

Draft Regulations laid before the Scottish Parliament under section 72(2) and (3)(a)(ii), (ia), (ib), (id) and (i) of the Bankruptcy (Scotland) Act 1985, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2014 No.

INSOLVENCY

BANKRUPTCY

DEBT

**The Bankruptcy (Money Advice and Deduction from Income
etc.) (Scotland) Regulations 2014**

Made - - - - 2014

Coming into force - - 1st April 2015

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 5A, 5B(5)(b), 5C(1)(d) and (2)(b), 32E(7), 39A(4)(a), 71C and 72(1A) of the Bankruptcy (Scotland) Act 1985(a), and all other powers enabling them to do so.

In accordance with section 72(2) and (3)(a)(ii), (ia), (ib), (id) and (i) of that Act(b), a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation and commencement

1.—(1) These Regulations may be cited as the Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014.

(2) They come into force on 1st April 2015.

(a) 1985 c.66 (“the 1985 Act”). Section 5A was inserted by section 15(2) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) (“the 2007 Act”) and is prospectively repealed by schedule 4 to the 2014 Act. Section 5B(5) was inserted by section 9(2) of the Home Owner and Debtor Protection (Scotland) Act 2010 (asp 6) and amended by the Bankruptcy and Debt Advice (Scotland) Act 2014 (asp 11) (“the 2014 Act”), schedule 3, paragraph 5 and schedule 4. Section 5C was inserted by section 1(2) of the 2014 Act. Section 32E(7) was inserted by section 4 of the 2014 Act. Section 39A(4)(a) was inserted by section 19(2) of the 2007 Act. Section 71C was inserted by section 36 of the 2014 Act. Section 72(1A) was inserted by the 2014 Act, schedule 3, paragraph 34(a). Section 73(1) of the 1985 Act contains a definition of “prescribed” relevant to the exercise of the statutory powers under which these Regulations are made. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).

(b) Section 72(2) has been modified by paragraph 5(2) of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) (“the 2010 Act”). The powers to make these Regulations are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland Act 2010 (asp 10)).

Interpretation

2. In these Regulations—

“the Act” means the Bankruptcy (Scotland) Act 1985;

“common financial tool” has the meaning given by section 5D(1) of the 1985 Act(a).

Money advisers

Approved categories of money advisers

3. Subject to regulation 4, the following classes of persons are prescribed for the purposes of section 5C(2)(b) of the Act as money advisers—

(a) persons who—

(i) are qualified to act as insolvency practitioners in accordance with section 390 of the Insolvency Act 1986(b); or

(ii) work for such an insolvency practitioner, who have been given authority by that insolvency practitioner to act on his or her behalf in providing money advice under the Act; and

(b) persons who—

(i) work as money advisers for organisations which have been awarded accreditation at Type 2 level or above against the Scottish National Standards for Information and Advice Provision; or

(ii) are approved for the purposes of the Debt Arrangement Scheme(c); or

(iii) work as money advisers for a citizens advice bureau which is a full member of the Scottish Association of Citizens Advice Bureaux – Citizens Advice Scotland; or

(iv) work as money advisers for councils constituted under section 2 of the Local Government etc. (Scotland) Act 1994(d).

Persons who may not be approved money advisers

4.—(1) The following persons may not be approved money advisers—

(a) a sheriff officer or messenger-at-arms, or an employee of such a person;

(b) a person or body providing financial services, or financial advice other than money advice, in the course of a business or otherwise for profit, or an employee of such a person, unless the person is a—

(i) solicitor;

(ii) chartered or certified accountant;

(iii) a credit union registered under the Co-operative and Community Benefit Societies Act 2014(e) or the Industrial and Provident Societies Act 1965(f) by virtue of section 1 of the Credit Unions Act 1979(g);

(a) See the Common Financial Tool (Scotland) Regulations 2014 (S.S.I. 2014/[]).

(b) 1986 c.45. Section 390 was amended by the Adults with Incapacity (Scotland) Act 2000 (asp 4), section 88(2), Schedule 5, paragraph 18; the Insolvency Act 2000 (c.39), section 8, Schedule 4, part 11, paragraph 16(2); the Mental Health (Care and Treatment) (Scotland) Act 2003 (Modification of Enactments) Order 2005, S.S.I. 2005/465, article 2, Schedule 1, paragraph 18(3); the Mental Capacity Act 2005 (c.9), section 67(1), (2), Schedule 6, paragraph 31(3), Schedule 7; and the Tribunals, Courts and Enforcement Act 2007 (c.15), section 108(3), Schedule 20, paragraph 6.

