POLICY NOTE

THE BANKRUPTCY FEES (SCOTLAND) REGULATIONS 2014

SSI 2014/227

1. The above instrument is made in exercise of the powers conferred by sections 69A and 72(1A) of the Bankruptcy (Scotland) Act 1985 (as amended) ("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 policy aim of the Bankruptcy Fees (Scotland) Regulations 2014 is to set the charges to be levied by the Accountant in Bankruptcy ("the AiB") and these are set out in the Table of Fees. The Table of Fees is divided into 2 parts. Part 1 lists the fees payable for the functions of the AiB in respect of functions carried out as interim and/or trustee in a bankruptcy. Part 2 lists the fees payable for all other statutory functions of the AiB. This instrument updates the fees set in the Bankruptcy Fees etc. (Scotland) Regulations 2012 and those Regulations are revoked (subject to the savings provision at regulation 13).

3. With the passing of the Bankruptcy and Debt Advice (Scotland) Act 2014 ("2014 Act"), the Scottish Government and the AiB have recognised the need for AiB to carry out a review of its fee structure, in order to take account of changes brought in by the Act and also to simplify the fee structure and introduce more transparent Fees Regulations, by removing a number of ad-hoc fees and replacing them with a fixed fee approach.

4. The fees are levied to recover part of the AiB's administration costs in respect of her statutory duties. For cases where the AiB is appointed as trustee and in cases where the realisation of the debtor's estate does not hold sufficient funds, fees are subsidised by the public purse, from the overall AiB budget from the Scottish Government. Where the AiB is not appointed as trustee, the fees stated in Part 2 of the Schedule are paid to the AiB from the debtor's estate (irrespective of whether there is any realisation or not.)

5. The Scottish Government's policy is to provide lower cost, effective and accessible debt relief to those on low incomes who need it most. Accordingly, the debtor application fee for the new 'Minimal Asset Process' ("MAP") has been set at £90 while the debtor application fee for 'full-administration' bankruptcy remains at its 2012 level of £200. This fee structure accurately reflects the cost of the services provided and ensures that the fees charged are both equitable and sustainable. This also supports AiB's policy to move further towards full cost recovery.

6. AiB's approach to full cost recovery is based on the need to recover costs that relate to the administration of insolvency. This is consistent with the guidance set out in the Scottish Public Finance Manual. A full assessment of these costs has been undertaken, based partly on assumptions about the amount which would have to be recovered in order to offset the cost to the public purse incurred in the administration of bankruptcy cases where no assets or contributions are identified. AiB has also undertaken an assessment to forecast activity under the 1985 Act as revised in relation to bankruptcy and Protected Trust Deeds, taking activity levels and trends into account along with the administrative costs of statutory insolvency instruments. These assumptions have been used along with

the administration costs to form the basis of cost recovery calculations. Full cost recovery is currently achieved through the legacy of high volume bankruptcies that are now generating fees on closure. The proposed new fee structure represents a realistic model for the future given the declining volumes associated with personal insolvency.

7. The Bankruptcy Fees (Scotland) Regulations 2014 will:

- remove redundant or outdated fees;
- put in place a more transparent and streamlined fees structure that could be understood by all stakeholders;
- deliver a fees structure that is considered fair by stakeholders;
- achieve AiB's on-going objective of full cost recovery of operational costs for administration insolvency products – excluding AiB's policy functions and the administration of the DAS scheme;
- fulfil the commitments made during the development and consultation of the BADA(S) 2014 Bill – particularly in relation to the costs of accessing bankruptcy through the Minimal Asset Product route; and
- ensure that fees take account of additional tasks that are transferring from Courts to AiB and introducing fair charges where appropriate – ensuring that costs do not exceed existing costs.

Background

8. Bankruptcy or sequestration is the state of being legally and publicly declared to be unable to meet debts when they fall due. It can apply to an individual, a partnership, certain corporate bodies or an incorporated body. When the insolvent person is declared bankrupt, by a sheriff or the AiB, that person's estate is removed from their control and set aside for the benefit of the person's creditors. Bankruptcy has the effect of permanently removing from the debtor liability to pay the debts accumulated up to the date of their bankruptcy, with certain exceptions including certain types of student loan and fines.

