POLICY NOTE

THE DEBT ARRANGEMENT SCHEME (SCOTLAND) AMENDMENT REGULATIONS 2014

SSI 2014/

The above instrument, will, if approved, be made in exercise of the powers conferred by sections 2(3)(d), 4(5), 5(4), 7 and 62(2) of the Debt Arrangement and Attachment (Scotland) Act 2002 ("the 2002 Act") and all other powers enabling them to do so. The Regulations are subject to the affirmative procedure.

Policy Objectives

1. The policy objective of these Regulations is firstly to amend the Debt Arrangement Scheme (Scotland) Regulations 2011 ("the DAS Regulations"), in consequence of changes introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 ("the 2014 Act"). In particular, the Regulations make provision for the introduction of the Common Financial Tool under section 3 of the 2014 Act.

2. Secondly, the aim is to extend the application of the Debt Arrangement Scheme ("DAS") to legal persons and other entities, i.e. partnerships, limited partnerships, corporate bodies (other than companies registered under the Companies Act 2006 and other bodies (including Limited Liability Partnerships which cannot be sequestrated under the Bankruptcy (Scotland) Act 1985 (as amended)), trusts and unincorporated associations. Amendments made to the 2002 Act by section 53 of the 2014 Act enabled the scope of DAS to extend beyond natural persons (i.e. individuals).

3. The changes, in so extending the scheme, are intended to play a role in avoiding unnecessary small business insolvency, by providing an early intervention mechanism that delivers advice, guidance and debt management solutions for small businesses and other entities. They also aim to encourage the regeneration of businesses and to help the economy by allowing legal persons and other entities some protection from creditors while repaying their debts over a period of 5 years.

4. Thirdly, the Regulations amend the DAS Regulations to provide that all qualifying debts must be included in an application (subject to an exception for certain debts owed by both a legal person or other entity and an individual) and in relation to the requirements upon money advisers for DAS.

5. In brief, these Regulations amend the DAS Regulations to:-

   - define 'legal persons' and other entities for the purposes of the Business DAS scheme;

   - provide that approved money advisers giving the debtor advice for the purposes of Business DAS must be qualified Insolvency Practitioners;

   - set out specific requirements for a legal person or other entity entering into a debt payment programme ("DPP"). In particular, when submitting an application for

approval of a DPP, the approved money adviser must include a declaration that the DPP is viable. Debtors which are legal persons or other entities are also required to declare all assets and may not sell any "non-trading assets" during their DPP, unless for the benefit of creditors. Consequential changes are also made in relation to the variation and revocation of a DPP entered into by a business or other entity;

- amend the DAS scheme as it applies to both individuals and legal persons or other entities, in order to require all debts to be included in a DPP;

- amend the criteria by which a money adviser may be judged fit or otherwise to be approved as a money adviser, by removing the option for the person to be a member of an organisation "working towards" Scottish National Standards accreditation. From 11 December 2014, a person will only qualify if their organization has achieved accreditation;

- make provision for the application of the Common Financial Tool to individuals using the DAS scheme; and

- provide the necessary statutory forms.

6. The specific provisions of the Regulations are explained further in the Annex.

Background

7. Measures which allow a debtor to write off some or all of their debts (which may be characterised as "debt relief") are currently available both to individuals and consumers or individuals operating a business as a sole trader. Partnerships and other legal persons (other than limited liability partnerships and companies registered under the Companies Act 2006) may also fall within personal insolvency..

8. In contrast, DAS is (except in relation to interest on charges and penalties) a debt management scheme, whereby debtors agree to repay the whole of their debts and receive statutory protection from action by creditors to recover sums owed (legally referred to as 'diligence') while they do so. However, DAS does not currently allow for partnerships to make applications to enter into a DPP, other than where each partner uses DAS as an individual to repay their share of any personal liability. Likewise other types of legal persons and entities are unable to apply under the DAS scheme , whereas they can apply for sequestration of their assets. These Regulations are intended to resolve this inconsistency.

Consultation

9. 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.

10. Throughout the parliamentary process for the Bill for the 2014 Act, the Scottish Government also engaged with various stakeholder groups giving them the opportunity to raise their concerns.

11. AiB also convened a Business DAS working group with stakeholders to seek their feedback on our proposals. The first meeting was held on 14 August 2013 to discuss our initial proposals and a further meeting was held on 11 July 2014, at which AiB was given feedback on a draft of the Regulations themselves. This feedback is reflected in the final draft of the Regulations. Membership of the working group included representations of the following stakeholders:-

- Her Majesty's Revenue & Customs (HMRC)
- Institute of Chartered Accountants Scotland (ICAS)
- British Bankers Association (BBA)
- Insolvency Practitioners Association (IPA)
- Wilson Andrews
- Begbies Traynor
- KPMG

12. AiB have also met with officials across the Scottish Government and the Office of the Scottish Charity Regulator (OSCR) to discuss the impact of the changes on charitable organisations.

13. In addition, AiB held a rolling programme of stakeholder events from December 2012 to August 2014. These events took 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.

14. 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

15. 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 in draft before the Parliament. A copy of the BRIA can be found on the Accountant in Bankruptcy website at: www.aib.gov.uk

16. An Equality Impact Assessment ("EQIA") has been completed which refers, in turn, to the EQIA completed in relation to the 2014 Act. AiB (as the DAS Administrator) administers each DPP 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 the Debt Arrangement Scheme (Scotland) Amendment 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 a DPP are considered and that no particular groups are disadvantaged or excluded more than others.

