

Draft Regulations laid before the Scottish Parliament under paragraph 2 of schedule 2 of the European Communities Act 1972, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2017 No.

INSOLVENCY

BANKRUPTCY

The Insolvency (Regulation (EU) 2015/848) (Miscellaneous Amendments) (Scotland) Regulations 2017

Made - - - - 2017

Coming into force - - 26th June 2017

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(a) and all other powers enabling them to do so.

In accordance with paragraph 2 of schedule 2 of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation and commencement

1. These Regulations may be cited as the Insolvency (Regulation (EU) 2015/848) (Miscellaneous Amendments) (Scotland) Regulations 2017 and come into force on 26th June 2017.

PART 1

Amendments to primary legislation

Amendment of Insolvency Act 1986 – receivers (Scotland)

2.—(1) The Insolvency Act 1986(b) is amended as follows.

(a) 1972 c.68. Section 2(2) was amended by the Scotland Act 1998 (c.46) (“the 1998 Act”), schedule 8, paragraph 15(3) (which was amended by section 27(4) of the Legislative and Regulatory Reform Act 2006 (c.51) (“the 2006 Act”). Section 2(2) was also amended by section 27(1)(a) of the 2006 Act and by the European Union (Amendment) Act 2008 (c.7), schedule 1, part 1. The functions conferred upon the Minister of the Crown under section 2(2), so far as they are exercisable within devolved competence, were transferred to Scottish Ministers by virtue of section 53 of the 1998 Act.

(b) 1986 c.45.

- (2) In section 51(6) (power to appoint receiver)—
- (a) in the definition of “the EU Regulation”(a) for “the Regulation of the Council of the European Union published as Council Regulation (EC) No. 1346/2000” substitute “Regulation (EU) 2015/848 of the European Parliament and of the Council”(b);
 - (b) in the definition of “court”, for “Article 2(d)” substitute “Article 2(6)”; and
 - (c) in the definition of “insolvency proceedings” for “Article 2(a)” substitute “Article 2(4)”.

Amendment of Bankruptcy and Diligence etc. (Scotland) Act 2007

3.—(1) Section 45 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (effect of floating charges on winding up)(c) is amended as follows.

- (2) In subsection (7)(a) for “EC Regulation” substitute “EU insolvency Regulation”.
- (3) In subsection (8)—
- (a) for the definition of “the EC Regulation” substitute—
““the EU insolvency Regulation” is Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings;”;
 - (b) in the definition of “court”, for “article 2(d)” substitute “Article 2(6)”; and
 - (c) in the definition of “insolvency proceedings”, for “Article 2(a)” substitute “Article 2(4)”.

Amendment of the Bankruptcy (Scotland) Act 2016

4.—(1) The Bankruptcy (Scotland) Act 2016(d) is amended as follows.

- (2) In section 2(1)(b)(iii) (sequestration of estate of living debtor) for “liquidator” substitute “insolvency practitioner”.
- (3) In section 5(d) (sequestration of estate of deceased debtor) for “liquidator” substitute “insolvency practitioner”.
- (4) In section 6(3)(b)(ii), (4)(c)(ii) and (7)(b)(ii) (sequestration of other estates) for “liquidator” substitute “insolvency practitioner”.
- (5) In section 11(3) (debtor application: provision of information) for “liquidator”, each time it occurs, substitute “insolvency practitioner”.
- (6) In section 12(2) (petition for sequestration of estate: provision of information) for “liquidator”, each time it occurs, substitute “insolvency practitioner”.
- (7) In section 13(2)(b)(iii), (3)(b)(iii) and (4)(b)(iv) (further provisions relating to presentation of petitions) for “liquidator” substitute “insolvency practitioner”.
- (8) After section 14, insert—

“14A. Main proceedings in Scotland: undertaking by trustee in respect of assets in another EU member State

(1) This section applies where a trustee in sequestration or acting under a protected trust deed in main proceedings proposes to give an undertaking under Article 36 of the EU insolvency proceedings regulation in respect of assets located in another member State.

(a) The definition of “the EU Regulation” was inserted by S.S.I. 2011/140.
(b) Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (O.J. No. L 141, 5.6.2015, p.19).
(c) 2007 asp 3.
(d) 2016 asp 21. Sections 170(1)(d)(ii), 171(1) and 193 were amended by S.S.I. 2016/398.

