POLICY NOTE

THE BANKRUPTCY (APPLICATIONS AND DECISIONS) (SCOTLAND) REGULATIONS 2014

SSI 2014/226

1. The above instrument is made in exercise of the powers conferred by sections 71C, 72(1A) and 72A of the Bankruptcy (Scotland) Act 1985 ("the 1985 Act") and all other powers enabling the Scottish Ministers to do so. It is subject to the negative procedure.

Policy Objectives

2. The Bankruptcy and Debt Advice (Scotland) Act 2014 ("the 2014 Act") amended the 1985 Act by transferring certain bankruptcy-related, largely administrative functions from the Scottish Courts to the Accountant in Bankruptcy ("AiB") to alleviate the burden upon the courts and allow resources within the Scottish Courts to be utilised more effectively. The policy behind these Regulations is founded on the principle that principally administrative decisions which do not require shrieval or judicial consideration should be made by the AiB.

3. During consultation and passage of the 2014 Act, where evidence showed bankruptcy-related functions require full shrieval or judicial consideration (e.g. creditor petitions for award of sequestration or bankruptcy restriction orders ("BROs") where the term of the order would be more than 5 years), and that the transfer of these functions would not, therefore, meet these policy aims, the functions will be retained by the Scottish Courts.

4. The policy aim of these Regulations is to provide further detail of the process and procedure for making certain applications to the AiB, as provided for in primary legislation by the 1985 Act (as amended by the 2014 Act.) Sections 25 to 35 and 37 to 43 of the 2014 Act set out functions of the Scottish Courts which will transfer to the AiB. The changes in the Act also introduce new functions where AiB has decision-making functions.

5. These Regulations also provide further detail around the process for making an application for the review by AiB, of a decision under the Act, together with forms to be used when making applications to the AiB. In moving certain matters away from the sheriff, these rules are broadly equivalent to court rules and are made under the power in section 71C of the 1985 Act to put in place procedure for applications to, reviews by, and other decisions of AiB. The Act retains appeal rights to the sheriff throughout (and see section 63C of the 1985 Act).

6. In brief, these Regulations include provisions for:—

    - The procedure by which certain new "first instance" applications must be made to the AiB;

- The process which must be followed if the AiB requires further information in order to decide on an application;
- Further detail of the process which must be followed once an application has been made, in relation to: –

    - applications for directions by trustees in sequestration;
    - applications for the recall of sequestration on the limited ground of being able to pay debts in full;
    - the appointment of a replacement trustee (including a trustee acting in more than one sequestration);
    - the removal of a trustee; and
    - the conversion of a PTD into bankruptcy.

7. The Regulations also make certain provisions in order to ensure that:—

    - The AiB's decisions in relation to review applications will be made publically available; and
    - AiB staff who make a particular decision cannot then be involved with a review of that same decision.

Background

8. Many decisions made by sheriffs in relation to bankruptcy matters are administrative in nature, time consuming and can often be made in chambers. To avoid sheriffs spending more time dealing with matters in chambers rather than with courtroom business, by transferring certain functions to the AiB, the Act and these Regulations will help to deliver the commitment to modernise bankruptcy and will reduce the administrative burden upon the courts.

Specific Provision

9. **Regulation 3:** provides detail of how an applicant can make an application to AiB under these Regulations. The relevant forms required to be used by the Regulations may be submitted either personally in hard copy, by a registered postal service, or to AiB electronically via email or using AiB's purpose built computer system. Certain basic details (name and address etc., and of any representative) must be included in all applications or review applications.

10. **Regulation 4:** requires the general application Form 1 set out in the Schedule to the Regulations to be used for certain applications.

11. **Regulation 5:** provides detailed procedure for first instance (i.e. not on a review) applications to which these Regulations apply being made to AiB. Applications at first instance include, among others:-

    - applications for a direction by a trustee (section 3A of 1985 Act);
    - applications for recall where the only ground for recall is that the debtor has paid or is able to pay his debts in full (section 17 of 1985 Act); or
    - applications to cure a clerical or incidental error in a document (section 63A).

12. When an application at first instance is made, the applicant must at the same time as submitting the application to the AiB send the application to anyone specified in the 1985 Act as a person who must be notified or a person who can make representations, and any other interested person. Where the applicant sends the relevant persons notice or a copy of the application, it must be sent via a registered postal service, and the applicant must provide the AiB with evidence of service, if requested to do so. Accordingly it cannot be sent to relevant parties electronically. The AiB can also determine that the application should be served on other persons.

13. Where a person is making representations to the AiB in respect of an application, they can be submitted in person, via registered postal service or electronically. Representations in respect of an application must be made within 14 days from the date the application is made, unless a time period for representations in relation to that specific application is provided for by the 1985 Act. If an application is submitted to the AiB and it is incomplete, the AiB can reject the application.