17. 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

18. These Regulations are intended to encourage the regeneration of small to medium unincorporated businesses and help the economy by allowing partnerships and other legal entities some protection from creditors and to repay their debts over a period of 5 years.

19. A Financial Memorandum was published for the Bankruptcy and Debt Advice (Scotland) Bill and can be found at :

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

August 2014

Annex

Specific Provisions

1. **Regulation 4:** inserts new definitions consequential to these changes.

2. **Regulation 5:** provides that, of the approved categories of money adviser, only a qualified Insolvency Practitioner can act on behalf of a legal person or other entity using the DAS scheme. This regulation also places the responsibility on a money adviser (both for individual and legal persons and other entities) to find a replacement should the money adviser wish to resign. This was previously the responsibility of the DAS Administrator.

3. **Regulation 6:** amends the criteria by which a money adviser may be approved for the purposes of the DAS scheme, by removing the option for the person to be a member of an organisation working towards Scottish National Standards (SNS) accreditation. From 11 December 2014, a person will only qualify if their organisation has achieved accreditation of Type 2 level or above.

4. **Regulation 7:** amends the functions and duties of a money adviser, including to specify additional functions and duties on a money adviser who advises a legal person or other entity.

5. **Regulation 8:** (together with Schedule 1), makes provision for the Common Financial Tool to apply to the current DAS scheme for individuals. This regulation also introduces a requirement for DPPs, under both the current scheme and Business DAS, to include all qualifying debts at the time of application. The definition of debt at Regulation 3 of the DAS Regulations continues to apply, and on-going liabilities will not be considered a debt unless they become "due" and remain unpaid. Regulation 8 also introduces the requirement for an application for a DPP to be intimated to the Office of the Scottish Charity Regulator (OSCR) where the applicant is a charity.

6. **Regulation 9**: amends the information to be included on the DAS Register to include the business name and address.

7. **Regulations 10 to 12:** amend the procedural requirements for application for approval of a DPP. In particular, a legal person or other entity can only apply for a DPP providing for the payment of more than one debt. Regulation 11 amends the DAS Regulations in respect of the residence requirements for legal persons or other entities using the scheme. Regulation 12(2) applies references in the DAS Regulations to "individuals" to debtors in relation to a joint debt payment programme.

8. **Regulation 13:** inserts regulation 22A into the DAS Regulations in order to make specific provision for DPPs entered into by legal persons and other entities. Regulation 22A(2) to (5) set out who is required to consent to an application. Regulation 22A(7) provides for conditions which must be met before a money adviser can issue a declaration that a DPP is viable (namely, that the DPP has a reasonable prospect of completion, all payments due under the DPP can be made within 5 years after the date of application and the debtor continues to trade or otherwise operate).

Regulation 22A(8) and (9) makes provision for the interaction with any individual DPP entered into, or which may be entered into, by individuals involved in the entity. It introduces certain protections for the individuals who consented to the application in relation to debts included in DPP for that business. Those individuals also have to have their information added to the DAS register.

9. **Regulation 14:** amends regulation 23 of the DAS Regulations to provide that where the debtor is a legal person or other entity a request to a creditor for consent must include a declaration of viability.

10. **Regulation 15:** inserts additional standard conditions to be met by legal persons or other entities. The standard conditions include the requirement to declare all assets and restrictions on the sale of non-trading assets during the period of the DPP unless for the benefit of creditors. A further standard condition is that all payments due under the DPP must be made within 5 years after the date of application. Legal persons and other entities are also required to provide notification to their money adviser of any information materially affecting their declaration of viability.

11. **Regulation 16:** amends regulation 33 of the DAS Regulations (effect on a creditor) in consequence of the introduction of Business DAS. In particular it extends the definition of an emergency repair to include a repair to a building used only or principally for the debtors work.

12. **Regulations 17 to 19:** amends the DAS Regulations in respect of variation and revocation of a DPP for programmes entered into by legal persons and other entities. An application for variation may be made by the legal person or by a money adviser, on behalf of the legal entity, and must include a declaration of viability. All payments must still be made within a period of 5 years from the date of application. The grounds for revocation for legal persons include where the format of the legal person changes during the period of the DPP, where a money adviser is unable to make a declaration of viability and where the required consents from those able to consent to the DPP application have been retracted.

13. **Regulation 20:** an offer of composition out of DAS cannot be made by a legal person or other entity.

14. **Regulation 21:** introduces new and amended forms for the DAS scheme.

15. **Regulation 22:** revokes regulation 45 in consequence of the Bankruptcy and Debt Advice (Scotland) Act 2014.

16. **Regulation 23:** includes transitional provisions, to allow the Common Financial Tool to be taken into account in restricted circumstances in relation to DPPs approved before 1 April 2015, and for regulation 6.

17. **Schedule 1:** adds new Schedule A1 to the DAS Regulations. This provides for how the Common Financial Tool (Scotland) Regulations 2014 made under section 5D of the Bankruptcy (Scotland) Act 1985 and section 7(2)(bd) of the 2002 Act apply in relation to the DAS scheme in relation to individuals, in the particular circumstances of DAS.

18. **Schedule 2:** inserts new or amended forms to the DAS Regulations in consequence of the changes to the DAS scheme.