(c) Under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17).

(d) 1994 c.39.

(e) 2014 c.14 (“the 2014 Act”).

(f) 1965 c.12. Section 1 is relevantly amended and repealed subject to savings and transitional provisions by the 2014 Act.

(g) 1979 c.34. Section 1 was amended by S.I. 1996/1189, 2001/2617 and 2538 and 2002/1501 and the 2014 Act, Schedule 4, subject to savings and transitional provisions specified in section 151 and Schedule 5 to that Act).

- (c) a person providing debt collection services, or an employee of such a person;
- (d) a person convicted of an offence involving theft, fraud or other dishonesty;
- (e) a person subject to a bankruptcy restrictions order (including an interim order) or bound by a bankruptcy restrictions undertaking, under Schedule 4A (bankruptcy restrictions order and undertaking) to the Insolvency Act 1986(a) or under section 56A or as the case may be 56F or 56G of the 1985 Act(b);
- (f) a person in respect of whom a court has made a disqualification order under section 1, or who has had a disqualification undertaking accepted under section 1A, of the Company Directors Disqualification Act 1986(c);
- (g) persons without a licence from the Money Advice Trust(d) to use the Common Financial Statement style and format for income and expenditure categories under that title (and, where relevant, related spread sheets, budget sheets, trigger figures, guidance materials and notes) published by the Money Advice Trust; or
- (h) persons whose approval is revoked or suspended under paragraph (2).

(2) The Accountant in Bankruptcy may revoke or suspend the approval of a money adviser who fails without good cause—

- (a) to apply the common financial tool in accordance with the Common Financial Tool Regulations 2014; or
- (b) to comply with regulation 6.

(3) The Accountant in Bankruptcy must provide written notice to a debtor of the revocation or suspension of the approval of a money adviser to the debtor.

Other matters on which a debtor must obtain advice

5. The following are prescribed for the purposes of section 5C(1)(d) of the Act as matters on which the debtor must obtain advice from a money adviser—

- (a) the income and expenditure of the debtor in accordance with the common financial tool;
- (b) the evidence required to confirm the debts of the debtor in making the debtor application;
- (c) the Debt Advice and Information Package referred to in section 10(5) of the Debt Arrangement and Attachment (Scotland) Act 2002(e);
- (d) the options of a voluntary repayment plan, debt payment programme under the Debt Arrangement Scheme or a trust deed;
- (e) the consequences of sequestration and that an award of sequestration, if granted, is recorded in a public register and may result in one or more of—
 - (i) the debtor being refused credit, or being offered credit at a higher rate, whether before or after the date of the debtor being discharged;
 - (ii) the debtor not being able to remain in his or her current place of residence;
 - (iii) the debtor being required to relinquish property which the debtor owns;
 - (iv) the debtor requiring to make contributions from income for the benefit of creditors;
 - (v) damage to the debtor’s business interests and employment prospects;
 - (vi) the debtor still being liable for some debts;
 - (vii) the debtor’s past financial transactions being investigated; and

(a) 1986 c.45. Schedule 4A was inserted by the Enterprise Act 2002 (c.40), Schedule 20, paragraph 1.
 (b) Sections 56A, 56F and 56G were inserted by section 2 of the 2007 Act. Section 56G and other references to bankruptcy restrictions undertakings are repealed by section 52 of the 2014 Act, subject to transitional arrangements.
 (c) 1986 c.46, as amended by the Insolvency Act 2000 (c.39), sections 5 and 6 and Schedule 4, paragraph 2, and the Enterprise Act 2002 (c.40), section 204(3).
 (d) The Money Advice Trust is a company registered in England and Wales with registered number 4741583, registered charity in England and Wales registration number 1099506.
 (e) 2002 asp 17.

- (viii) other restrictions or requirements imposed on the debtor as a result of the debtor's own circumstances and actions.

Money advice on debtor applications: procedure on evidence and information

6.—(1) In advising under section 5C of the Act(a) on a debtor application, a money adviser must obtain evidence of the debtor's income and expenditure.

