

POLICY NOTE

THE BANKRUPTCY (SCOTLAND) REGULATIONS 2014

SSI 2014/225

The above Regulations are made by the Scottish Ministers in exercise of the powers conferred by sections 1A(1)(b) and (5), 2(8), 5(2ZA)(a)(ii), (2D) and (6A), 6(7), 7(1)(d), 11(1), 19(2), 22(2)(a) and (6), 23(1)(a), 32(9A), 40(3B), 43A(2), 43B(1), 45(3)(a), 49(3), 51(7)(a), 54(2), 54A(2), 54C(2), 54D(2)(a) and (c), 54E(2) and (5), 69, 71C and 73(1) of and paragraphs 5(1) and 6 of Schedule 3 to the Bankruptcy (Scotland) Act 1985 (as amended by the Bankruptcy and Debt Advice (Scotland) Act 2014) and all other powers enabling them to do so.

The Regulations are subject to the negative procedure.

Policy Objectives

1. The policy aim, under provision introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”), in making the Bankruptcy (Scotland) Regulations 2014 (“the Regulations”) is to make new provision in connection with changes to the 1985 Act made by the 2014 Act. In particular, these Regulations make provision in connection with the new Minimal Asset Process (“MAP”) and in connection with debtors who are sequestrated undertaking a course of financial education, if required to do so by their trustee.
2. The MAP replaces the current low income, low asset route into bankruptcy. Subject to their meeting other pre-requisites as set out in the 1985 Act, the MAP will be available to debtors who have been assessed, using the Common Financial Tool, as being unable to make a contribution from their income (a debtor contribution) towards what is owed or whose only income is derived from the social security benefits which are ‘prescribed payments’. More generally social security benefits will not vest in a trustee – see section 187(1) of the Social Security Administration Act 1992.
3. The MAP will require limited administration as the debtor will have minimal assets to be realised and therefore no dividends to be paid to creditors.
4. As amended by the 2014 Act, section 43B of the 1985 Act makes it mandatory for the trustee to require a living person to participate in financial education, if the trustee considers that the person meets one or more criteria set out in the 1985 Act and that undertaking financial education would be appropriate for the person. The criteria include:
 - the person has been made bankrupt (anywhere) in the last 5 years;
 - the person has granted a protected trust deed in Scotland, entered into an Individual Voluntary Arrangement in England & Wales or Northern Ireland or entered into a similar arrangement elsewhere in the last 5 years;
 - the person has been in any debt management programme under which they made regular payments (including a Debt Payment Programme under the DAS

Scheme, any contractual scheme agreed with creditors, or any informal agreement) within the last 5 years;

- the person is subject to a Bankruptcy Restrictions Order (BRO) or is currently under investigation with a view to an application being made for a BRO;
 - the trustee has identified in relation to the person a pattern of issues, or course of conduct, which would indicate that the person would benefit from financial education (eg the person's bankruptcy is due to poor money management or reckless spending);
 - the person believes they would benefit from financial education and volunteer to participate in the programme.
5. The provision for debtors to undertake financial education made in the 1985 Act (as amended by the 2014 Act) and the Regulations contributes to the AiB's policy aim of providing a 'Financial Health Service' for Scotland, which seeks to help individuals avoid repeated financial difficulties.
6. These Regulations also substantially re-enact, with modifications, the Bankruptcy (Scotland) Regulations 2008 ("the 2008 Regulations") so far as those Regulations made provision in relation to the following:
- debtor applications
 - debt advice and information package
 - application of the 1985 Act to limited partnerships
 - apparent insolvency/creditor debt threshold
 - claims in a foreign currency
 - conversion of foreign currency claims
 - trustee resignation application
 - abandonment of heritable property by trustee
 - notice by trustee of proceedings to obtain authority in relation to debtor's family home
 - debtor's requirement to give account of state of affairs
 - interest in claims on sequestration
 - premium bond of caution
 - preference for remuneration of employees, etc.
7. In both making new provision and re-enacting provision in the 2008 Regulations, the Regulations make provision for the majority of the statutory forms to be used in connection with the modernised bankruptcy system.

