

POLICY NOTE
THE REGISTERS OF SCOTLAND (DIGITAL REGISTRATION, ETC.)
REGULATIONS 2022

SSI 2021/XXX

These Regulations are made by the Scottish Ministers in exercise of the powers conferred by sections 99(3), 100, 115 and 116(1) of the Land Registration etc. (Scotland) Act 2012 (“the 2012 Act”), sections 9E(1)(b) and 9G(3) and (5)(a) of the Requirements of Writing (Scotland) Act 1995 (“the 1995 Act”) and all other powers enabling them to do so. They are subject to the affirmative procedure.

Summary

The Regulations make provision alongside the Coronavirus (Scotland) Acts to allow applications to the property registers to be submitted electronically (as electronic copies of paper documents), by making digital submission the default method of submission for these Land Register and Register of Sasines applications, subject to exceptions.

They also enable the registration of full electronic documents in the Register of Deeds and Probative Writs in the Books of Council and Session, and make technical amendments to the Electronic Documents (Scotland) Regulations 2014 in relation to annexations to and authentication of electronic documents.

Policy Objectives

Following closure of her offices on 24th March 2020, the Keeper of the Registers of Scotland (RoS) introduced a digital submission service in collaboration with customers to enable applications to the Land Register, Register of Sasines and Register of Inhibitions to be submitted electronically, allowing these registers (and the property market and court processes which they support) to remain operational during the period of public health restrictions. These applications comprised electronic copies of traditional (i.e. paper) documents.

The legislative basis for digital submission was introduced in paragraphs 11 to 14 of schedule 7 of the Coronavirus (Scotland) Act 2020 and paragraph 3 of schedule 4 of the Coronavirus (Scotland) (No. 2) Act 2020.

Following positive feedback from stakeholders and customers, RoS launched a public consultation on the future of digital submission on behalf of the Scottish Government, including whether it should become the default method of submission. Response to the consultation was overwhelmingly positive, with 97% of 223 respondents stating that they were in favour of placing digital submission on a permanent statutory footing as the default method of submission – benefits cited by respondents included greater speed and certainty of submission, reduced postage costs, and greater flexibility of work location. Similar benefits are also obtained by RoS, in addition to greater operational resilience in the case of future disruption, and as a useful stepping-stone on the road to a fully electronic conveyancing process.

Measures to place digital submission on a permanent statutory footing will be taken forward in a forthcoming bill related to recovery from the Covid pandemic. These regulations are designed to work in tandem with the permanent provisions (and the relevant provisions will commence at the same time), by making digital submission of applications in the Land Register and Register of Sasines compulsory subject to exceptions.

In addition, these Regulations will open up the Register of Deeds and Probative Writs in the Books of Council and Session (the RoD) to fully electronic documents i.e. electronic documents authenticated by way of electronic signature. This register was not included in the original suite of emergency digital submission legislation as digital submission of copies of deeds was seen as inconsistent with its primary purpose, namely preservation of documents. Applications are still therefore made on paper.

However, in order that the RoD could remain open in the event of future disruption, and to ensure that the growing number of legal professionals who are choosing to use fully electronic documents (such as missives) can register these documents electronically, provision to permit electronic registration on an optional basis is now being made.

Presumption of Use of Digital Submission in the Land Register and Register of Sasines

These Regulations provide for a presumption in favour of digital submission of applications in respect of the Land Register and Register of Sasines. From commencement, the digital submission of applications to these registers should be the default method of submission, unless certain exceptions apply. Where an exception applies, the applicant will be able to submit a traditional paper application.

The exception criteria mirror those already in place in respect of Advance Notices and Digital Registration (rules 3 and 7 of the Land Register Rules etc. (Scotland) Regulations 2014 respectively¹), and provide for situations where (a) the computer system controlled and managed by the Keeper for the purposes of digital submission is unavailable for a period of 48 hours or longer, (b) the applicant has no access to the internet, or (c) where the Keeper is satisfied that exceptional circumstances mean that digital submission is not possible. This last exception would include where an application is made by a natural person not engaging the services of a solicitor or other legal advisor.

Annexations to Electronic Documents

These regulations amend the requirements for annexations to electronic document by providing clear rules for both those documents where an electronic signature is required for the electronic document requirements under section 1(2) of the Requirements of Writing (Scotland) Act 1995, and provide for a wider presumption for annexations to be deemed to be comprised in other electronic documents.

Authentication of electronic documents: special cases

These regulations make provision to adjust regulation 5 of the Electronic Documents (Scotland) Regulations 2014 (“the 2014 Regulations”) which provides for authentication rules for partnerships and companies and similar bodies and offices so they apply to

¹ of the Registers of Scotland (Digital Registration, etc.) Regulations 2018 (SSI 2018/72)

authentication by a granter of an electronic documents in the same way as the detailed rules in the 1995 Act.

Requirements of Registration of Electronic Documents in the Land Register

These regulations update the identity standard required in respect of electronic signatures associated with a digital certificate supplied by the Keeper of the Registers of Scotland by removing reference to the now redundant ‘level 3 Identity’ contained within Cabinet Office Good Practice Guide No. 45, and instead provide that regard must be had to this guide when issuing qualified certificates.

Registration of electronic documents in the Register of Deeds and Probative Writs in the Books of Council and Session

These regulations provide for the registration of fully electronic documents (within the meaning of the 1995 Act) in the Register of Deeds and Probative Writs in the Books of Council and Session.

Using powers to regulate the procedure in relation to such applications for registration, and the forms such applications should take, the Regulations set out the requirements for electronic documents to be registered, namely that the document must be in the form of a PDF, and must be authenticated by the type of electronic certificate certified by a qualified certificate for electronic signature defined in Article 3(15) of Regulation (EU) Non 910/2014 of the European Parliament and for the Council on electronic identification and trust services for electronic transactions in the internal market.

Consultation

On behalf of Scottish Ministers, as noted above, the Keeper carried out a public consultation on Digital Submission between 22nd December 2020 and 1st February 2021. 223 written responses were received and they have been taken into account when finalising this instrument.

The consultation, and a report on the consultation, are available on the RoS website:

<https://www.ros.gov.uk/about/publications/consultations-and-surveys/2020/digital-submissions-2020>

The Scottish Ministers have consulted the Keeper of the Registers of Scotland, the Keeper of the Records of Scotland and the Lord President of the Court of Session in accordance with requirements under section 99(4), 100(4) and 115(2) of the 2012 Act and section 9G(4) of the 1995 Act.

Impact Assessments

Equality, Islands, Fairer Scotland Duty and Children’s Rights impact assessments have been prepared and published on the RoS Website.

A BRIA will be published as part of the accompanying Bill documentation for the forthcoming re-enactment of the provisions in the Coronavirus (Scotland) Act 2020 and the Coronavirus (No.2) (Scotland) Act 2021. No significant impact on the private or voluntary sectors is foreseen.

Registers of Scotland on behalf of the Scottish Government

December 2021