(2) A money adviser must retain records in relation to the advice given to the debtor (including the evidence obtained under paragraph (1)) in making a debtor application, for 2 years from the date on which the advice was given.

(3) A money adviser must provide as required by the Accountant in Bankruptcy, information about a debtor's application (including evidence obtained under paragraph (1) or the debtor's consent to the application).

Amendment of the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010

7.—(1) The Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010(b) are amended as follows.

(2) Omit regulation 3 (authorised persons).

(3) Omit regulation 4 (further provisions relating to certification).

(4) In regulation 5 (form and manner of certificate)—

(a) in paragraphs (1) and (2), for “an authorised person” each time it occurs substitute “a money adviser”; and

(b) in paragraph (3)—

(i) omit “in the case of the authorised person referred to in regulation 3(1)”; and

(ii) for “authorised person” both times it occurs substitute “money adviser”; and

(iii) for “authorised person's” substitute “money adviser's”.

(5) For the Form set out in the Schedule to those Regulations (form of certificate for sequestration), substitute the Form set out in Schedule 1 to these Regulations.

Deduction from debtor's earnings and other income

Deduction from debtor's earnings and other income

8.—(1) This regulation applies where an instruction to make deductions of specified amounts from the debtor's earnings or other income and payments to the trustee of the amounts so deducted is given by a debtor or trustee under section 32E(2) or (4) of the Act(c).

(2) Except in the case of a subsequent variation under paragraph (7)—

(a) an instruction given by the debtor under section 32E(2) must be in Form 1; and

(b) an instruction given by the trustee under section 32E(4) must be in Form 2.

(3) On delivery of the instruction and while the instruction is in effect, the

(a) person by whom the debtor is employed; or

(b) third person required to pay to the trustee money otherwise due to the debtor by way of income (“third person”),

must deduct the sum specified in the instruction on every pay day or day on which a payment is to be made to the debtor, as the case may be, and pay the sum deducted to the trustee as soon as it is reasonably practicable to do so.

(a) Inserted by section 1(2) of the 2014 Act.

(b) S.S.I. 2010/397.

(c) Inserted by section 4 of the 2014 Act.

(4) Where an employer or third person fails without good cause to make a payment due under an instruction, the employer or third person is—

- (a) liable to pay on demand by a trustee the amount that should have been paid; and
- (b) not entitled to recover from a debtor the amount paid to the debtor in breach of the instruction.

(5) An employer or third person may on making a payment due under an instruction charge a fee equivalent to the fee chargeable for the time being under section 71 (employer's fee for operating diligence against earnings) of the Debtors (Scotland) Act 1987(a) and deduct that fee from the balance due to the debtor.

(6) The trustee must, without delay after the end of the payment period for the debtor under section 32B, notify in writing any person who has received an instruction in accordance with paragraph (2) (or varied in accordance with paragraph (7)) that the instruction has been recalled.

(7) Following any change to the debtor's contribution, the debtor or trustee may give a variation instruction under section 32(2) or (4) of the Act in accordance with that change to the instruction mentioned in paragraph (2) in Form 3 to the employer or third person.

(8) In this regulation, references to Forms are to be construed as references to the form so numbered in Schedule 2 to these Regulations or a form substantially to the same effect, with such variation as circumstances may require.

Minor and consequential amendments

Amendment of the 1985 Act: family home not to reinvest (gratuitous alienation)

9. For section 39A(3)(g) of the Act(b) substitute—

“(g) the trustee has commenced an action under section 34 of this Act in respect of any right or interest mentioned in subsection (1) above or the trustee has not known about the facts giving rise to a right of action under section 34 of this Act, provided the trustee commences such an action reasonably soon after the trustee becomes aware of such right.”.

Revocations and debtor applications before 1st April 2015

Revocation

10. The Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008(c) (“the 2008 Regulations”) and regulation 18 of the Welfare Reform (Consequential Amendments) (Scotland) (No. 2) Regulations 2013(d) are revoked, subject to regulation 11.

(a) 1987 c.18.

(b) Inserted by S.S.I. 2008/81.

(c) S.S.I. 2008/81, amended by S.S.I. 2013/137.

(d) S.S.I. 2013/137.

