

POLICY NOTE

THE PROTECTED TRUST DEEDS (SCOTLAND) REGULATIONS 2013

SSI 2013/DRAFT

1. The above instrument will, if approved, be made in exercise of the powers conferred by sections 69A and 72(1) of and paragraph 5(1) of Schedule 5 to the Bankruptcy (Scotland) Act 1985 as amended (“the 1985 Act”) and all other powers enabling the Scottish Ministers to do so. It is subject to the draft affirmative resolution procedure.

Policy Objectives

2. The policy intent is to consolidate and amend the Protected Trust Deeds (Scotland) Regulations. This is required to introduce changes based on the outcomes from the Protected Trust Deed (“PTD”) and Bankruptcy Reform consultations - see below. The Regulations revoke and replace the Protected Trust Deeds (Scotland) Regulations 2008, as amended by the Protected Trust Deeds (Scotland) Amendment Regulations 2010, for any trust deed granted on or after 28 November 2013. They introduce into the PTD process additional conditions required to be met before a trust deed can gain protected status, a structured approach to fees charged, increased information available to creditors, and increased transparency.

Background

Protected Trust Deeds

3. Protected Trust Deeds are voluntary trust deeds entered into by a debtor for the benefit for creditors that are “protected” in the sense that creditors who do not agree to the terms of the trust deed have no higher right to recover their debts than creditors who do agree. Once protected, the trust deed is binding on all creditors who can usually take no further action to pursue the debt owed providing the debtor complies with the terms of the trust deed.

4. Upon completion of the PTD any remaining unpaid debt is discharged and cannot be pursued by creditors although secured lenders can still rely on their security. The current conditions for protection of a trust deed include: the consent, or deemed consent, of a majority in number, or two-thirds in value of creditors; advertisement of the trust deed in the Edinburgh Gazette and registration of the trust deed in the Register of Insolvencies (RoI).

5. The Bankruptcy and Diligence etc. (Scotland) Act 2007 amended section 1A of the 1985 Act and gave the Accountant in Bankruptcy (“The Accountant”) responsibility for the supervision of trustees under PTDs. This came into force on 1 April 2008.

6. Following commencement of those amendments, a review of the PTD process was conducted in 2009. Among its findings, the review concluded that further consultation with stakeholders should be undertaken to develop a more cost effective and transparent PTD process which would best serve the needs of both debtors and creditors.

7. In 2010, at the request of the then Minister for Community Safety, Fergus Ewing MSP, the Protected Trust Deed Working Group (“PTDWG”) was established. The purpose of this group was to make recommendations for appropriate legislative and non-legislative

measures, to ensure the PTD process in Scotland was fit for purpose. The PTDWG was chaired by Rosemary Winter-Scott, the Accountant and Chief Executive of the Accountant in Bankruptcy (“AiB”) and comprised of a cross-section of stakeholders from the advice sector, creditor organisations, insolvency practitioners and the AiB.

8. On the 17 October 2011, a consultation was launched: ‘*Protected Trust Deeds – Improving the Process*’. The consultation sought the views of stakeholders and public on recommendations to make the trust deed a more efficient, fit-for-purpose product, which would help ensure that PTDs achieved the best balance between the needs of debtors and the rights of creditors. The consultation was published on the AiB and Scottish Government websites and ran until the 31 January 2012.

9. Proposals in the consultation looked at, where possible, standardising the processes and improving the levels of information available to debtors and creditors and to increase the dividends paid to creditors.

Bankruptcy Law Reform

10. The performance of PTDs in recent years has been an issue of some concern to the Scottish Government. As trust deeds must only be granted for the benefit of a debtor’s creditors, a fair return to creditors must be achieved. Historically high fees and costs associated with delivering PTDs, alongside disappointing dividend returns to creditors, are issues that need to be addressed.

11. The Scottish Government launched a *Consultation on Bankruptcy Law Reform* between 24 February and 18 May 2012. This consultation sought views on proposals to develop a service for debt advice, debt management and debt relief (including PTDs) that was fit for the 21st Century.