(2) In addition to the requirements as to form and content set out in Article 36 the proposed undertaking must contain—

- (a) the heading “Proposed Undertaking under Article 36 of the EU Insolvency Regulation (2015/848)”,
- (b) identification details for the main proceedings,
- (c) identification and contact details for the trustee, and
- (d) a description of the effect of the undertaking if approved.

(3) The proposed undertaking must be delivered to all local creditors^(a) in the member State concerned of whose address the trustee is aware.

(4) Where the undertaking is rejected the trustee must inform every creditor known to the trustee of the rejection of the undertaking as soon as reasonably practicable.

(5) Where the undertaking is approved the trustee must as soon as reasonably practicable send a copy of the undertaking to every creditor known to the trustee with a notice—

- (a) informing them of the approval of the undertaking, and
- (b) describing its effect (so far as they have not already been given this information under subsection (2)(d)).

(6) The trustee may advertise details of the undertaking in the other member State in such manner as the trustee thinks fit.

14B. Main proceedings in another member State: approval of undertaking offered by member State insolvency practitioner to local creditors in the UK

(1) This section applies where a member State insolvency practitioner proposes an undertaking under Article 36 of the EU insolvency proceedings regulation and the secondary proceedings which the undertaking is intended to avoid would be sequestration or a protected trust deed.

(2) A decision on approval of the undertaking by local creditors shall be taken as if it were a decision taken by a company’s creditors to approve a proposed company voluntary arrangement under section 4A of the Insolvency Act 1986^(b).

(3) Without prejudice to the generality of subsection (2), Rules 1.12 to 1.16E^(c) of the Insolvency (Scotland) Rules 1986 apply to that decision.

(4) The member State insolvency practitioner must publish a notice in the Edinburgh Gazette of the undertaking containing—

- (a) the fact that the undertaking was approved,
- (b) the date the undertaking was approved, and
- (c) a description of the effect of the undertaking.”.

(9) In section 15(9) (jurisdiction) for “EC” substitute “EU”.

(10) In section 128 (voting and drawing a dividend) in subsections (5)(b) and (6) for “liquidator” substitute “insolvency practitioner”.

(11) In section 129(8) (surplus to be made over to debtor, successors or assignees subject to the EC insolvency proceedings regulation) for “Article 35 of the EC” substitute “Article 49 of the EU”.

(12) In section 170(1)(d)(iv) and (v) (protected trust deeds - documents to be sent to creditors) for “EC” substitute “EU”.

(a) “Local creditor” is defined in Article 2(11) of the EU Regulation.

(b) Section 4A was inserted by the Insolvency Act 2000, section 2, schedule 2, Part 1, paras 1, 5.

(c) Rules 1.12 to 1.16E were amended by, and Rules 1.14ZA, 1.14A and 1.1.4AA, 1.15A, 1.1.5AA, 1.15B, 1.16A, 1.16B, 1.16C, 1.16D, 1.1.6E inserted by, S.I. 1987/1921, S.I. 2010/688, S.I. 2002/2709 and S.I. 2009/662.

- (13) In section 190(1) (application for conversion of protected trust deed to sequestration)—
- (a) for “liquidator” substitute “insolvency practitioner”;
 - (b) for “Article 37 of the EC” substitute “Article 51 of the EU”; and
 - (c) for “earlier” substitute “secondary insolvency”.
- (14) In section 191 (contents of affidavit required under section 190(2))—
- (a) for subsection (1)(b) substitute—
 - “(b) state that the member State insolvency practitioner believes that the conversion of the protected trust deed into sequestration would be most appropriate as regards the interests of the local creditors^(a) and coherence between the main and secondary proceedings,”; and
 - (b) in subsections (1)(c) and (2), for “liquidator” substitute “insolvency practitioner”;
- (15) In section 192 (powers of Accountant in Bankruptcy on application for conversion to sequestration) in subsection (3)(b), for “liquidator” substitute “insolvency practitioner”.
- (16) In section 207 (member State liquidator deemed creditor)—
- (a) for “paragraph 3 of Article 32 of the EC” substitute “paragraph 3 of Article 45 of the EU”; and
 - (b) for each occurrence of “liquidator” substitute “insolvency practitioner”.
- (17) In the title of section 207 for “liquidator” substitute “insolvency practitioner”.
- (18) In section 208 (trustee’s duty to provide certain notices and copies of documents to member State liquidator)—
- (a) in subsection (1) and (2), for “liquidator” substitute “insolvency practitioner”; and
 - (b) in subsection (3), for “Article 31 of the EC” substitute “Article 41 of the EU”.
- (19) In the title of section 208 for “liquidator” substitute “insolvency practitioner”.
- (20) In section 226 (modification of regulation making powers), for each occurrence of “EC” substitute “EU”.
- (21) In section 228(1) (interpretation)—
- (a) in the definition of “centre of main interests” for “EC” substitute “EU”;
 - (b) in the definition of “creditor”, for “liquidator” substitute “insolvency practitioner”;
 - (c) omit the definition of “the EC insolvency proceedings regulation”;
 - (d) in the definition of “establishment” for “Article 2(h) of the EC” substitute “Article 2(10) of the EU”;
 - (e) after the definition of “establishment”, insert—
 - ““the EU insolvency proceedings regulation” means Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings,”;
 - (f) in the definition of “main proceedings”—
 - (i) for “EC” substitute “EU”;
 - (ii) for “Article 2(a)” substitute “Article 2(4)”;
 - (iii) omit “England and Wales and”.
 - (g) for the definition of “member State liquidator” substitute—
 - ““member State insolvency practitioner” means a person falling within the definition of insolvency practitioner in Article 2(5) of the EU insolvency proceedings regulation appointed in proceedings to which it applies in a member State other than the United Kingdom,”;