Debtor applications before 1st April 2015 (low income, low asset debtors)

11. The regulations revoked by regulation 10, except for regulation 4 of the 2008 Regulations, continue to apply to debtor applications made before 1st April 2015.

St Andrew's House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

SCHEDULE 1

Regulation 7(5)

Form - Certificate for Sequestration

FORM

CERTIFICATE FOR SEQUESTRATION

This certificate is invalid unless ----

- Completed by a money adviser defined in section 5C(2) of the Bankruptcy (Scotland) 1985 Act (as amended), and
- Countersigned by the debtor.

This certificate is valid for 30 days including the date signed by the money adviser,

I,	Insert money adviser's name
	Job title
	Organisation
	Address
	Town
	Postcode
	e-mail address
	Phone number

confirm that, under section 5B(1) and 5C(2) of the Bankruptcy (Scotland) 1985 Act (as amended), I am a money adviser who may grant this certificate which has been applied for by the debtor, and certified that, on the basis of the information provided to me, by

	Insert debtor's name and title
	Address
	Town
	Postcode
	Telephone number
	Date of birth

that he/she* is unable to pay his/her* debts as they become due

I have provided the debtor with a copy of the Debt Advice and Information Pack and, where appropriate, have advised the debtor of the options of a voluntary repayment plan, a debt payment programme under the Debt Arrangement Scheme or Trust Deed.

I have advised the debtor that an award of sequestration, if granted, is recorded in a public register and may result in one or more of the following:

- 1) the debtor being refused credit, or being offered credit at a higher rate, whether before or after the date of the debtor being discharged;
- 2) the debtor not being able to remain in his/her current place of residence;
- 3) the debtor being required to relinquish property which they own;
- 4) the debtor being required to make contributions from income for the benefit of creditors;
- 5) damage to the debtor's business interests and employment prospects;
- 6) the debtor still being liable for some debts which are excluded;
- 7) the debtors past financial transactions being investigated; and
- 8) other restrictions or requirements imposed on the debtor as a result of the debtor's own circumstances and actions.

Please select the relevant qualification which gives you the authority to grant a certificate for sequestration.

- person qualified to act as insolvency practitioner in accordance with section 390 of the 1986 Act
- person who works as money adviser for organisations which have been awarded accreditation at type 2 level or above against the Scottish National Standards for Information and Advice Provision
- person approved for the purpose of the Debt Arrangement Scheme
- person who works as a money adviser for citizens advice bureau which is full member of the Scottish Association of Citizens Advice Bureaux/Citizens Advice Scotland
- person who works as money adviser for councils constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39)
- person who works for an insolvency practitioner as defined in regulation 3(a)(i) of the Certificate for Sequestration Regulations 2010, who has been given authority by that insolvency practitioner to act on behalf of that insolvency practitioner in providing money advice.

Signed _____ (money adviser) _____(date)

I, _____ (debtor's name) confirm that I have provided the money adviser with correct and complete information about my financial circumstances.

Signed _____ (debtor) _____(date)

SCHEDULE 2

Regulation 8(2)(a) and (b)
(7) and (8)

Forms – Deduction from Income

Form 1

Employee's Payment Instruction to Employer or Third Person
Bankruptcy (Scotland) Act 1985 (as amended)
Section 32E(2)

Employee's instruction to employer or third person

I,	Insert employee/debtor's name
	Address
	Town
	Postcode
	Bankruptcy reference number
	Employee reference number (if applicable)

authorise my employer or third person,

	Insert employer/third person's name
	Address
	Town
	Postcode

to deduct the sum of £(amount) from my income on each pay day or the day upon which payment is next due to be made to me and pay this amount, as soon as reasonably practicable, to the trustee in my bankruptcy detailed below:

	Insert trustee's name
	Address
	Town
	Postcode

using the following bank details and quoting the relevant bankruptcy reference number,

	Insert name of bank
	Address
	Town
	Postcode
	Sort code
	Account number

Note to employer or third person: It is your duty under section 32E(5) of the Bankruptcy (Scotland) Act 1985 (as amended) to comply with this instruction.