12. Stakeholder events to discuss the proposed changes to PTD Regulations and proposals for bankruptcy reform were held in Scottish Government buildings around Scotland: the Europa building in Glasgow on 22 April, Atlantic Quay in Glasgow on 20 May, Victoria Quay in Edinburgh on 29 April 2013 and at the Royal Highland Hotel, Inverness on 24 April 2013.

Summary of proposed policy changes

13. Based on the outcomes of the PTD and Bankruptcy Law Reform consultations and feedback received from stakeholders, AiB has developed PTD policy in several key areas. The Protected Trust Deeds (Scotland) Regulations 2013 make provision for the following principal changes to PTDs:-

- Introduce a minimum debt level of £5,000.
- A trust deed which includes a contribution from the debtor’s income (assessed partly by reference to the Common Financial Statement published by the Money Advice Trust – see Annex below for details) will be ineligible to be protected if the debtor’s total debts can be repaid in full within a 48 month period.
- Removal of the requirement to advertise the trust deed in the Edinburgh Gazette, replaced by notice in the public Register of Insolvencies (RoI).

- A new standard front sheet for notification of the trust deed to creditors and the Accountant (a revised PTD Form 3).
- Pre-trust deed fees and outlays will be excluded as outlays of a trust deed.
- Trustees will no longer be able to charge their fees at an hourly rate - they will be required to charge a single, fixed upfront fee, augmented by further remuneration based on a percentage of funds ingathered through the administration of the trust.
- These fee proposals will require to be notified to creditors and AiB on the new Form 3 when the trustee is seeking to have the trust deed protected.
- Trustees will only be allowed to increase their fixed fee in exceptional circumstances. There will be a process for trustees to seek approval from creditors, failing which, the Accountant will determine if the increased fee is appropriate.
- The Annual Form 4 report on the management of the trust will be issued to creditors as well as AiB, with trustees required to provide information to creditors if the expected dividend has reduced by 20% or more. Trustees will be required to provide details of the options available and a recommendation on the way forward, to be approved by a required number of creditors.
- The Accountant will retain power to issue Directions to Trustees. There will be a new process under which the Accountant can apply to the Sheriff if she considers trustees have not reasonably complied with a Direction.
- Interim dividends should be paid to creditors where sufficient funds are available after 24 months, and then 6 monthly thereafter.
- Acquirenda (assets other than income acquired by the debtor after granting of the trust deed but which must fall to creditors) will be standardised at 4 years from when the trust deed is granted.
- No contributions can be paid from a debtor's social security benefits.
- Equity may be frozen in a dwelling-house at the date the trust deed is granted.

14. It is intended that, subject to Parliamentary approval, this instrument will introduce these changes for trust deeds granted after 28 November 2013.

Consultation

15. There has been formal consultation on the reforms in this instrument, as set out at paragraphs 7 to 9 and 10 to 11 above. This has included the proceedings of the PTDWG and extensive engagement with key stakeholders. The key stakeholders are: the money advice sector (including Money Advice Scotland and Citizens Advice Scotland); insolvency practitioners and their representative professional bodies (including the Institute of Chartered Accountants of Scotland); creditor representatives and other interested parties, such as the British Bankers Association; the Law Society of Scotland and local government. During the course of the consultation meetings, seminars, surveys and conferences were all held. Feedback from the consultation has been used to draft the Protected Trust Deeds (Scotland) Regulations 2013, which are expected to deliver greater benefit to debtors and creditors.

Impact Assessments

16. An equality impact assessment (EQIA) has been completed on the detailed changes to the PTD Regulations in the instrument.

Financial Effects

17. A Business and Regulatory Impact Assessment (BRIA) has been completed on the effects of the detailed changes to the PTD Regulations in the instrument and will be published when this instrument is laid before the Parliament.

The Accountant in Bankruptcy on behalf of the Scottish Government

29 August 2013

Annex

Specific provisions

Regulation 1: Citation and commencement

Regulation 2: Interpretation

Regulation 3: specifies the date from which a trust deed is protected, that being the date it is recorded by AiB in the Register of Insolvencies (RoI). It also prescribes that the conditions in regulations 4–10 must be met in order for a trust deed to gain protected status.