Specific Provisions

8. **Regulation 4:** makes provision for the form of the Register of Insolvencies and for circumstances in which information need not be included in that Register – ie where the Accountant in Bankruptcy ("the AiB") is of the opinion that inclusion of the

information would be likely to put any person at risk of violence or otherwise jeopardise the safety or welfare of any person.

9. **Regulation 5:** defines the process of debtor applications to the AiB. In particular it provides that an application by a living debtor, or the executor or person to be appointed executor on the estate of a deceased debtor, must be in Form 14. It also provides that an application by a trust/partnership/body corporate or unincorporated body/limited partnership must be in Form 15 (accompanied by a statement of assets and liabilities in Form 16). This regulation re-enacts, with modifications, regulation 14 of the 2008 Regulations.
10. **Regulation 6:** relates to applications for sequestration where a debtor has few assets (the MAP). It lists the 'prescribed payments' for the purposes of section 5(2ZA)(a)(ii) of the 1985 Act (section 5(2ZA) of the 1985 Act (as amended by the 2014 Act) sets out the requirements to be met in connection with a debtor application for bankruptcy under the MAP).
11. **Regulation 7:** prescribes a time limit for the Debt Advice and Information Package (DAIP) to be issued to a debtor by a creditor prior to petitioning for their bankruptcy. The time limit prescribed by this Regulation is that the DAIP should be sent by a creditor not less than 14 days before the presentation of the petition, and not more than 12 weeks before the presentation of the petition. This regulation re-enacts regulation 12 of the 2008 Regulations.
12. **Regulation 8:** makes modifications to the 1985 Act in its application to limited partnerships. Generally any reference to a partnership in the 1985 Act includes a reference to a limited partnership. The Regulation makes provision that the AiB has jurisdiction in the bankruptcy of a limited partnership if it is registered in and has a place of business in Scotland and that a sheriff has jurisdiction if a limited partnership is registered in Scotland and has a place of business in the sheriff's sheriffdom. It also provides that the sheriff clerk shall send a copy of every court order mentioned in sections 14(1), 15(5) and 17(8) of the 1985 Act to the Registrar of Limited Partnerships in Scotland and that the AiB shall send a copy of every determination under section 14(1A) of the 1985 Act to the Registrar of limited Partnerships in Scotland. This regulation re-enacts regulation 9 of the 2008 Regulations.
13. **Regulation 9:** states that the sum prescribed for the minimum threshold for apparent insolvency on the basis of a Statutory Demand is £1500. This regulation re-enacts regulation 13 of the 2008 Regulations.
14. **Regulation 10:** relates to claims in foreign currency, and defines what types of claims are acceptable in foreign currency. These are claims made in a foreign currency if constituted by a decree or other order made by a court ordering the debtor to pay a sum expressed in a foreign currency, and a claim arising from a contract or bill of exchange requiring the debtor to make payment in a foreign currency. This regulation re-enacts regulation 4 of the 2008 Regulations.
15. **Regulation 11:** also relates to claims in a foreign currency and provides that any claim made in a foreign currency is to be converted into sterling at the mean of the

buying and selling spot rates at the close of business on the day of the bankruptcy. This regulation re-enacts regulation 5 of the 2008 Regulations.

