POLICY NOTE

THE BANKRUPTCY (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2021

SSI 2021/XXX

1. The above instrument is made by the Scottish Ministers in exercise of the powers conferred in sections 2(2)(b)(ii), 2(5), 9(4), 16(1)(i), 19(1), 46(2)(a), 87(8), 94(7)(a), 113(5), 116(2), 119(6)(a), 137(2), 140(2), 141(2)(a) and (c), 142(2) and (5), 205(1), 224, 225(2) and 227 of the Bankruptcy (Scotland) Act 2016, section 10 of the Coronavirus (Scotland) (No. 2) Act 2020, and all other powers enabling them to do so. The instrument is subject to the affirmative procedure.

The purpose of this instrument is to introduce measures to improve access to Minimal Asset Process bankruptcy for those that need debt relief and improve the efficiency of bankruptcy administration. It also reduces the cost of accessing bankruptcy, particularly for the most financially vulnerable.

Policy Objectives

2. The aim of The Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021 ("the Regulations") is to make permanent some of the temporary bankruptcy changes introduced by the emergency Coronavirus (Scotland) (No. 2) Act 2020 ("the 2020 Act"). This will involve expiring those provisions contained in the 2020 Act and the Regulations include provision to achieve this. These changes are aimed at: streamlining and improving the bankruptcy administration process; improving access to debt relief through bankruptcy for those who need it; and ensuring the procedures are well-placed to react to any future increase in demand. These Regulations provide lower cost access to both the Full Administration and Minimal Asset Process routes to bankruptcy, with complete removal of fees for those in receipt of certain prescribed benefits.

3. Further measures are included to improve access to Minimal Asset Process bankruptcy. The debt threshold for eligibility is increased and student loan debt has been removed from any calculation of the total debt held. Although these measures were introduced initially on a temporary basis, it has been recognised that taking action to place these on a permanent footing is an appropriate and necessary policy position.

4. In brief, these Regulations amend the Bankruptcy (Scotland) Act 2016 ("the 2016 Act"), the Bankruptcy (Scotland) Regulations 2016 and the Bankruptcy Fees (Scotland) Regulations 2018 to:

    - Reduce bankruptcy application fees for debtors. Primarily, the reduction of the full administration fee to £150 and the Minimal Asset Process fee to £50;
    - Remove bankruptcy application fees for those individuals in receipt of prescribed benefits;

- Increase the debt threshold for entering a Minimal Asset Process bankruptcy from £17,000 to £25,000;
- Remove student loans from the debt threshold calculation in accessing Minimal Asset Process bankruptcy;
- Allowing the electronic signature of bankruptcy forms; and
- Increasing the length of time for a trustee to submit an initial proposal for the Debtor's Contribution Order from 6 weeks to 12 weeks.

Background

Background on bankruptcy

5. Bankruptcy or sequestration is the state of being legally and publically declared unable to meet debts when they fall due. Declaration of bankruptcy, by either a sheriff or the Accountant in Bankruptcy ("AiB"), results in the debtor's estate being transferred to a trustee to administer for the benefit of the individual's creditors. Some items will be exempt from transfer including items deemed essential. In administering the estate the trustee may ingather funds and sell the debtor's non-essential assets or property. The trustee will distribute these ingathered funds in order of priority (see section 129 of the 2016 Act); with bankruptcy administration fees being paid first.

6. This process has the effect of removing the debtor from liability to pay debts incurred prior to the date of bankruptcy. This is subject to a number of exceptions, including student loans and fines. Similarly, the bankrupt may be required to make some payment from their disposable income towards the pre-bankruptcy debts. At the end of bankruptcy a debtor is afforded a fresh start.

Background to changes

7. The Coronavirus (Scotland) Act 2020 and the 2020 Act introduced several measures dealing with debt and insolvency. These measures were deemed necessary to ensure bankruptcy was flexible enough in reacting to the economic and operational problems caused by the pandemic. At the present time, the Acts have been extended to 31 March 2021, with the option for further extension to the latest possible date of 30 September 2021. This is subject to review and any further extension will require Parliamentary approval.

8. Stakeholders in this area are strongly supportive of the need for further extension, in view of the anticipated surge in demand for debt solutions as the economic consequences of the pandemic unfold. Separately, they have voiced support for some of the temporary changes introduced by the 2020 Act to be made permanent in respect of bankruptcy. They are pushing for this because they believe it will benefit the long term operation of bankruptcy by ensuring the process is flexible and efficient. In turn, this will better protect debtors and creditors alike. Therefore, they view it as advantageous to put these legislative changes on a permanent footing.

Consultation

9. The Minister for Business, Fair Work and Skills met with stakeholders on 26 October 2020 to discuss the scope for a general review of Scotland's debt solutions. A three

stage approach was agreed: immediate priorities that could be delivered in the current Parliamentary session; medium term recommendations for any necessary reform to existing solutions for the incoming administration; and a longer term strategic view.

10. AiB then took forward a series of stakeholder meetings to establish views on the immediate priorities in respect of stage one of the general review. The timescale for these regulations will not allow for full consultation, which would apply under normal circumstances. Therefore, broad cross-sector consensus has been sought and obtained on these immediate changes.

