

## **POLICY NOTE**

### **The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016**

#### **SSI 2016/295**

The above Regulations are made by the Scottish Ministers in exercise of the powers conferred by sections 224, 225(2) and 227 of the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) and all other powers enabling them to do so. They are subject to the negative procedure.

#### **Policy Objectives**

1. The policy objective of these Regulations is to consolidate the secondary legislation under the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”) as part of the replacement of the 1985 Act by the consolidating 2016 Act. The aim of the consolidation of bankruptcy law is to aid the accessibility and understanding of bankruptcy law for practitioners and those affected by it.
2. They do not make policy changes, but replace and update, for sequestrations petitioned or applied for on or after 30 November 2016, the provisions regarding the procedure for the making of certain applications to, and decisions by, the Accountant in Bankruptcy (AiB) in one place and to prescribe the forms to be used when applying to the AiB.
3. The Regulations also provide further detail around the process for applications for review by AiB of a decision under the Act, together with forms to be used when making those applications. These rules are broadly equivalent to court rules and are made under the power in section 224. The 2016 Act contains appeal rights to the sheriff throughout.
4. In brief, the Regulations include provisions for:—
  - The procedure by which certain “first instance” applications must be made to AiB;
  - The process which must be followed if the AiB requires further information in order to decide on an application;
  - Further detail of the process which must be followed once an application has been made, in relation to:—
    - o applications for directions by trustees in sequestration;
    - o applications for the recall of sequestration on the limited ground of being able to pay debts in full;
    - o the appointment of a replacement trustee (including a trustee acting in more than one sequestration);
    - o the removal of a trustee; and
    - o the conversion of a PTD into bankruptcy.
5. The Regulations also make certain provisions in order to ensure that:—
  - The AiB’s decisions in relation to review applications will be made publically available; and

- AiB staff who make a particular decision cannot then be involved with a review of that same decision.
6. The order of the provisions follows the running order of the Bankruptcy (Scotland) Act 2016. Some other drafting changes have been made to follow the Act, e.g. around the wording of the time limit provisions and for other terminology.

## Background

7. In their eighth programme of Law Reform, the Scottish Law Commission, at the suggestion of AiB, undertook a project to consolidate the legislation relating to bankruptcy in Scotland. The majority of the legislation proposed for consolidation is contained in the 1985 Act. The 1985 Act has been heavily amended on many occasions, as a result it has lost its coherence and structure. Many of the provisions are inordinately long and numbering has become complex and unwieldy. The primary aim of the 2016 Act was to make it more readable and accessible for practitioners and for those affected by it, saving time and money.
8. The 2016 Act received Royal Assent on 28 April 2016. These Regulations are part of the work to consolidate:-
  - the Bankruptcy (Scotland) Regulations 2014
  - the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010
  - the Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014
  - the Common Financial Tool etc. (Scotland) Regulation 2014
  - the Protected Trust Deed (Scotland) Regulations 2013
  - the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014
  - the Bankruptcy Fees (Scotland) Regulations 2014
9. The Bankruptcy Fees (Scotland) Regulations 2014<sup>1</sup> will continue to apply to all sequestrations under the savings and continuity of law provisions in sections 234(3) and 235(1), (2) and (4) of the Bankruptcy (Scotland) Act 2016. They are due to be replaced in 2017 after the conclusion of a review of the current fee levels. An informal tracked changes version is available on the AiB website to provide the correspondences to the new legislation.
10. Tables of Destinations and Derivations identifying the corresponding provisions in the 1985 Act and in the 2016 Act are available for the Bankruptcy (Scotland) Act 2016<sup>2</sup>.

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<sup>1</sup> SSI 2014/227 as amended by SSI 2015/80.

<sup>2</sup> <https://www.aib.gov.uk/bankruptcy-scotland-act-2016-tables-derivations-and-destinations-draft>

## Consultation

11. AiB has worked closely with stakeholders who have provided valuable feedback on the proposals for consolidation. This goes back to August 2011, when the Scottish Law Commission (“SLC”) initially published their “Consolidation of the Bankruptcy Legislation in Scotland” consultation paper, making a number of recommendations following responses to that consultation. Virtually all of the SLC recommendations were implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014 which allowed for a straight consolidation of the existing law in the new Act.
12. There was extensive engagement with key stakeholders during the passage of the Consolidation Act. The Delegated Powers and Law Reform Committee (DPLRC) took evidence from ICAS and the R3 Technical Committee who were broadly supportive of the Bill.
13. AiB published a draft version of these Regulations, together with the accompanying Regulations<sup>3</sup> in August 2016 and invited comments from stakeholders. Some minor changes have been introduced as a consequence of the points raised highlighted in the descriptions for regulations 6 and 11 in the specific provisions annexed.

## Impact Assessments

14. A Business and Regulatory Impact Assessment (BRIA) has been completed. A copy of this BRIA can be found on the AiB website at: [www.aib.gov.uk](http://www.aib.gov.uk).
15. An Equality Impact Assessment (EQIA) has not been carried out as these Regulations purely consolidate existing legislation which was previously subject to an EQIA and which highlighted no issues. AiB has, however, given thought to the effects of these regulations and the changes set out in this instrument will apply equally to all. 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.

