

POLICY NOTE

THE COMMON FINANCIAL TOOL ETC. (SCOTLAND) AMENDMENT REGULATIONS 2015

SSI 2015/149

1. The above Regulations will, if approved, be made by the Scottish Ministers in exercise of the powers conferred by sections 5D, 71C and 72(1A) of and paragraph 5 of Schedule 5 to the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”), section 7(2)(bd) of the Debt Arrangement and Attachment (Scotland) Act 2002 (“the 2002 Act”) and all other powers enabling them to do so. The Regulations are subject to the affirmative procedure.

Policy Objectives

2. These Regulations amend the Common Financial Tool etc. (Scotland) Regulations 2014 (S.S.I. 2014/290) (“the CFT Regulations”) which provide for the method of assessing an individual’s income and expenditure, and determining an appropriate amount of a living debtor’s income to be paid to a trustee after sequestration of a debtor’s estate. This method is known as the “Common Financial Tool” (“CFT”) in the 1985 Act as amended by the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”). The CFT Regulations fix the CFT as the Common Financial Statement (“CFS”) published by the Money Advice Trust, operated in accordance with the provisions of the CFT Regulations. The CFT Regulations also make a number of other amendments to related legislation in the Protected Trust Deeds (Scotland) Regulations 2013 (S.S.I. 2013/318 as amended by the CFT Regulations) (“the PTD Regulations”).

3. These Regulations:-

- add a contingency allowance to the CFT, within defined limits, to allow a bankrupt debtor to retain a certain amount of their income to help meet contingencies which may arise; and
- make minor clarifications and corrections in response to observations made in particular by the Institute of Chartered Accountants of Scotland (“ICAS”) in evidence to the Economy, Energy and Tourism Committee on the CFT Regulations.

Contingency Allowance

4. The policy intention behind providing for a contingency allowance is to support the debtor’s financial rehabilitation by encouraging them to save, and also to build their financial resilience in the event of any unexpected income shocks. As set out in the Business and Regulatory Impact Assessment (“BRIA”) in relation to the Regulations, limits are set at 10% of the amount calculated in accordance with applying the CFT, subject to a maximum of £20 per month or the equivalent (see principally the amendments by regulation 3(3) and (5)). Regulation 3(5) inserts a new regulation 3A to set out the amount of income which may be retained by the debtor towards contingencies which may arise in terms of the newly created regulation 3(3)(b).

5. The remainder of regulation 3 makes related changes. Regulation 3(1) makes a consequential amendment referring to new regulation 3A. Regulation 3(2) is amended to make clearer it is subject to paragraphs (3) and (7) to provide greater clarity on how the CFT operates, in response to stakeholder concerns. Regulation 3(3) rearranges regulation 3(3) and adds the new regulation 3(3)(b) under which the debtor must be allowed to decide to retain an additional amount of income in accordance with new regulation. Regulation 3(4) makes consequential amendments to regulation 3(4) and (9) by substituting “paragraph (3)(a)” for “paragraph (3)” as this instrument creates a new paragraph (3)(a), as a consequence of the addition of a new paragraph (3)(b).

Minor Amendments

6. TICAS submitted written evidence to the Economy, Energy and Tourism Committee setting out their observations on the CFT Regulations. Minor clarifications and corrections are made to the CFT Regulations following consideration of those comments.

7. Regulation 4(2) amends regulation 3(2)(a) and (b) to further clarify how the trigger figures in the CFS relate to the amount of the debtor’s whole surplus income. Regulation 4(4) addresses stakeholder concerns that a provision covering “any statement” could apply where it was not necessary to send a statement under the 1985 Act, e.g. by certain applicants on review or appeal of the debtor’s contribution under section 32C or 32H of the 1985 Act.

8. Regulation 4(5) amends regulation 7(5) by removing “a statement”, and inserting those words at the beginning of regulation 7(5)(i) so regulation 7(5)(ii) reads more easily. Regulation 4(6) corrects a layout issue in regulation 8(1) of the CFT Regulations for regulation 21(2A) of the PTD Regulations so the wording after “value,” at 21(2A)(b) appears as a full-out to the main provision at 21(2A).

9. Regulation 4(7) amends regulation 9 in order to provide greater clarity as ICAS requested that one valuation is allowed for each property in a debtor’s estate, if the property is included or covered in the said valuation, prior to grant of the trust deed. All property in the debtor’s estate does not have to be valued at the same time, in one single valuation report. Separate valuation reports may be provided for separate properties, which form part of the estate (but only one for each prior to the grant of the trust deed).

10. Regulation 4(8) makes minor amendments to Form 3 and Form 4 in the Schedule, including inserting a new table row “S” in Form 4 to allow for other or miscellaneous costs of a protected trust deed to be detailed. Regulation 4(8)(b)(ii) omits Note 3, as the requirement of the total realisation from assets excluding the value of any security and realisation costs is not consistent with Statement of Insolvency Practice 7 (Presentation of Financial Information in Insolvency Proceedings).