11. AiB hosted a series of 5 stakeholder meetings between 9th and 11th November – this included all of those attending the Minister's meeting on 26th October (although 4 members were unable to attend and 2 fed in written views) and other stakeholders who have a strong interest in our debt solutions. Further detail on the consultation is included in the Business and Regulatory Impact Assessment ("BRIA") accompanying these regulations.

12. These discussions revealed a high level of agreement on the case for immediate change and to place legislation on a more stable footing. Out of these meetings, the proposed changes have been identified as being able to be immediately dealt with.

13. A separate consultation was undertaken in late 2019 to early 2020 as part of a review of the Bankruptcy and Debt Advice (Scotland) Act 2014. This consultation concluded prior to the COVID-19 pandemic and therefore did not focus on the temporary changes introduced by the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020.

14. However, the review did involve consideration of the period of time for a trustee to submit a Debtor Contribution Order proposal. Of those responding, 74% did not believe the pre-Covid-19 pandemic timescale of 6 weeks for submission was sufficient. The consultation highlighted several reasons for this. A majority consensus was reached around a more appropriate timescale of 12 weeks. This consultation also sought views on the appropriate debt threshold to enable access to Minimal Asset Process bankruptcy. The responses highlighted a majority in favour of increasing the level of £17,000, with £25,000 the favoured option from the alternatives presented.

Impact Assessments

15. A BRIA has been completed on the effects of the instrument and has been published when this instrument was laid before the Parliament. A copy can be found on www.legislation.gov.uk.

16. No equality issues were raised as part of the consultation process and it is considered that a full Equality Impact Assessment (EQIA) is not required. The changes introduced are primarily associated with streamlining the bankruptcy process and improving accessibility to debt relief. The changes are associated with increasing those qualifying for a more efficient, quicker and easier form of bankruptcy procedure, the Minimal Asset Process. However, this does not impact on access to bankruptcy overall. Additionally, the changes eliminate perceived barriers to bankruptcy by removing or

reducing the fees payable. Bankruptcy is accessible to, and fees are charged to, all irrespective of their age, race, gender, disability or sexual orientation.

17. 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 and in accordance with the law. AiB regularly consults with stakeholders, service users and the general public on reforms to bankruptcy to ensure that the needs of all groups of society in bankruptcy are considered and that no particular groups are disadvantaged or excluded more than others.

18. In view of the Fairer Scotland Duty regarding socio-economic inequalities which exists under the Equality Act 2010, the impact of these proposals on those with low wealth and low income has been considered. The proposed changes will make bankruptcy more flexible and removes perceived barriers to bankruptcy by removing/reducing fees. Removing fees for those on benefits ensures the protection bankruptcy offers is more accessible than ever to the most financially vulnerable.

Financial Effect

19. The changes introduced to the bankruptcy application fees will impact on the funding of AiB and the operation of the existing fees order. A BRIA has been completed outlining these funding implications. The overall impact of these new fee structures will depend on the level of uptake of these bankruptcy processes. This could create a deficit ranging from approximately £251k with low application levels to approximately £753k with high predicted activity levels.

20. However it is anticipated that AiB can absorb the income deficit through efficiency savings in terms of reduction in staff numbers and continued efficiency savings through the continued development of IT systems. Any remaining shortfall will need to be covered by the Scottish Government.

The Accountant in Bankruptcy on behalf of the Scottish Government
January 2021

Annex

Specific Provisions

1. **Regulation 3:** expires the relevant temporary provisions in the Coronavirus (Scotland) (No. 2) Act 2020.

2. **Regulation 4:**
    a. Increases the Minimal Asset Process debt threshold from £17,000 to £25,000. This allows more debtors to qualify for this quicker form of bankruptcy; and

    b. Removes student loans from the debt threshold calculation in the Minimal Asset Process bankruptcy.

3. **Regulation 5:** Increases the timescale for a trustee to submit an initial proposal for the Debtor's Contribution Order from six to 12 weeks.

4. **Regulation 6:** introduces electronic signature of forms prescribed under the Bankruptcy (Scotland) 2016 Regulations ("2016 Regulations"). This will help to take account of technological advances and modernise the bankruptcy process.

    Electronic signatures are construed according to the Electronic Communication Act 2000, other than those used on Form 9 (Notification of Bankruptcy Award to the Keeper) of the 2016 Regulations. This is to preserve the ability of AiB and the Keeper of the Registers of Scotland to agree the format of electronic signature to be used for Form 9 in line with Regulation 12(6) and (7) of the 2016 Regulations.

5. **Regulation 7:** amends the prescribed Form 1 (Debtor Application) contained in the 2016 Regulations to incorporate the increase in debt threshold in the Minimal Asset Process and account for the change in the Full Administration bankruptcy application fee.

6. **Regulation 8:** amends the prescribed Form 8 (Form of Refusal of Award of Sequestration) of the 2016 Regulations to incorporate the increase in debt threshold in the Minimal Asset Process.

7. **Regulation 9:** introduces changes to the Bankruptcy Fees (Scotland) Regulations 2018. In particular:
    a. Fee exemption for all debtor applications submitted by those in receipt of prescribed benefits;

    b. Fee reduction for all debtor applications in Minimal Asset Process bankruptcy from £90 to £50; and

    c. Fee reduction for all debtor applications submitted for Full Administration bankruptcy from £200 to £150.