Employee/Debtor's signature _____ Date _____

Form 2
Trustee's Payment Instruction to Employer or Third Person
 Bankruptcy (Scotland) Act 1985 (as amended)
 Section 32E(4)

Trustee's instruction to employer or third person

I,	Insert trustee's name Address Town Postcode

confirm that,

	Insert employee/debtor's name Address Town Postcode Bankruptcy reference number Employee reference number (if applicable)

has failed to pay his/her required contribution to his/her bankruptcy in accordance with Section 32 of the Bankruptcy (Scotland) Act 1985 (as amended). Therefore I now instruct,

	Insert employer/third person name Address Town Postcode

in accordance with Section 32(4) of the Bankruptcy (Scotland) Act 1985 (as amended), to deduct the sum of £(amount) from the income of the above noted employee on each pay day or the debtor on the day on which next payment is due to be made to them. Deductions should be paid in the following account and quote the relevant bankruptcy reference number:

	Insert name of bank Address Town Postcode Sort code Account number

Note to employer or third person: It is your duty under Section 32E(5) of the Bankruptcy (Scotland) Act 1985 (as amended) to comply with this instruction.

Trustee's signature _____ Date _____

Form 3
Payment Variation Instruction to Employer or Third Person
 Bankruptcy (Scotland) Act 1985 (as amended)
 Section 32E - variation

Instruction to employer or third person due to make payments

I,	Insert employee/debtor's name Address Town Postcode Bankruptcy Reference number Employee Reference number (if applicable)

authorise my employer or third person due to make payments to me,

	Insert employer/third person's name Address Town Postcode

to vary the sum of £(amount) currently being deducted from my income to £(amount) with effect from my next pay day or the day upon which payment is next due to be made to me, and for the new amount to be paid, as soon as reasonable practicable after each pay day thereafter, to my trustee,

	Insert trustee's name Address Town Postcode

using the following bank details and quoting the relevant bankruptcy reference number,

	Insert name of bank Address Town Postcode Sort code Account number

Note to employer or third person: It remains your duty under section 32E(5) of the Bankruptcy (Scotland) Act 1985 (as amended) to comply with this instruction.

Employee/Debtor's signature _____ Date _____

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision about various matters to implement provisions of the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”) which amended the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”).

Regulations 3 and 4 prescribe persons who can act as money advisers in relation to sequestration under the 1985 Act, including the classes of—

insolvency practitioners and persons who work for them who have been given authority by the insolvency practitioner to act on behalf of that insolvency practitioner

persons approved for the purposes of the Debt Arrangement Scheme

persons working as money advisers for organisations awarded Type 2 against Scottish National Standards for Information and Advice Provision, full bureau members of the Scottish Association of Citizens Advice Bureaux – Citizens Advice Scotland; or councils.

Regulation 4 provides for who may not be a money adviser, including those whose approval is revoked by the Accountant in Bankruptcy in specific cases.

Regulations 5 prescribes additional matters on which debtors must obtain money advice in making a debtor application for sequestration. Regulation 6 sets out procedural requirements for obtaining money advice in connection with debtor applications under the 1985 Act.

Regulation 7 amends the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010 which provides for a certificate that the debtor has demonstrated he or she is not able to pay his or her debts as they become due, in consequence of the 2014 Act. Those authorised to grant certificates are replaced by money advisers under section 5C of the 1985 Act as amended by the 2014 Act. The form of the Certificate of Sequestration is replaced with the form in Schedule 1 to these Regulations, which can be included in the debtor application for sequestration.

Regulation 8 makes provision for the forms of instructions by the debtor or trustee under section 32E of the Act to an employer or third party due to make payment to the debtor for deductions from earnings or other income. It also provides for how the instruction affects the recipient and what happens if the employer or third person refuse to pay the deduction.

Regulations 10 revokes the Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008 in consequence of the 2014 Act. Regulation 9 continues in effect regulation 4 of those Regulations, amending section 39A of the Bankruptcy (Scotland) Act 1985 to add certain actions for gratuitous alienations to the circumstances which preclude a family home reinvesting in the debtor 3 years after sequestration. Regulation 11 saves the regulations relevant to low income, low asset debtors in respect of sequestrations where the debtor application was made before 1st April 2015, as those sequestrations will continue under the existing low income, low asset provisions to the end of those sequestrations.

A Business and Regulatory Impact Assessment has been prepared for these Regulations. Copies can be obtained from the Accountant in Bankruptcy’s website: <http://www.aib.gov.uk>.

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