(a) “Local creditor” is defined in Article 2(11) of the EU Regulation.

- (h) for the definition of “secondary proceedings” substitute—
- ““secondary proceedings” means proceedings opened in accordance with Articles 3(2) and (3) of the EU insolvency proceedings regulation which are set out in Annex A to that regulation—
- (a) in relation to Scotland, under the heading “United Kingdom”, and
- (b) in relation to another member State, under the heading relating to that member State,”
- (i) in the definition of “temporary administrator”, for “Article 38 of the EC” substitute “Article 52 of the EU”; and
- (j) in the definition of “territorial proceedings”—
- (i) for “Article 2(a)” substitute “Article 2(4)”; and
- (ii) omit “England and Wales and”.
- (22) In section 231 (proceedings under EC insolvency proceedings regulation: modified definition of “estate”), for “EC” substitute “EU”.
- (23) In the title to section 231 for “EC” substitute “EU”.
- (24) In schedule 5 (information to be included in the sederunt book), after paragraph 3, insert—
- “**3A.** Any undertaking given by the trustee approved under Article 36 of the EU insolvency proceedings regulation.”.

PART 2

Amendments to secondary legislation

Amendment of Bankruptcy Fees (Scotland) Regulations 2014

- 5.**—(1) The Bankruptcy Fees (Scotland) Regulations 2014(**a**) are amended as follows.
- (2) In regulation 2(1), after the definition of “member State liquidator” insert—
- ““member State insolvency practitioner” has the meaning given by section 228(1) of the Bankruptcy (Scotland) Act 2016(**b**);”.
- (3) In column 1 of item 21 of Part 2 of the Table of Fees in the schedule (fee for conversion of a trust deed into sequestration) after “liquidator” insert “or member State insolvency practitioner”.

Amendment of Public Services Reform (Insolvency) (Scotland) Order 2016

- 6.** In the Public Services Reform (Insolvency) (Scotland) Order 2016(**c**), in article 15(6)(b), after “Article 37 of Council Regulation (EC) No. 1346/2000 on insolvency proceedings” insert “or Article 51 of Regulation (EU) 2015/848 on insolvency proceedings”.

Amendment of Bankruptcy (Scotland) Regulations 2016

- 7.**—(1) The Bankruptcy (Scotland) Regulations 2016(**d**) are amended as follows.
- (2) In schedule 1 (forms), in form 11 (statement of claim by creditor) note 4, for “liquidator” each time it occurs substitute “insolvency practitioner”.

(a) S.S.I. 2014/227, as amended by S.S.I. 2015/80.

(b) 2016 asp 21 (“the 2016 Act”). That definition is inserted by regulation 4(21)(g) of these Regulations. The Bankruptcy Fees (Scotland) Regulations 2014 apply to sequestrations applied or petitioned for or trust deeds executed after 30th November 2016 by virtue of sections 234(3) and 235(1), (2) and (4) of the 2016 Act.

(c) S.S.I. 2016/141.

(d) S.S.I. 2016/397, amended by S.S.I. 2017/136.

- (3) In schedule 2 (register of insolvencies), section B (protected trust deeds for creditors)—
- (a) for “Council Regulation (EC) No 1346/2000” substitute “Regulation (EU) 2015/848(a)”; and
 - (b) for “Council” each time it occurs substitute “EU”.

Amendment of Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016

8.—(1) The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016(b) are amended as follows.