14. **Regulation 6:** enables the AiB to seek further information on any application at first instance, any review application or any representations made in respect of an application. If the AiB are seeking further information, they will issue a notice in writing specifying what further information is required. Where the 1985 Act specifies a time limit for the AiB to make a decision on an application, the time limit is extended if the AiB seek further information in order to make the decision. The AiB may refuse to consider an application if sufficient evidence is not provided within the time period specified.

15. **Regulation 7:** provides the AiB with the option to hold an oral hearing in relation to an application at first instance if necessary, to provide an opportunity to take oral evidence in person, should the AiB deem it necessary, only following written representations. It is expected that hearings will be necessary only exceptionally, where the applicant has specific difficulties with providing evidence by other means. The AiB can require an applicant or a person making representations to attend for the purpose of giving evidence. Where the AiB determine a hearing is necessary, the time limits detailed within the 1985 Act for AiB to make a decision are extended.

16. **Regulation 8:** relates to an application by a trustee to the AiB for a direction under section 3A(2) of the 1985 Act on a matter relating to the sequestration. Where a trustee applies, the AiB must give a direction on the application within 28 days or determine within 28 days that the matter must be referred to the sheriff.

17. **Regulation 9:** Where an application for recall is submitted to the AiB in accordance with section 17A of the 1985 Act, section 17B(3) of the 1985 Act requires the trustee to submit a statement on the debtor's affairs. Regulation 9 states that AiB need not consider an application for recall by a trustee until she or he has submitted the statement on the debtor's affairs.

18. Where the AiB decides to recall an award of sequestration under section 17D(1) and 17E(6) of the 1985 Act, AiB must notify that decision to the debtor, any creditor, the trustee or any other person having an interest.

19. Where the AiB is trustee and they consider recall of sequestration should be granted as the debtor has paid or is able to pay their debts in full, AiB must notify the debtor, every known creditor and any interested persons. In doing so, AiB must advise the recipients that they can make representations within 21 days from the date of the notice. The notice should also be accompanied by a statement of the debtor's affairs and a copy of the application.

20. Where the AiB recall an award of sequestration, if the debtor has a bankruptcy restriction order or an interim bankruptcy restriction order in place, the AiB must, at the same time consider whether to annul the bankruptcy restriction order or interim bankruptcy restriction order.

21. **Regulation 10:** relates to the appointment of a replacement trustee under section 25 of the 1985 Act. Section 25 applies where a replacement trustee is elected by virtue of a trustee vote. The debtor, a creditor, the original trustee or the replacement trustee may object to any matter connected with the election by applying to the AiB. Where such an application is made to the AiB, the AiB must give the original trustee, the replacement trustee, the objector and any other interested person an opportunity to make written submissions on the application within 14 days from the date of notification.

22. Once the AiB makes a declaration under section 25A(3) of the 1985 Act either declaring the elected person to be trustee or ordering the original trustee to arrange a new meeting at which a new trustee vote must be held, AiB must notify the original and the replacement trustee of their decision.

23. **Regulation 11:** relates to section 28A of the 1985 Act, where a trustee is acting in two or more sequestrations and he or she dies, ceases to be qualified, there is a conflict of interest or a change in the personal circumstances of the trustee. The AiB can remove the trustee from office and appoint a new trustee. Where an application is made to the AiB under section 28A(7) of the 1985 Act seeking such a direction, regulation 11 confirms AiB must make the determination within 14 days from the expiry of the 14 day time period for making representations under section 28A(10) of the 1985 Act.

24. **Regulation 12:** relates to removal of a trustee in accordance with section 29 of the 1985 Act. An order by the AiB removing a trustee may be made on the application of commissioners, a person representing not less than one quarter in value of the creditors or by the AiB if they are satisfied that there are reasons to do so on circumstances other than those mentioned in section 29(9). Where an application is made, it must be served on the trustee. Before AiB determine the application, they must give the trustee the opportunity to make representations. Regulation 12 provides that the trustee has 21 days from the date the application was sent to the trustee to make representations. Thereafter, the AiB will within 14 days decide whether to remove or refuse to remove the trustee, make any other order or refer the matter to the sheriff for a determination.

25. The trustee may also be removed from office if unable to act or has so conducted herself or himself that he or she should no longer continue to act in the sequestration in accordance with section 29(9) of the 1985 Act. Where an application is made to

remove the trustee under such circumstances, regulation 12 provides that the trustee must be given the opportunity to make representations within 14 days from the date the application was made. Thereafter, the AiB must decide within 14 days whether to make a declaration under section 29(6) or refer the matter to the sheriff.

