

POLICY NOTE

THE PROTECTED TRUST DEEDS (FORMS) (SCOTLAND) REGULATIONS 2016

SSI 2016/398

1. The above Regulations would be made by Scottish Ministers in exercise of the powers conferred by sections 166(2)(b) and (c), 169, 170(1)(b) and (e), 174(2) and (3), 175(1), 181(2), 183(1)(a) and (b), 184(1)(b) and (2)(a), 186(3) and (9), 194(1) and (3) and 225(2) of the Bankruptcy (Scotland) Act 2016 and all other powers enabling them to do so. They are subject to the affirmative procedure.

Policy Objectives

2. The policy objective of these Regulations is to consolidate the secondary legislation under the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”) as part of the replacement of the 1985 Act by the consolidating Bankruptcy (Scotland) Act 2016 (“the 2016 Act”). The aim of the consolidation of bankruptcy law is to aid the accessibility and understanding of bankruptcy law for practitioners and those affected by it.
3. The legal framework for Protected Trust Deeds (PTDs) has been written into primary legislation at Part 14 of the 2016 Act. This replaces the Protected Trust Deeds (Scotland) Regulations 2013 (SSI 2013/318 as amended, to be revoked by the 2016 Act subject to savings).
4. Part 14 of the 2016 Act will be supplemented by the slimmed-down version of the PTD Regulations in these Regulations concerning only the PTD forms.
5. The PTD forms under Part 14 of the 2016 Act and these Regulations will apply to trust deeds executed on or after 30 November 2016.
6. In brief, these Regulations list the forms to be used in connection with PTD as those outlined in the table below:-

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| Form 1 | Notice in the register of insolvencies by trustee under a trust deed for the benefit of creditor. |
| Form 1A | Consents required for exclusion of a secured creditor from a protected trust deed. |
| Form 1B | Agreement in respect of heritable property. |
| Form 2 | Statement of claim by creditors in a trust deed. |
| Form 2A | Income and expenditure. |
| Form 3 | Trust deed protection proposal and trustee’s application. |
| Form 4 | Trustee’s statement of status of a protected trust deed. |
| Form 4A | Debtor’s payment instruction to employer. |

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| Form 4B | Trustee's payment instruction to employer. |
| Form 4C | Payment variation instruction to employer. |
| Form 5 | Application for discharge of debtor. |
| Form 6 | Application to creditors for discharge of the trustee of a protected trust deed. |
| Form 7 | Trustee statement of realisation and distribution of estate under a protected trust deed. |

7. Although this is almost entirely a consolidation exercise, it has been considered prudent to take this opportunity to improve and clarify regulations where appropriate and taking on views expressed in a public consultation on draft Regulations.
8. The main changes introduced are at regulation 2(2) and (4), to amend the documents to be sent to give creditors notice of a proposal to protect a trust deed, to require Form 2A to be used (as at present) instead of the "Common Financial Statement" used in the industry. This amendment uses the ongoing power preserved in section 194 of the 2016 Act to change the Part 14 regime in that Act to restore what is provided for in the 2013 Regulations. This was a late amendment to the 2013 Regs that was not captured in the 2016 Act.
9. Regulation 2(4) adds an express requirement to require Part 2 of PTD Form 3 which was previously omitted from the Regulations – the trustee's proposal to AiB to protect a trust deed, including a declaration by the trustee. Unlike the other amendment this was not the law in the 2013 Regs as amended before the Consolidation Act. It requires a declaration from trustees, again currently complied with in practice.
10. The numbering of the forms remains deliberately the same as in the PTD Regulations for convenience of users of the forms; however, there have been a few small amendments to some of the forms. In particular extra fields have been added to the tables in Forms 4, 6 and 7 for miscellaneous payments and statutory interest and this has necessitated other minor amendments in the Notes and in the calculation formulae detailed in the Forms.

Background

11. In their eighth programme of Law Reform, the Scottish Law Commission, at the suggestion of the Accountant in Bankruptcy (AiB), undertook a project to consolidate the legislation relating to bankruptcy in Scotland. The majority of the legislation proposed for consolidation is contained in the 1985 Act. The 1985 Act has been heavily amended on many occasions, as a result it has lost its coherence and structure. Many of the provisions are inordinately long and numbering has become complex and unwieldy. The primary aim of the 2016 Act was to make it more readable and accessible for practitioners and for those affected by it, saving time and money.
12. The 2016 Act received Royal Assent on 28 April 2016. These Regulations are part of the work to consolidate:-
 - the Bankruptcy (Scotland) Regulations 2014

- the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010
 - the Bankruptcy (Money Advice and Deduction from Income etc.) (Scotland) Regulations 2014
 - the Common Financial Tool etc. (Scotland) Regulation 2014
 - the Protected Trust Deed (Scotland) Regulations 2013
 - the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014
 - the Bankruptcy Fees (Scotland) Regulations 2014
13. The Bankruptcy Fees (Scotland) Regulations 2014¹ will continue to apply to all sequestrations under the savings and continuity of law provisions in sections 234(3) and 235(1), (2) and (4) of the Bankruptcy (Scotland) Act 2016. They are due to be replaced in 2017 after the conclusion of a review of the current fee levels. An informal tracked changes version is available on the AiB website to provide the correspondences to the new legislation.
14. Tables of Destinations and Derivations identifying the corresponding provisions in the 1985 Act and in the 2016 Act are available for the Bankruptcy (Scotland) Act 2016².

Consultation

15. AiB has worked closely with stakeholders who have provided valuable feedback on the proposals for consolidation. This goes back to August 2011, when the Scottish Law Commission (“SLC”) initially published their “Consolidation of the Bankruptcy Legislation in Scotland” consultation paper, making a number of recommendations following responses to that consultation. Virtually all of the SLC recommendations were implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014 which allowed for a straight consolidation of the existing law in the new Act.
16. There was extensive engagement with key stakeholders during the passage of the Consolidation Act. The Delegated Powers and Law Reform Committee (DPLRC) took evidence from ICAS and the R3 Technical Committee who were broadly supportive of the Bill.
17. AiB published draft consolidated Regulations during August 2016 and minor changes to forms have been introduced in light of the comments raised.

Impact Assessments

18. A Business and Regulatory Impact Assessment (BRIA) has been completed. A copy of this BRIA can be found on the AiB website at: www.aib.gov.uk.
19. An Equality Impact Assessment (EQIA) has not been carried out as these Regulations purely consolidate existing legislation which was previously subject to an EQIA and which highlighted no issues. AiB has, however, given thought to the effects of these regulations and the changes set out in this instrument will apply equally to all. AiB regularly consults with stakeholders, service users and the general public on reforms

¹ SSI 2014/227 as amended by SSI 2015/80.

² <https://www.aib.gov.uk/bankruptcy-scotland-act-2016-tables-derivations-and-destinations-draft>

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.

Financial Effects

20. AiB has considered the financial impact of the Consolidation in the 2016 Act and associated Regulations on firms. Stakeholders mentioned to the DPLRC the costs that would require to be incurred. Whilst there will be one-off limited costs and training requirements these will be mitigated over time by the savings associated by simpler statute and reduced time in sourcing appropriate legislation.

The Accountant in Bankruptcy on behalf of the Scottish Government

September 2016