## Financial Effects

16. AiB has considered the financial impact of the Consolidation in the 2016 Act and associated Regulations on firms. Stakeholders mentioned to the DPLRC the costs that would require to be incurred. Whilst there will be one-off limited costs and training requirements these will be mitigated over time by the savings associated by simpler statute and reduced time in sourcing appropriate legislation.

## The Accountant in Bankruptcy on behalf of the Scottish Government September 2016

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<sup>3</sup> the Bankruptcy (Scotland) Regulations 2016; the Bankruptcy (Scotland) Act 2016 (Commencement) Regulations 2016; and the Protected Trust Deeds (Forms) (Scotland) Regulations 2016.

## Annex

### Specific Provisions

1. **Regulations 4-8** make particular procedural provision in relation to specific applications under the Act, including how to make an application and prescribing the form to be used.
2. **Regulation 4** provides detail of how an applicant can make any application to AiB under these Regulations. The relevant forms required to be used by the Regulations may be submitted either personally in hard copy, by a registered postal service, or to AiB electronically via email or using AiB's purpose built computer system. Certain basic details (name and address etc., and of any representative) must be included in all applications or review applications.
3. **Regulations 5 and 6** provide detailed procedure for first instance (i.e. not on a review) applications to which these Regulations apply being made to AiB. Following consultation, a minor change has been introduced at regulation 6(12)(b) for copies of first instance applications to AiB to be able to be sent to "any place of business" of a partnership where it appears service will be effective instead of "the principal address". Stakeholders highlighted the existing provision could be problematic for practitioners and the ability to issue notices to any place of business will assist with case administration.
4. **Regulation 7** enables AiB to seek further information on any application at first instance, any review application or any representations made in respect of an application. If AiB are seeking further information, they will issue a notice in writing specifying what further information is required. Where the 2016 Act specifies a time limit for AiB to make a decision on an application, the time limit is extended if AiB seek further information in order to make the decision. AiB may refuse to consider an application if sufficient evidence is not provided within the time period specified.
5. **Regulation 8** provides AiB with the option to hold an oral hearing in relation to an application at first instance if necessary, to provide an opportunity to take oral evidence in person, should AiB deem it necessary, only following written representations. It is expected that hearings will be necessary only exceptionally, where the applicant has specific difficulties with providing evidence by other means. AiB can require an applicant or a person making representations to attend for the purpose of giving evidence. Where AiB determine a hearing is necessary, the time limits detailed within the 2016 Act for AiB to make a decision are extended.
6. **Regulation 9** covers the provision in relation to the recall of sequestration by AiB. These provisions include whom AiB must notify and details of the documents required to accompany such notification.
7. **Regulation 10** prescribes that an application for direction by a trustee must be made to AiB on Form 2 and the application must be made before the

expiry of the period of 28 days beginning with the day on which the application is made.

8. **Regulation 11** prescribes that a report to AiB of the statutory meeting appointing a replacement trustee must be made in Form 4 and states who must be notified and the timescale for doing so. Following consultation, one minor change has been introduced at regulation 11(4) to set a time-scale “without delay” for AiB to make a decision to sustain an objection to the appointment of a replacement trustee (per section 61(3)(b) of the 2016 Act).
9. **Regulation 12** states that a determination or appointment in relation to a replacement trustee acting in more than one sequestration must be made before the expiry of the period of 14 days under section 66(10) of the Act.
10. **Regulation 13** concerns the provisions in relation to the removal of a trustee from office and prescribes an order removing a trustee from office must be made by the AiB in Form 5.
11. **Regulation 14** details procedure in relation to the contractual powers of the trustee where an application is made under section 110(4)(b) of the Act.
12. **Regulation 15** concerns bankruptcy restrictions orders and states that the AiB must allow a debtor 14 days from the date of the notice to give representations. Representations must be made in writing by any means by which an application to AiB may be made under these Regulations. Reasons must be given and AiB must make or decide not to make a BRO within 21 days beginning with the date on which the notice was given.
13. **Regulation 16** concerns the revocation or variation of a Bankruptcy Restriction Order.
14. **Regulation 17** prescribes that Form 6 must be used when an application is made to convert a protected trust deed into sequestration and when such an award is made it must be made in Form 7.
15. **Regulation 18** states that AiB must notify all interest persons when it makes or refuses to make a corrective order or to waive a time limit.
16. **Regulation 19** details that where AiB puts a value on a debt under paragraph 3(3) of schedule 2 of the Act must notify the creditor and all other interested persons.
17. **Regulation 20** provides for the extension of the relevant time limit when a matter is being referred or remitted to the court.
18. **Regulation 21** outlines the review provisions of the Act where a Form 3 review application must be used.

19. **Regulation 22** provides that no member of staff including the AiB herself or himself involved in an original decision may be involved in the review decision.
20. **Regulation 23** allows the AiB to take into account the views of an independent person in relation to a review application, and to disclose information for that purposes, which may be used only for that purpose.
21. **Regulation 24** requires that decisions made by AiB on the review application will be made publicly available.
22. **Regulation 25 and 26** revoke the Regulations replaced, subject to a saving so they continue to apply to sequestrations where the petition was presented or the debtor application was made before 30 November 2016.