinburgh Gazette was the only practical means of ensuring that information about insolvencies was disseminated to creditors.

The 2010 Act repeals sections 15(6) and 25(6) of the 1985 Act so that adverts in the Edinburgh Gazette will not be required for awards of bankruptcy or appointment of replacement trustees.

The purpose of the notice can be adequately met by the record of the insolvency in the Register of Insolvencies, the content of which has been reviewed to ensure it provides the equivalent information to that currently displayed in the Edinburgh Gazette.

Section 12 of the 2010 Act removes the need for trustees to publish awards of bankruptcy in the Edinburgh Gazette. This will result in a significant saving to the public purse as the Accountant in Bankruptcy is the trustee in between 80% and 90% of all bankruptcies. To ensure that creditors and other interested parties are not disadvantaged by this change, the fee for access to the Register of Insolvencies has been abolished by an amendment to the Bankruptcy Fees (Scotland) Regulations 1993 (S.I.1993/486). Reform of the Register will also enable Scotland's participation in a European e-Justice initiative to provide access to information about insolvencies through a single European portal.

Section 5 of the 1985 Act allows debtors to petition for their own bankruptcy if they have the concurrence of a qualified creditor, could prove apparent insolvency or met the Low Income Low Asset conditions. The Home Owner and Debtor Protection (Scotland) Act 2010 introduces a new Certificate for Sequestration route into bankruptcy which allows the debtor to apply for bankruptcy on the granting of a certificate by an authorised person. These regulations remove any reference to the creditor concurrence route for individual debtors, as the new Certificate for Sequestration route will ensure universal access to bankruptcy. Creditor concurrence will remain as the route into bankruptcy for entities like partnerships and trusts which can be sequestrated under section 6 of the 1985 Act.

Section 11 of the Homelessness etc. (Scotland) Act 2003 prescribes that secured lenders must notify a local authority that they are seeking to take possession of a debtor's family home. These regulations introduce a similar requirement for a trustee in a sequestration or trust deed, when seeking authority to sell or dispose of any right or interest in a debtor's family home, to notify the relevant local authority. This will assist local authorities to respond effectively to potential homelessness.

The Debt Action Forum was set up in 2009 by Scottish Ministers to help those people of Scotland who are struggling with debt to obtain debt relief. Section 11(1)(b) of the Debt Arrangement and Attachment (Scotland) Act 2002 prescribes that the value of a vehicle exempt from attachment will not exceed £1,000. In its response to the Debt Action Forum Report, the Scottish Government made a commitment to take forward at the earliest legislative opportunity proposals to render it incompetent to attach (and in consequence exempt from vesting in bankruptcy) any vehicle, the use of which is reasonably required by a debtor, the value of which does not exceed £3,000. These Regulations therefore raise the exemption level from £1,000 to £3,000.

Presently debtors applying for their own bankruptcy, complete Form 9 contained in the 2008 Regulations. Additionally those debtors who appear to meet the Low Income, Low Assets criteria are required to complete a second form, Form 17. Feedback from stakeholders has shown that the requirement for a second form can in certain circumstances delay the consideration of the application. There has also been concern that debtor applications have been inadequately supported by evidence to confirm eligibility for an award of bankruptcy. To address these issues these Regulations review Form 9, impose an evidence requirement and repeal Form 17. These Regulations also clarify that the Accountant in Bankruptcy may refuse an application for bankruptcy if insufficient evidence is not provided within a required timescale.

## **Specific Provisions**

Regulation 3(2) allows for communication by electronic means as defined in Electronic Communication Act 2000.

Regulation 3(3) repeals Regulation 11 which prescribes the information to be published in a notice in the Edinburgh Gazette. It also repeals Regulation 15. Regulation 15(3) is the requirement for a trustee to publish in the Edinburgh Gazette that a debtor meets the Low Income Low Assets conditions and that creditors are not invited to submit claims in anticipation of a dividend. Regulation 15(1) stipulates the requirement of a debtor who meets the Low Income Low assets conditions to complete and return a Statutory Declaration (Form 17) to the Accountant in Bankruptcy. Regulation 15(2) states that should the debtor fail to complete and return the Form 17 and the Accountant in Bankruptcy is not satisfied that the debtor is apparently insolvent in terms of section 7 of the 1985 Act, the Accountant in Bankruptcy shall refuse to grant the application.