16. **Regulation 12:** prescribes the form (Form 21) for the use of a trustee who is applying for authority to resign under section 28(1) of the 1985 Act. A trustee in bankruptcy must apply to the AiB for the authority to resign and the AiB must be satisfied that the trustee is unable to act, or has conducted himself in such a way that he is no longer fit to act. This regulation re-enacts regulation 17 of the 2008 Regulations.
17. **Regulation 13:** prescribes Forms 22 and 23 as forms of notice to be used when the AiB or any other trustee abandons to the debtor any heritable property (see section 32(9A) of the 1985 Act). This regulation re-enacts regulation 19 of the 2008 Regulations.
18. **Regulation 14:** prescribes Forms 24 and 25 which must be used by AiB when fixing a debtor contribution order following an award of sequestration through a debtor application or creditor petition, respectively (section 32A of the 1985 Act (as amended by the 2014 Act) refers).
19. **Regulation 15:** prescribes the form of notice (Form 26) to be given, under section 40 of the 1985 Act, to the local authority by the trustee or a trustee under a trust deed before proceedings are commenced for authority to sell or dispose of any right or interest in the debtor's family home. This regulation re-enacts regulation 19A of the 2008 Regulations.
20. **Regulation 16:** prescribes the form (Form 27) on which the debtor must provide his current state of affairs for the purposes of section 43A(2) of the 1985 Act. This regulation re-enacts regulation 20 of the 2008 Regulations.
21. **Regulation 17:** makes provision about the course of financial education for the purpose of section 43B(1) of the 1985 Act.
22. **Regulation 18:** prescribes, for the purposes of section 51 of the 1985 Act, that the rate of interest to be paid on the preferred debts and the ordinary debts between the date of sequestration and the date of payment of the debt, is to be 8 per cent per annum. This regulation re-enacts regulation 6 of the 2008 Regulations.
23. **Regulation 19:** prescribes Form 28 as the form of certificate to be issued by the AiB, pursuant to section 54D(4)(b) or 54D(6)(b) of the 1985 Act, deferring indefinitely the discharge of a debtor.
24. **Regulation 20:** provides that the premium of any bond of caution or other security given by an insolvency practitioner, in relation to acting as interim trustee or trustee, may be taken into account as part of the insolvency practitioner's outlays in the sequestration. This regulation re-enacts regulation 7 of the 2008 Regulations.
25. **Regulation 21:** sets the maximum amount which can be claimed as a preferred debt by an employee or a person under the Reserve Forces (Safeguard of Employment) Act 1985 as £800. This regulation re-enacts regulation 10 of the 2008 Regulations.

26. **Regulation 22:** prescribes the form to be used when a person gives notice under section 4A of the 1985 Act (as amended by the 2014 Act) of their intention to make a debtor application for sequestration; to seek to fulfil the conditions required in order for a trust deed to become protected, or to apply for the approval of a debt payment programme through the Debt Arrangement Scheme (Form 29). It also prescribes the form to be used when an entity gives notice under section 4B of the 1985 Act (as amended by the 2014 Act) of their intention to make a debtor application for sequestration (Form 30). The giving of such notice triggers a period of moratorium in which creditors cannot generally take enforcement action against a debtor to recover sums owed (known as ‘diligence’) (see section 4C and 4D of the 1985 Act (as amended by the 2014 Act)).
27. **Regulation 23:** revokes, subject to regulation 24, the majority of the 2008 Regulations (and also makes provision for revocation of subsequent Regulations which amended the 2008 Regulations). The 2008 Regulations are not, however, revoked in their entirety. In particular regulation 8 of the 2008 Regulations, which amends the definition of “associate” in section 74 of the 1985 Act, is not revoked.
28. **Regulation 24:** provides that, subject to what is provided in regulation 24(2), the Regulations will not apply as regards any bankruptcy where the petition is presented before 1st April 2015 or the debtor application was made before that date and that, notwithstanding regulation 23 (revocations), the 2008 Regulations will continue to apply in such cases.

Consultation

29. 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.
30. 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.
31. 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.
32. 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.
33. 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. This was their opportunity to contribute to the development of the

Regulations. 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

34. A Business and Regulatory Impact Assessment ("BRIA") has been completed on the effects of the implementation of these Regulations and will be published when the Regulations are laid before the Parliament. A copy of the BRIA can be found on the Accountant in Bankruptcy website at: www.aib.gov.uk
35. 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.
36. 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

37. A financial memorandum was published for the Bill for the Bankruptcy and Debt Advice (Scotland) Act 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