Regulation 4: set out who may and who may not, enter into a trust deed. It is usually granted by a living debtor but there is also scope for other entities to grant a trust deed. This provision follows the provisions for the sequestration of other entities in section 6 of the 1985 Act. Limited companies are specifically excluded. Paragraph (3) introduces a new minimum debt level of £5,000.

Regulation 5: provides that the trustee of a PTD must be a person who could act as a trustee in a sequestration. This means that the trustee must be a qualified insolvency practitioner; a debtor cannot be his or her own trustee and the trustee cannot have a vested interest in the trust. Section 7(2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 provided that a trustee is no longer required to reside in Scotland, derived from section 24(2) of the 1985 Act as amended.

Regulation 6: sets out actions the trustee, debtor and secured creditor must take for a secured creditor to be excluded from the trust deed. The trustee must provide the secured creditor and debtor with a 3rd party valuation of the dwellinghouse to be excluded from the estate, the debtor must give their consent for the trustee to act on their behalf with regard to obtaining the secured creditor's permission to exclude the dwellinghouse; and the secured creditor must consent to the exclusion.

Regulation 7: provides that the trust deed must contain a statement confirming that all of the debtor's estate is conveyed to his or her trustee, except for any assets which would be excluded from vesting in a trustee in a sequestration.

Paragraph (1): also introduces a fixed 4 year period during which *acquirenda* (assets other than income acquired by the debtor after granting of the trust deed) is conveyed to the trustee.

The 4 year period begins on the date of granting of the trust deed. Previously, the *acquirenda* period was the period during which the trustee remained in office, which could be several years after the debtor had met all their obligations in the trust deed. This change has been made in order to better align the *acquirenda* period with the expected minimum period a debtor will remain undischarged in their PTD, as introduced by Regulation 8(a).

Paragraph (3): sets out the possible consequences to a debtor if they grant a trust deed and compels the trustee to inform the debtor of these consequences.

Regulation 8: provides that where there is an ongoing contribution from income the trust deed must state that there is a minimum payment period within which the debtor will pay a contribution at regular intervals. The minimum payment period will be 48 months (or such shorter or longer period as determined). The trustee may shorten the payment period if, in the trustee's opinion, the shorter period will result in the total of all the debtor's debts (including interest) being paid in full. If there is a period during which the debtor does not pay, then the payment period may be extended.

Paragraph (4): introduces a condition of protection, that the total amount of contributions from income assessed and payable throughout the payment period must be less than the total debts and interest that are included in the trust deed.

Regulation 9: introduces a requirement on a trustee under a trust deed to publish a notice of a trust deed seeking protected status in the RoI for the prescribed period (5 weeks). Previously the notice seeking protected status was published in the Edinburgh Gazette for the same period. This change aligns with reforms that fit within the European e-Justice initiative, to provide access to information regarding insolvencies through a single European portal. It will also allow all interested parties both inside and outside the UK, to access this information.

Regulation 10: specifies the documents required to be sent to all known creditors (other than a secured creditor who has agreed to be excluded from the trust deed) to seek their consent to the protection of a trust deed and that the trustee must send them not later than 7 days after registration. It also makes clear when consent will be deemed if creditors do not respond within the prescribed period.

Paragraph (1) subsection (d)(ii): provides that these documents must include a statement of the debtor's income and expenditure as at the date on which the trust deed was granted, in the style and format of the Common Financial Statement ("CFS") published by the Money Advice Trust. The CFS is a free budgeting tool (although prospective users must register in order to obtain a license) used by advice agencies and other third party organisations to make debt repayment offers to creditors on behalf of clients. It provides a detailed budgeting format enabling an accurate overview of a debtor's income, expenditure, assets and liabilities to be produced. Further information regarding the CFS is available from its dedicated pages on the Money Advice Trust website - <http://www.cfs.moneyadvicetrust.org/>

Regulation 11: specifies the documents which the trustee must send to AiB, at the end of the prescribed period for creditors' responses, and the timescales within which they must be sent. It also imposes a requirement on AiB to record the trust deed as having protected status in the RoI, if the conditions of regulations 4–10 have been met and the Accountant is satisfied that

the contribution, assessed partly by reference to the CFS, and the expenditure notified in the statement of income and expenditure, are appropriate.