Regulation 3(4)(a) and (b) amends Regulation 14 by revoking the creditor concurrence route into bankruptcy for debtor applications thereby revoking Form 10.

Regulation 3(4)(c) amends Regulation 14(c) to advise of the additional information to be provided by the debtor in the form of Form 25.

Regulation 3(4)(d) removes the requirement for an entity or trust to complete Form 12.

Regulation 3(4)(e)(i) introduces a requirement for further evidence to substantiate the facts on the debtor application.

Regulation 3(4)(f) allows the Accountant In Bankruptcy to refuse an award of bankruptcy where the debtor fails to provide the necessary information to prove they meet the bankruptcy criteria.

Regulation 3(5) insets a new Regulation 19A which requires a trustee in a bankruptcy or a trustee acting under a trust deed to notify a local authority where the debtor resides at, that the trustee is taking action to obtain consent from a sheriff to sell or dispose of the debtors' home. This will allow the local authority in which the home is situated to take any necessary action to assist the debtor in the event that they lose their home.

Regulation 3(6) prescribes the schedule of forms:

It amends Form 3, the statement of assets and liabilities, where there is a petition by a creditor or trustee under a trust deed and it amends Form 9, the Debtor Application form and Form 15, the form of Refusal of Award of sequestration. It also revokes Form 10, Form 12 and Form 17. It inserts a new Form 24 for the trustee to use to advise local authorities of action being taken to obtain consent from a sheriff to sell or

dispose of any right or interest in a debtor's family home. This should allow the local authority to be aware of a potential homelessness situation. It inserts a new Form 25 which is a statement of assets and liabilities to be used when a trust, partnership or other entity applies to be made bankrupt.

Regulation 4 substitutes £3,000 as the upper limit on the value of a vehicle that may be exempt from attachment for the purposes of section 11(1)(b) of the Debt Arrangement and Attachment (Scotland) Act 2002.

Regulation 5 provides that in respect of bankruptcy awards made prior to 15 November 2010, a notice should still be placed in the Edinburgh Gazette.

Regulation 6 allows debtor applications with creditor concurrence, provided that these are competent and that the application is received by the Accountant in Bankruptcy within 30 days after the repeal.

Regulation 7 provides that where a debtor applies for bankruptcy prior to 15 November 2010 on the basis of Low Income Low Assets conditions, the debtor would be required to complete the Form 17 to declare their status.

## **Consultation**

There has been no formal consultation on the reforms in this instrument. There has, however, been extensive engagement with the key stakeholders, not only during the passage of the Home Owner and Debtor Protection (Scotland) Act 2010 but also through workshops convened to discuss the provisions of the Act. Stakeholders have included Money Advice Scotland, Citizens Advice Scotland, Insolvency Practitioners and their representative bodies, including the Institute of Chartered Accountants of Scotland, creditor representatives and other interested parties, such as the British Bankers Association and Local Government.

Separate discussions have also taken place with representatives from the Edinburgh Gazette and credit reference agencies.

As a result of the above consultation with stakeholders and the limited impact on the sector and our stakeholders, a Business Regulatory Impact Assessment for these Regulations has not been carried out.

## **Financial Implications**

There is currently a fee of £100 for every debtor application for bankruptcy. It is not anticipated that the changes introduced by these regulations will increase the cost to the Accountant in Bankruptcy in carrying out the administration required. There will be nominal upfront printing costs to produce new forms, however, these costs have been built into the budget of the Accountant in Bankruptcy. There will be small savings through reduced interaction with debtors in obtaining completion of Form 17 and there will also be savings to trustees, estimated at £396,600, as a result of the removal of the requirement to publish bankruptcies in the Edinburgh Gazette.

Whilst this saving to trustees would result in a loss of income for the Edinburgh Gazette of £396,600 an offer has been made to provide them with the data contained on the Register of Insolvencies. This would allow the Edinburgh Gazette to continue to provide access to information for agencies who currently purchase their services.

Accountant in Bankruptcy

19 October 2010