26. Where the AiB makes an order removing the trustee from office, or such further order as the AiB thinks fit under sections 29(1)(b), (3) or (6) of the 1985 Act, AiB must notify the trustee, the debtor, commissioners or any creditor of their decision. The trustee, commissioners or any creditor may apply to the AiB for a review of the decision. Where an application for a review is sought, regulation 12 provides that the AiB must notify any commissioners who are required to call a meeting for the election of a new trustee under section 29(5) or (6C) of the 1985 Act. Any time period specified within the 1985 Act to hold such a meeting is extended where an application for review is sought. Where a review decision is made, the AiB must notify any commissioners required to call a meeting under section 29(5) or (6C) of the 1985 Act.

27. **Regulation 13:** relates to section 42 of the 1985 Act. A trustee can decide to enter into or "adopt" a contract that the debtor had entered into or refuse to do so. Where the trustee receives a request in writing to adopt a contract, she or he must make a decision within 28 days of receipt of the request. This period may be extended upon the trustee making an application to the AiB. Where an application is made to the AiB, AiB can determine on whom the application should be served in accordance with regulation 5(6). Within 14 days of receipt of the application, the AiB must decide whether to extend the period or refer the matter to the sheriff. The AiB must notify all interested person of any decision made or any direction given by the sheriff.

28. **Regulations 14 and 15:** relate to bankruptcy restriction orders. Where AiB proposes to make a bankruptcy restriction order, they must notify the debtor of their intention to do so. They must provide details of the reasons for proposing to make an order, any grounds for proposing an interim bankruptcy restriction order and that the debtor is entitled to make representations. Once AiB have notified the debtor, they must allow the debtor 14 days to make representations to the AiB or in the case of an interim bankruptcy restriction order, a period of 2 days. The debtor can submit representations personally, by post or electronically. AiB must decide whether or not to make an order within 21 days from the date on which notice is given to the debtor under section 56A(3) of the 1985 Act.

29. Section 56E of the 1985 Act allows a debtor to apply to annul or vary a bankruptcy restriction order. The AiB must notify all interested persons that they have a right to make representations in respect of an application within 21 days from the date that the application was made. They can be sent to the AiB either via the post, electronically or submitted to AiB personally.

30. Section 56J(4) of the 1985 Act allows the AiB to annul a bankruptcy restriction order or interim bankruptcy restriction order where an award of sequestration is recalled. If AiB refuse to annul the bankruptcy restriction order or interim bankruptcy restriction order, regulation 15 provides that AiB must advise the debtor that he or she has the right to apply to the AiB for a review of the decision within 14 days from the date that sequestration was recalled.

31. **Regulation 16:** requires forms to be used to make an application to the AiB for conversion of a protected trust deed into bankruptcy. Where an application is made to the AiB, the AiB must inform the member state liquidator, the debtor, the trustee and any other person who has been served with a copy of the application and the accompanying affidavit of their decision.

32. **Regulation 17:** provides that the AiB must notify all interested persons of their decision upon an application being made to them to correct a clerical or incidental error or waive a failure to comply with a time limit under section 63A of the 1985 Act.

33. **Regulation 18:** provides that the AiB must notify all interested persons where they put a value on a contingent debt in accordance with an application made under paragraph 3(2) of Schedule 1 to the 1985 Act.

34. **Regulation 19:** relates to applications made to the sheriff. Under the 1985 Act there are certain applications which, once submitted to the AiB, the AiB can determine to remit or refer to the sheriff. If a matter is referred to the sheriff, where the sheriff requires the AiB to make an order, decision or direction. regulation 19 sets out the time period AiB have in which to make that order, decision or direction.

35. **Regulation 20:** provides further detail in relation to a review application. It confirms what applications for a review must be made using a Form 3 and what information a review application must include. Where a review application is made to the AiB, the AiB must send a copy of the review application, without delay to any person specified within the 1985 Act as a person who is to be notified, a person who can make representations on the application or a person who can appeal the review decision. AiB must at the same time advise those persons that they have 21 days from the date specified within the 1985 Act to make representations.

36. Where the AiB make a review decision, they must notify the decision to persons specified within the 1985 Act to be notified, able to make representations or persons who can appeal against a review decision.

37. **Regulation 21:** ensures that where an application for review of decision is made to the AiB, any staff member who was involved in the initial decision shall not be involved in making a decision under review.

38. **Regulation 22:** confirms that where the AiB make a review decision, the reasoning behind the decision will be publicly available if required.

Consultation

39. 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.

40. 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.

41. 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.

42. 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.

43. 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

44. 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: aib.gov.uk

45. 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.

46. 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

The Accountant in Bankruptcy on behalf of the Scottish Government

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