

POLICY NOTE

THE BANKRUPTCY (MONEY ADVICE AND DEDUCTION FROM INCOME ETC.) (SCOTLAND) REGULATIONS 2014

SSI 2014/

1. The above instrument will, if approved, be made 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 as amended, and all other powers enabling them to do so. It is subject to the affirmative procedure.

Policy Objectives

2. The policy aim of these Regulations, under provision introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”), is to provide for who can be an approved money adviser and on what other matters advice must be obtained, prior to obtaining access to bankruptcy.

3. These Regulations also provide for how the debtor and/or the trustee can instruct an employer or third party to pay an assessed contribution to the trustee directly from the debtor’s wages or other income, where they are entitled to do so, and on the effects of that instruction. Minor changes are also made to existing secondary legislation under the affirmative procedure following the 2014 Act.

Background

Money Advice

4. The money advice landscape in Scotland is made up of free advice, available from third sector organisations and local authorities and advice for which there is a fee, usually through insolvency practitioners and debt management firms. Insolvency practitioners operate in a highly regulated framework while third sector organisations do not.

5. Prior to the 2014 Act coming into force, individuals entering into bankruptcy did not require to have taken advice before applying directly to the Accountant in Bankruptcy (“AiB”) for an award of bankruptcy. Evidence collated by AiB shows that, in the year 2011-2012, between 6-8% of people (approximately 500) applying for bankruptcy, which is a last resort debt remedy, applied without having taken advice from a money adviser.

6. By contrast, it is a requirement that all individuals entering into any other Scottish statutory debt management/relief solution (such as a Debt Payment Programme under the Debt Arrangement Scheme or a Protected Trust Deed) must have taken advice prior to entering into the solution. Advice in respect of the Debt Arrangement Scheme is available through ‘approved’ advisers, the definition of which is currently set out in the Debt Arrangement Schedule (Scotland) Regulations 2011 (S.S.I. 2011/141) as amended, and includes advisers in both the third sector and private sector, to ensure sufficient choice and to help meet demand.

7. Given the consequences of bankruptcy, it is desirable that people in debt understand the full range of debt solutions available to them, are made aware of the impact of such solutions and are guided to the most appropriate remedy for their circumstances.

Deductions from Income

8. Currently, there is provision within the Protected Trust Deeds (Scotland) Regulations 2013 (S.S.I. 2013/318), for a debtor to instruct their employer at any time, to take the assessed contribution from the debtor's earnings from employment and pay this directly to the debtor's trustee acting under the trust deed .

9. The Protected Trust Deeds Regulations also provide for the trustee to instruct the employer to make a deduction from the debtor's earnings from employment, but limits this to allow the instruction to be made only where the debtor has failed to pay the assessed contribution to the trustee on 2 consecutive occasions.

10. In current bankruptcy legislation, there is no provision by which a debtor or a trustee in bankruptcy can instruct a debtor's employer or third party to take the debtor's assessed contribution from the debtor's earnings or other income and pay this to the trustee. Feedback from stakeholders, including ICAS, has suggested that having such provision would have a positive impact on the amounts ingathered and, therefore, on returns to creditors. This supports one of the central policy principles behind the 2014 Act, in relation to its bankruptcy reform programme, that those who can pay, should pay.

Summary of proposed policy changes

11. The Bankruptcy (Money Advice and Deduction from Income etc.)(Scotland) Regulations 2014, make provision for the following:-

- The categories of people who may and who may not be money advisers;
- Other matters on which the debtor must obtain advice;
- For the money adviser to retain records for 2 years, in relation to the advice that they give to the debtor, and make these records available for inspection by AiB, if required;
- The process and sanctions for deductions to be made from a debtor's earnings and other income to be made by an employer or third party and payments forwarded directly to the trustee, drawing on provisions contained in the Debt Arrangement Scheme and Protected Trust Deeds Regulations.

Consultation

12. The Scottish Government gave a commitment to modernise the bankruptcy system in Scotland, ensuring that the people of Scotland have access to the appropriate debt management and debt relief mechanisms which will allow them to deal with the economic challenges society faces today.

13. In 2012, the Scottish Government consulted on its proposals for bankruptcy law reforms. Its "Consultation on Bankruptcy Reform" -

<http://www.scotland.gov.uk/Publications/2012/02/6283n> was published on 24th February 2012 and remained open until 18 May 2012.