Paragraph (3): introduces a timescale of no later than 7 days for the trustee to notify the debtor and all creditors that the Accountant has recorded, or has refused to record, the trust deed as having protected status in the RoI.

Regulation 12: sets out the effects of protected status.

Paragraph (1): restricts the rights of creditors to pursue debts included in a PTD, whether or not they consented to it being protected. This provision specifies the rights of creditors who dissented, or who were not sent a copy of the proposed PTD. A secured creditor who has consented to be excluded from the trust deed is not entitled to make a claim in the PTD for any debt where a security is held, or execute diligence against that asset, or petition for the sequestration of the debtor during the term of the trust deed.

Regulation 13: introduces new restrictions on diligences against a debtor whose trust deed has gained protected status. It aligns the diligences which cease to have effect on the date of protection of the trust deed with those that cease to have effect on the date of award of bankruptcy.

Regulation 14: introduces a new process to be followed in circumstances where the debtor has failed, on two consecutive occasions, to pay the required contribution from their income to the trustee. It requires new Forms 4A, 4B and 4C to be used to instruct the debtor's employer who, on receipt of the appropriate form, is required to make a deduction from the debtor's income and pay this to the trustee. It also prescribes that an employer can charge a fee for this service and the consequences if the employer fails to make a payment. An employer will be liable to cover the payment themselves if they do not comply with instructions and cannot recover the funds from the debtor.

Regulation 15: introduces a process which requires the trustee and debtor to make an agreement regarding the amount of equity in the debtor's heritable property) to be realised during the period of the PTD (this amount may be nil). This agreement is made at the date that the trust deed is granted. This regulation also provides for the circumstances in which the agreement can be made void. Where the dwellinghouse is excluded from the trust deed this regulation does not apply.

Paragraph (6): states who must receive copies of this agreement.

Regulation 16: provides for the conditions and timescales for a trustee to make an interim dividend payment to creditors. These circumstances are defined as where there are sufficient funds to allow a payment to creditors of at least 5 pence in the pound after the fees and outlays of the trustee have been paid.

Regulation 17: prescribes the limited circumstances in which a qualified creditor who is not a notified creditor, or a creditor who has objected to the protection of the trust deed within the relevant period, may be entitled to petition for the debtor's sequestration.

Regulation 18: makes provision for a prescribed creditor, who is unhappy with the trustee's intromissions (financial dealings) in administering the trust deed and who believes their claim

has not been fairly dealt with, to apply to a sheriff for an order that they are not to be bound by the trustee's discharge. This allows such a creditor to challenge the actions of a trustee, after the trustee has been discharged of their liabilities by the other creditors.

Paragraph (3): records who must receive a copy of the court order and for AiB to register the order in the RoI.

Regulation 19: gives effect to the Accountant's power to supervise a trustee under a PTD, by enabling the Accountant to issue directions to the trustee as to the administration of the trust. Appeal rights against such directions are set out in regulation 27.

Regulation 20: introduces an requirement on the trustee under a PTD to supply AiB with any information relating to the trust deed that the Accountant considers necessary to complete her statutory functions under legislation. It also makes clear that this requirement applies regardless of whether the trustee is still acting under the trust deed or not. Where the trustee has failed to provide this information (without reasonable excuse) the Accountant may report the matter to a sheriff. The sheriff may censure the trustee or make such other order as circumstances require.

Paragraph (1): provides that where the trustee makes a determination to vary the payment period, the trustee must notify the debtor of the determination without delay.

Regulation 21: provides for a statement of the trustee's accounts and the trustee's report on the status of the PTD to be forwarded to AiB on an annual basis. Form 4 set out in the Schedule to the Regulations allows AiB to evaluate performance of the PTD against the expected dividend proposed to creditors. This regulation also prescribes the timescales during which the trustee's accounts must be sent to the debtor, creditors and AiB and the timescale during which the debtor or a creditor may require AiB to carry out an examination of the administration of the trust.

Paragraph (4): clarifies that a contribution payable from the debtor's income cannot include any monies derived from social security benefits although social security benefits income can be taken into account when assessing the level of contribution to be paid.