Consultation

11. A Scottish CFT Working Group was set up to identify a single CFT to be used throughout Scotland. The tool would be used to assess the amount of contribution to be paid by a debtor, regardless of which statutory debt relief or debt management solution they entered into.

12. As noted in the BRIA for these Regulations, the CFT Working Group was specifically asked for views on the savings/contingency provision of the tool. The majority were in agreement and welcomed a contingency allowance ceiling of £20 per month.

13. There was also extensive engagement with key stakeholders during the passage of the 2014 Act. In 2012 the Scottish Government consulted on its proposals for bankruptcy law reforms. Its “Consultation on Bankruptcy Reform” –

<http://www.scotland.gov.uk/Publications/2012/02/6283/0>

was published on 24 February 2012 and remained open until 18 May 2012. Throughout the Parliamentary process for the Bill for the 2014 Act, the Scottish Government also engaged with various stakeholder groups, providing them with an opportunity to raise any concerns.

14. Additionally, the Accountant in Bankruptcy (“the AiB”) held a rolling programme of stakeholder events between December 2012 and August 2014. Following a presentation from the AiB at the end of each event, delegates were invited to participate in a question and answer session; allowing them to contribute to the development of the Regulations. In total, approximately one hundred and thirty delegates attended these events representing a wide range of businesses and representative bodies, including; the Insolvency Practitioners Association, ICAS, Lloyds Banking Group, Credit fix, Solicitors and Money Advice (public and private sector). Further stakeholder events were held in January and February 2015.

Impact Assessments

15. A BRIA has been completed on the effects of the implementation of these Regulations and will be published when this instrument is laid before the Parliament. A copy of the BRIA can be found on the AiB website at: www.aib.gov.uk

16. An Equality Impact Assessment (“EQIA”) has not been carried out for this instrument, however an EQIA was completed for the CFT Regulations which refers, in turn, to the EQIA completed in relation to the 2014 Act. The AiB administers each bankruptcy on an individual basis, and has appropriate measures in place to ensure that the collation and transmission of statistics and information regarding individuals are completed sensitively.

17. The equality impact of this instrument has however been considered. The changes set out in this instrument will apply equally to all. The AiB regularly consults with stakeholders, service users and the general public on reforms to bankruptcy law to ensure that the needs of all groups of society who require to enter bankruptcy are considered and that no particular groups are disadvantaged or excluded more than others.

18. A copy of the EQIA for the CFT Regulations can be found on the AiB website at: www.aib.gov.uk and the EQIA published in relation to the 2014 Act can be found on the Scottish Government website at: www.scotland.gov.uk

Financial Effects

19. The AiB has carried out an analysis to estimate the impact of the new contingency allowance when a debtor is being assessed using the CFT to determine their monthly surplus income. The impact on all three statutory debt solutions in Scotland - bankruptcies, Protected Trust Deeds (“PTDs”) and the Debt Arrangement Scheme (“DAS”) – has been considered, using a statistically robust sample of live cases. Further details of this analysis are published in the BRIA in relation to the Regulations.

20. Only around one third of bankruptcies result in the debtor making any contribution at all and this will not change as a result of these Regulations. For those debtors making a contribution to their bankruptcy, an estimated average of £13 per month will be kept for contingency each month, amounting to an average of £633 over the 48 month contribution period.

21. PTDs are voluntary arrangements that require creditors’ consent, hence the impact of the contingency allowance on PTDs may not apply evenly, as creditors will have a choice as to whether to agree to it or not. Currently around 70% of PTDs conclude with a dividend paid to creditors and this change should not impact on this proportion. It is estimated that an average of £15 per month will be kept for contingency and this will result in an average of £710 over the 48 month contribution period. This should also result in the contributions being more sustainable over the 4 year period resulting in fewer breakages.

22. Finally, the impact this change will have on DAS is expected to be that the average expected length of a Debt Payment Programme (“DPP”) under DAS will increase, as the contingency allowance will potentially reduce the amount a debtor can pay each month. It is estimated that an average of £14 per month will be kept for contingency each month, or an average of £1,180 over the full length of the DPP. This should result in a more sustainable scheme and may also result in proportionally fewer revocations and variations.

23. A financial memorandum was published for the Bill for the 2014 Act and can be found at:

[http://www.scottish.parliament.uk/S4_Bills/Bankruptcy%20and%20Debt%20Advice%20\(Scotland\)%20Bill/b34as4-stage2-supp-fm.pdf](http://www.scottish.parliament.uk/S4_Bills/Bankruptcy%20and%20Debt%20Advice%20(Scotland)%20Bill/b34as4-stage2-supp-fm.pdf)

The Accountant in Bankruptcy on behalf of the Scottish Government

19 February 2015