9. A trustee, either the AiB or an insolvency practitioner, will be appointed or nominated to administer the bankrupt's estate. A bankrupt will be able to keep some things that are essential for everyday living, but may be required to make some payment from income. Where a debtor has sufficient surplus income, after their living costs have been taken into consideration, the debtor will usually have to be due to pay a contribution from income for a period of 48 months. If the debtor's financial circumstances change, then the trustee may reassess the contribution payable, subject to review by the AiB.

10. It is the duty of the trustee to ingather funds, sell the debtor's non-essential assets or property and to use the money to:

- pay the costs of managing the bankruptcy; and
- pay creditors as much as possible of what the debtor owes them.

11. At the end of a bankruptcy where funds have been ingathered, the trustee will distribute these funds in order of priority laid out in section 51 of the 1985 Act. This allows for the fees and outlays of the trustee and the expenses of the petitioning creditor to be paid prior to the payment of any dividend to creditors, subject to sufficient funds being

available. In cases where the AiB is trustee and there are insufficient funds, the costs of administering the bankrupt's estate will fall to the public purse.

12. The current fee structure is based on a method developed in the early 1990s, which has since stayed broadly the same, with the occasional additional fee added as a consequence of new statutory functions. This was reflected in the introduction of the Bankruptcy Fees etc. (Scotland) Regulations 2012, which consolidated and updated the Bankruptcy Fees (Scotland) Regulations 1993 in a new instrument.

13. The main difference between the existing Regulations and the approach taken in this instrument is to adopt fixed fees as opposed to hourly rates for the administration or supervision of bankruptcy, thus providing a simpler fee structure which is more transparent in advance and one that will provide greater certainty to trustees, creditors and others with an interest in the process.

Specific Provisions

14. The Annex to this note has further detail on the specific provisions.

Consultation

15. 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.

16. These changes are predominately as a result of the AiB's Fees Review. The revised fee structure has been discussed at the AiB's Board, which includes representatives from the money advice and insolvency sectors and agreed with the principle that the new Regulations should put in place a more transparent and streamlined fees structure.

17. In addition, 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.

18. 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. These events were attended by a wide range of businesses and bodies representing businesses, including:

- Lloyds Banking Group
- HMRC
- Insolvency Practitioners Association
- ICAS
- Deloitte LLP
- KPMG
- Grant Thornton UK LLP
- ABCUL

- The Carrington Dean Group
- Scott & Co, Sheriff Officers

Impact Assessments

18. A Business and Regulatory Impact Assessment ("BRIA") has been completed on the effects of the implementation of the Bankruptcy Fees (Scotland) Regulations 2014 and the instrument 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. Fees are charged to all irrespective of their age, race, gender, disability or sexual orientation. The majority of the fees will only be charged where there are sufficient funds available in the bankrupt's estate to pay the costs.

20. 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 fees stipulated in the Bankruptcy Fees (Scotland) Regulations 2014 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. A copy of the EQIA in relation to the 2014 Act can be found on the Scottish Government website at: www.scotland.gov.uk

Financial Effect

20. These fees are levied to recover part of the operational administration costs incurred by the AiB. Any shortfall would otherwise be subsidised by the public purse as part of the overall AiB budget from the Scottish Government.

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

22. There are no financial implications for the Scottish Government. At the present time AiB is achieving full cost recovery on an annual basis and the intention is that, as well as providing transparency and fairness in fee charging, the 2014 Fees Regulations will continue to maintain this position. AiB's subsidy from Scottish Government during 2013/14 amounted to less than £50k. AiB plans to review the Fees Regulations annually in order that the fees levied are appropriate taking into account factors including administrative costs and volume of personal insolvencies cases.