(2) In regulation 17(3) (conversion of protected trust deed into bankruptcy), for “liquidator” substitute “insolvency practitioner”.

(3) In the schedule (forms)—

- (a) in form 6 (Application for Conversion of a Protected Trust Deed into Bankruptcy)—
 - (i) for “Member State Liquidator” substitute “Member State Insolvency Practitioner”; and
 - (ii) for “Article 37 of the EC Regulation (conversion of earlier proceedings)” substitute “Article 51 of the EU Regulation (conversion of secondary insolvency proceedings)”; and
- (b) in form 7 (Conversion of protected trust deed into bankruptcy: section 192 award), for “Member State Liquidator” substitute “Member State Insolvency Practitioner”.

PART 3

Saving

Saving

9.—(1) The amendments made by regulations 2 to 8 do not apply to proceedings opened before 26th June 2017.

(2) The time at which proceedings are opened is to be determined in accordance with Article 2(8) of Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings(c).

St Andrew’s House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

(a) Regulation (EU) 2015/148 of the European Parliament and of the Council on insolvency proceedings, O.J. No. L 141, 5.6.2015, p.19.
(b) S.S.I. 2016/295.
(c) Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings, O.J. No. L 141, 5.6.2015, p.19.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Insolvency Act 1986 in connection with receivers, the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”), the Bankruptcy (Scotland) Regulations 2016 (“the 2016 Regulations”), and other statutes and secondary legislation to implement Regulation (EU) 2015/848 on insolvency proceedings (O.J. No L 141, 5.6.2015, p.19) (“Regulation (EU) 2015/848”) which replaces Council Regulation (EC) No. 1346/2000.

Relevant parts of Regulation (EU) 2015/848 have effect from 26th June 2017, but these amendments do not apply to insolvency proceedings opened before 26th June 2017 in accordance with Articles 84 and 92 of Regulation (EU) 2015/848.

The EU Regulation aims to provide for the efficient and effective functioning of cross-border insolvency proceedings in the European Union. Information is provided in guidance issued by the Insolvency Service which may be found on the Insolvency Service website, the address of which is <https://www.gov.uk/government/organisations/insolvency-service>, and by the Accountant in Bankruptcy at <https://www.aib.gov.uk/>

The Regulations update the provisions in the 2016 Act and Regulations and those other enactments, including in certain forms. Annex D of Regulation (EU) 2015/848 contains a correlation Table between the corresponding provisions of the EC and EU Regulations.

The main amendments made are to—

- a) replace a consequential reference in receivership law in the Insolvency Act 1986 to the jurisdiction rules on centre of main interests by reference to Council Regulation (EC) No. 1346/2000 on insolvency proceedings;
- b) replace references to Council Regulation (EC) No. 1346/2000 on insolvency proceedings with references to the corresponding provisions of Regulation (EU) 2015/848 for sequestration proceedings by an insolvency practitioner (within the meaning of Article 2(5) of Regulation (EU) 2015/848) appointed in proceedings by virtue of Article 3(1) of Regulation (EU) 2015/848;
- c) replace references in the provisions for conversion of a protected trust deed into a sequestration on the application of a member State insolvency practitioner appointed in another EU member State (formerly “a member State liquidator”) in main proceedings (“member State insolvency practitioner”, “main proceedings” and “secondary proceedings” are defined by reference to the EU Regulation in section 228 (interpretation) of the 2016 Act);
- d) support the recognition of undertakings under Article 36 of the Regulation (EU) 2015/848:—
 - given by trustees in sequestration or protected trust deeds (i.e. in main insolvency proceedings) in respect of assets in other member States where secondary insolvency proceedings could be opened, to require certain additional details to be provided in the proposed undertakings, and for the manner of their notification and advertisement (new section 14A of the 2016 Act);
 - given by insolvency practitioners in main insolvency proceedings in other member States to avoid sequestration or a protected trust deed secondary proceedings – to provide for such an undertaking by local creditors in the UK that is taken in accordance with Article 36(5) of Regulation (EU) 2015/848 as a decision by a company’s creditors to approve a company voluntary arrangement (new section 14B of the 2016 Act);
- e) amend form 11 (creditor claims) in the schedule to the 2016 Regulations for creditors making a claim in the case of a member State insolvency practitioner in applying for sequestration and specifying and vouching the underlying claims for which the practitioner is claiming as a creditor.

No business and regulatory impact has been prepared for these Regulations as no significant change is foreseen to the existing impacts upon business, charities or voluntary bodies.

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