Regulation 22: lists the documents to be retained by the trustee for at least 12 months after their discharge as trustee. This provision is required to support the Accountant's supervisory role and is analogous to the sederunt book retained by trustees in sequestrations.

Regulation 23: specifies that trustees are entitled to remuneration consisting of a fixed fee for the administration of the trust deed and an additional fee based upon a percentage of the total assets and contributions realised by the trustee. It also provides for circumstances where the trustee may obtain additional fees for work to be completed that was not foreseen at the outset. The trustee must apply to creditors for approval of the additional fee and if no approval is granted by the creditors, then the trustee may apply to the Accountant to approve the increase.

The policy intention of this change is to allow creditors greater transparency and control over of the costs incurred in a PTD. Statistical data published by AIB has shown that, during 2011-

12, in many as 42% of cases handled by certain IP companies, there was a rise in administration costs of 25% or more¹.

Regulation 24: introduces a new process for the discharge of debtors under PTDs. The discharge of the debtor will now be conditional on their cooperation with the trustee. If, in the trustee's opinion, the debtor has met the debtor's obligations under the PTD and the debtor has co-operated with the trustee, the trustee must make a statement to this effect and, apply to AiB to seek the discharge of the debtor.

Form 5 (in Schedule 1 to the Regulations): is a letter of discharge to be sent to the debtor. If the Accountant is satisfied with the statements made by the trustee, she will record the debtor's discharge in the RoI and the date of registration is the date of discharge. The trustee must notify AiB if he is not to apply for the discharge the debtor. This regulation provides for the debtor to be notified if the trustee refuses to discharge the debtor from their PTD. If the debtor's discharge is refused, creditors will be able to take due diligence to recover any outstanding debts.

Regulation 25: deals with the trustee's discharge. Form 6, prescribed in the Schedule to the Regulations, provides for the trustee to apply to creditors for the trustee's discharge. This Regulation also introduces a requirement and timescale for the trustee to send a copy of Form 6 to AiB. Regulation 27(3) allows the trustee the right of appeal against a refusal by creditors to grant the trustee's discharge.

Regulation 26: provides for electronic delivery of any notices or documents in circumstances where a recipient has consented or provided an electronic address. Unless evidence can be presented to the contrary, there will be a presumption that electronic delivery has occurred where the sender can produce a copy of the electronic message which shows the time and date the message was sent. This regulation does not apply where another form of delivery is required by court rules or order of the court.

Regulation 27: introduces a right of appeal and the timescales for appeals to be lodged by the trustee, debtors and creditors, who can demonstrate that they have, or are likely to have, a pecuniary interest in the outcome of the appeal. The process and timescales for lodging appeals are set out.

Regulation 28: provides a general power for any persons with an interest in the trust deed to apply to a sheriff for directions in respect of, or in relation to, the administration of a trust deed, including any order to correct defects in procedure. The sheriff to whom application is made, must be the sheriff who would have jurisdiction to award a petition for sequestration of the debtor.

Regulation 29: amends the Bankruptcy Fees etc. (Scotland) Regulations 2012 by introducing a new fee which is payable to the Accountant for the publication in the RoI of a notice of a trust deed seeking protected status. There are two monetary fee rates which are determined by how the notice is sent to AiB. The fees are: £35 for notices sent by electronic service provided by AiB; or £90, for notices sent by any other means. These fee rates are

¹ PTD Form 4 Performance - Summary by Company - 2011-12: Trust Deeds Protected 1 April 2008 - 31 March 2011. Available at - http://www.aib.gov.uk/protected-trust-deed-update#Annex_A

significantly less than those previously charged by the Edinburgh Gazette to advertise trust deeds.

Regulation 30: revokes the Protected Trust Deeds (Scotland) Regulations 2008 and a relative amending instrument.

Regulation 31: specifies that the Protected Trust Deeds (Scotland) Regulations 2008 (as amended) will continue to apply to any trust deed granted prior to 28 November 2013. It also includes a minor transitional modification to Form 5, which will also apply for trust deeds granted before 28 November 2013.