23. The analysis undertaken relating to the implementation of fixed supervision fees for trustees in bankruptcy shows that there is no significant impact as compared with the previous statutory fees that were levied. Consequently there will be limited financial

impact on Insolvency Practitioners. The fees changes will not impact on the dividend that creditors in sequestration will expect to receive. By way of comparison, an up-front administrator's fixed fee of £1,850 is levied in personal insolvencies in England and Wales, with additional fees taken from funds ingathered. The administrator's time and line fees are subsequently charged to the case. The commissions taken in a case with £10,000 of assets realised will total £3,545 in England and Wales, while in Scotland the equivalent commissions amount to £1,500. In view of this, the Scottish model proposed represents a very positive structure from a creditor's perspective

The Accountant in Bankruptcy on behalf of the Scottish Government

August 2014

Annex - Specific Provisions

1. **Regulation 3**: provides for the fees payable to the AiB for the functions carried out where the AiB is the interim trustee and/or trustee in a bankruptcy. The rates are set out in Part 1 of the Table of Fees in the Schedule. These fees are not payable in advance and are applied to a bankrupt's estate (where funds are available), to cover the administration of the estate.

2. **Regulation 4**: gives examples of the types of outlays which might reasonably be incurred by the AiB where she has to use third party suppliers. It also allows for other outlays, where reasonable incurred, which are not listed. Outlays associated with publication of notices in the Edinburgh Gazette are removed, as any requirement for such notices has been revoked by the BADA(S) 2014 Act.

3. **Regulation 5**: allows for the fees and outlays payable to the Accountant to be paid from the debtor's estate at certain times throughout the lifetime of the bankruptcy, such as at the annual accounting period. References to determination of fees and outlays where an offer of composition is approved are removed as provision for composition has been repealed by the BADA(S) 2014 Act.

4. **Regulation 6**: provides for the fees payable to the AiB for the other functions carried out by the AiB, such as the duty to supervise trustees in bankruptcy or protected trust deeds (PTDs). These fees are set out in Part 2 of the Table of Fees.

5. **Regulation 7**: clarifies that these "Part 2" fees are also payable by the AiB in the case of those estates which she administers as interim trustee or trustee.

6. **Regulation 8**: specifies the manner in which fees payable to the AiB for undertaking the functions (detailed in Part 2 of the Table of Fees). Paragraph (a) makes provision about the fees due in relation to functions that have transferred from Scottish Courts to AiB. Paragraphs (b) and (c) set out how fees associated with AiB's supervisory functions in relation to bankruptcy and PTDs are payable, and paragraph (d) for fees associated with AiB's new functions in relation to the election of replacement trustee by trustee vote. Paragraph (e) provides for the fees relating to the payment of debtor application fees for debtor applications, including arrangements for collecting the balance of the higher fee where the administration of bankruptcy awarded under the MAP arrangements is converted to full administration. Fees due for other functions are payable when the AiB carries out the service.

7. **Regulation 9**: confirms that the debtor application fee is payable by the debtor irrespective of whether or not the AiB awards the bankruptcy.

8. **Regulation 10**: provides that, where the AiB supervises a trustee, the trustee is liable to pay the fee, irrespective of whether there will be funds in the estate to cover those costs. (Though this cost can normally be recovered through the fees charged for administering the trust deed or bankruptcy.)

9. **Regulation 11**: prescribes the circumstances under which the AiB may waive, either in whole or part, any fees listed in Part 2 of the Table of Fees. These circumstances are limited to:

- the payment of the balance of PTD supervision fees in circumstances where a debtor has failed to meet the obligations of the trust deed; and
- the balance of the debtor application fee where a case is converted from MAP to full administration, other than in circumstances where the debtor has provided false or misleading information.

10. **Regulation 12**: provides that a fee charged for an application for a Bankruptcy Restriction Order against a debtor, where the application is not granted on the grounds that it was not reasonable to make an application must be refunded.