14. The consultation included questions about whether or not money advice should be compulsory when debtors are considering any form of statutory debt relief and, if so, who should provide this money advice. The majority of respondents (93 of the 129), were in favour of money advice being compulsory for all individuals considering entering into any Scottish statutory debt solution.

15. Throughout the parliamentary process for the Bill for 2014 Act, the Scottish Government also engaged with various stakeholder groups giving them the opportunity to raise their concerns. This provided stakeholders with the opportunity to contribute to the development of the Bill and these Regulations.

16. In addition to the Consultation on Bankruptcy Law Reform, AiB has held a rolling programme of stakeholder events in December 2012 to August 2014. These events have taken place in Edinburgh, Glasgow, Inverness and Aberdeen. The latest public stakeholder events took place on 8 July 2014 in Edinburgh and 14 July and 11 August 2014 in Glasgow. Further details of these events can be found on AiB's website.

17. At each event AiB delivered presentations on forthcoming Regulations. At the end of each presentation delegates were invited to participate in a question and answer session. In total approximately 130 delegates attended these events, representing a wide range of businesses and representative bodies, including:

- Insolvency Practitioners Association
- ICAS
- Lloyds Banking Group
- Credit fix
- Solicitors
- Money Advice (public and private sector)

Impact Assessments

18. A Business and Regulatory Impact Assessment ("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 Accountant in Bankruptcy website at: www.aib.gov.uk

19. An Equality Impact Assessment ("EQIA") has been completed which refers, in turn, to the EQIA completed in relation to the 2014 Act. 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. The changes set out in these Regulations 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.

20. A copy of the EQIA 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

21. A Financial memorandum was published for the Bankruptcy and Debt Advice (Scotland) Bill 2014 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

August 2014

ANNEX A

Specific Provisions

Regulations 3 and 4: prescribe the classes of persons who can act as money advisers in relation to sequestration under the Bankruptcy (Scotland) Act 1985 (as amended) (“1985 Act”). These include:

- insolvency practitioners and persons who act on behalf of insolvency practitioners; persons approved for the purposes of the Debt Arrangement Scheme; persons working as money advisers for organisations which have been awarded the Type 2 Scottish National Standard for Information and Advice Provision,
- full bureau members of the Scottish Association of Citizens Advice Bureaux – Citizens Advice Scotland; and councils.

Regulation 4: provides for who may not be a money adviser, including those without a licence to use the Common Financial Statement published by the Money Advice Trust, and those whose approval can be revoked or suspended by the Accountant in Bankruptcy in specific cases for failure without good cause to meet specific requirements of the Common Financial Tool to be provided for under section 5D of the 1985 Act, and regulation 6.

Regulation 5: prescribes additional matters on which debtors must obtain money advice in making a debtor application for sequestration.

Regulation 6: makes procedural provision requiring a money adviser, in advising on a debtor application for sequestration, to obtain evidence of the debtor’s income and expenditure, and retain records in relation to the advice given to the debtor in making the debtor application for a period of 2 years from the date the advice was given. Information must be provided to AiB on request.

Regulation 7: amends the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010, which provide for a certificate that the debtor has demonstrated that they are unable to pay their 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 the Schedule 1 to these Regulations, which can be completed and included with the debtor application for sequestration.

Regulation 8: provides for the form of instructions by the debtor or trustee under section 32E of the Act to an employer or third party to make payment from the debtors earnings or other income to the trustee. It also provides for how the instruction affects the recipient, including for a fee to be deducted from the balance due to the debtor, and what happens if the employer or third person refuses to pay the deduction. An employer or third party who fails to pay is liable to the trustee but not entitled to recover the amount from the debtor.

Regulation 9: continues in effect a minor provision in regulation 4 of the (Low Income, Low Asset Debtors etc.) Regulations 2008 which amended section 39A of the 1985 Act to add certain actions for gratuitous alienations to the circumstances which preclude a family home reinvesting in the debtor 3 years after sequestration.

Regulation 10: revokes the Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008 in consequence of the 2014 Act.

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. Those sequestrations will continue under the existing low income, low asset provisions to the end of those sequestrations.