11. **Regulation 13**: provides for transitional arrangements for sequestrations and trust deeds prior to 1 April 2015. The 2012 Fees Regulations will continue to apply to any sequestration where a warrant to cite was granted prior to 1 April 2015 or where a debtor application was granted before this date, with the exception of a small number of Part 2 Fees. Similarly, the 2014 regulations will have no effect on any trust deed which was granted before 1 April 2015. The Part 2 Fees that do apply to pre 1 April 2015 bankruptcies are those that relate to the new AiB powers that come into effect from 1 April 2015, for which AiB's policy is that they should also apply to earlier bankruptcy awards. These are fees for:

- the AiB giving a direction on receipt of an application by a trustee;
- determining an application for recall of sequestration; and
- considering and making an order in relation to an application by a member state liquidator for conversion of a trust deed into sequestration. =

12. **Regulation 14**: revokes the 2012 Fees Regulations subject to the circumstances described in regulation 13.

Changes to the Schedule, Table of Fees

Part 1 – fees where AiB is trustee or interim trustee

13. **Items 1 & 2 in Part 1 of the Table of Fees**: refer to the administration fee that can be charged by AiB in undertaking the functions of interim trustee or trustee. The £100 per hour bankruptcy administration rates have been removed in favour of the fixed fee, providing greater certainty in advance for creditors and other interested parties. The existing cost of bankruptcy administration where AiB is trustee is typically within a range of £815 to £1,060, although this can be significantly higher depending on the nature of the case. There is no specific provision within the current fees structure to recover the full operational costs of supervising contract providers or the additional functions that will come to AiB from the Sheriff Courts, under the provisions in the BADA(S) 2014 Act. The proposed fixed administration fee for AiB trustee bankruptcy cases is set at £1,100. This reflects the total cost incurred in the administration of the case and the fact that AiB will pay a Service Provider to administer the case. It removes the existing anomaly that results in differing bankruptcy costs where AiB is trustee, as these costs are contingent on the Contract Provider that has been assigned to the case.

14. **Items 3 and 4**: refer to the percentage amount of any funds realised through the sale of assets or the payment of contributions that can be charged to cover the cost of work

undertaken by the AiB. The charging model has remained unchanged from the 2012 Regulations and is consistent with the industry standard charging practice.

15. **Item 5**: refers to the percentage amount of any dividend funds, which may be available after payment of outlays and costs, that can be charged to cover the cost of that work undertaken by the AiB. This has remained largely unchanged from the 2012 Regulations.

Part 2 – fees for other functions of AiB

16. **Item 1(a) in Part 2 of the Table of Fees**: provides for a creditor in a creditor petition for bankruptcy to pay a fee to the AiB for administration of the creditor petition. This fee remains fixed at £100 and can be reclaimed by the creditor at the end of the sequestration process, if there are funds in the estate. It also prescribes a fee for administration of petitions made by a trustee under a trust deed. However, the sequestration of a deceased person's estate is now dealt with through a debtor application process and this has been reflected in column 3.

17. **Item 1(b)**: provides for a creditor fee of £200, payable by the creditor only when the bankruptcy is awarded and the AiB is appointed trustee. This has remained unchanged from the 2012 Regulations. AiB will invoice the creditor for this fee and, where there are funds in the estate the creditor can recover it.

18. **Item 2**: sets out new fixed supervision fees that are payable on an annual basis. This is a change to the 2012 Regulations. There are two rates, with a lower annual fee fixed in cases where a commissioner has been in post for the entire 12 month supervision period. This reflects the AiB's reduced administrative function in these cases. The annual fee charged where no commissioner is in post is £70 and the lower fee chargeable where a commissioner is elected is £50 per year. This equates to fees amounting to £350 or £250 in a sequestration spanning a 5 year period.

19. The above fee incorporates a number of functions that attracted a separate statutory fee in the 2012 Fees Regulations. These have now been revoked in favour of the fixed fee approach. The revoked fees include:

- Supervision of proceedings in sequestration - £210 (£139 if commissioners in post).
- Registration of award of sequestration - £20
- Examination of Sederunt Book - £36
- Supervision of dividend to creditors (where no commissioners elected) - £69
- Special Report to Court - £69

20. The revoked fees in a typical sequestration with no commissioner in post totalled £335 (assuming no special report to court). However, these fees could increase in certain circumstances, including where more than one distribution of dividend took place or where court action was involved. The 2014 Fees Regulations also remove other fees that could be levied in different circumstances. These include:

- Granting of certificate of discharge to interim trustee - £36

- Granting of certificate of discharge to debtor - £11
- Providing a certified copy of an entry in the register of insolvencies - £24
- For the certifying of any other document (excluding copying charges) - £17
- For providing a copy of any document by photocopying
    - 10 pages or less - £11
    - Each page after first 10 - £0.32
- For providing a copy of any document by electronic medium or printout – per document – £0.13

21. **Items 3 and 4**: relate to the fees for considering and issuing a determination in an appeal against the determination of commissioners as to the outlays and remuneration payable to the trustee and for issuing a determination fixing the outlays and remuneration payable to an interim trustee or trustee. These remain unchanged from the 2012 Regulations.

22. **Items 5, 6 and 7**: cover fees that are levied only in specific circumstances. It would not be appropriate to incorporate these fees into the fixed administration fee for supervision or administration of bankruptcy. These include AiB's attendance at any meeting of creditors, for calling a meeting of creditors and for attendance at any examination of the debtor. It is still appropriate to levy these fees on a case by case basis. These fees remain unchanged from the 2012 Regulations.

23. **Item 8**: relates to the fees charged in relation to PTDs. Item 8(a) relates to publication of a notice in the register of insolvencies, in order to gain protection of a trust deed. This incorporates amendments to the 2012 Fees Regulations which have arisen from the introduction of the Protected Trust Deeds (Scotland) Regulations 2013. Items 8(b) and (c) remain unchanged and include the fees for registering a PTD and the annual fee for the supervision of a trustee under a PTD.

24. **Items 9, 10 and 11**: include the fees for auditing the accounts of a trustee under a PTD and fixing remuneration and for actions associated with lodging and uplifting unclaimed dividends that have been consigned in respect of each creditor. It would have been inappropriate to incorporate this fee within a fixed administration fee as this situation does not arise in a significant number of cases. These fees remain unchanged from the 2012 Regulations

25. **Items 12 to 19 (inclusive)**: introduce fees which have all been set at £50, to meet the costs of new functions transferring to AiB from the Sheriff Court. These cover specific actions by the AiB which relate to the appointment or replacement of a trustee in bankruptcy, along with new powers to cure a defect in procedure or deal with an application for direction from a trustee. All of these actions are currently dealt with by the Sheriff Court and the application fee is £56. The 2014 Fees Regulations meet a commitment made to ensure that the costs involved through the transfer of these powers would not increase.

26. **Item 20**: is the fee levied for AiB to deal with an application for recall in the circumstances prescribed in the BADA(S) Act 2014. The fee levied is £100 as compared with the existing Sheriff Court fee of £107.

27. **Item 22**: sets the fees for the determination of a debtor application. This remains at £200. However, the BADA(S) Act 2014 introduces the Minimal Asset Process (MAP), which is a new access route to bankruptcy for debtors with few assets, minimal income and limited levels of debt. The fee is set at £90, a level which honours a commitment made by the AiB, to set the fees for access through the MAP at less than £100. No other statutory fees apply to the administration of MAP bankruptcies, provided there are no circumstances that would result in the case being converted to full administration.

28. **Item 23**: is the fee levied for an application to the court or the AiB for a Bankruptcy Restriction Order (BRO). This fee remains unchanged although the BADA(S) 2014 Act introduced powers for the AiB to consider and grant BROs with duration of less than 5 years. Determination of BRO applications involving sanctions lasting 5 years or over will remain with the Sheriff Court.

29. **Item 24**: covers the fee for registering a court order appointing a replacement trustee. This fee remains unchanged.