



RESPONSE TO

INFORMAL CONSULTATION ON  
CONSOLIDATED BANKRUPTCY REGULATIONS

ACCOUNTANT IN BANKRUPTCY

## Introduction

- 1 The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents over 21,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK. We have an in-depth knowledge and expertise of insolvency law and procedure.
- 2 ICAS's Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.
- 3 ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all of the implications and that alleged failings within the process are supported by evidence.
- 4 ICAS is pleased to have the opportunity to submit its views in response to the informal consultation issued by the Accountant in Bankruptcy (AiB) on the consolidated Regulations (the Regulations) supporting the introduction of the Bankruptcy (Scotland) Act 2016 (the 2016 Act). We shall be pleased to discuss in further detail with AiB any of the matters raised within this response.

## Response

- 5 We are pleased to note that drafts of the Regulations have been issued for informal consultation prior to laying in the Scottish Parliament. We have previously highlighted that Regulations have been laid before Parliament without the opportunity to comment on the Regulations and to identify any practical issues or to consider whether any unintended consequences may exist. While these are less likely in 'consolidating' existing Regulations, we welcome the inclusive approach which the AiB has taken in bringing forward the Regulations.
- 6 We are supportive of the consolidated approach to the Regulations. We consider that this makes accessing the legislation easier for all stakeholders who require to use the legislation either periodically or on a day to day basis.
- 7 We support the amendment to the approach on how claims in a foreign currency are to be converted in Regulation 22. The approach adopted will be easier to determine and administer for trustees.
- 8 We note that Regulation 26 (Interest on claims in sequestration) has retained the interest rate at 8% per annum. In view of the current economic climate and bank base rates we would suggest that such an interest rate is overly penal, especially in situations where recall of sequestration may apply and the burden of the interest shall be borne by a solvent debtor. The Scottish Law Commission recommended in their report on [Interest on Debt and damages](#) that interest should fluctuate at a statutory rate above Bank of England base rate. They suggested that the statutory rate should be 1.5% above Bank of England base rate.
- 9 If the above approach were to be adopted, we would suggest that regulations would also require to clarify whether or not the interest rate applicable was the interest rate at the date of sequestration or whether this would be variable dependant on any movements in Bank of England base rate during the course of the sequestration. We would suggest that it would be more appropriate for interest to be fixed in relation to the Bank of England base rate at the date of sequestration. Any variation in Bank of England base rate during the sequestration would be ignored making the calculation much more straightforward.
- 10 We call on the AiB and Scottish Government to take the opportunity to address some shortcomings in the existing Regulations. Many of these we previously raised in our response to the regulations laid in Parliament in support of the Bankruptcy and Debt Advice (Scotland) Act 2014 (BADAS). While we welcome changes which have been made in the Regulations, we

consider that there are valuable additional amendments which could be made at this time. These are discussed further in paragraphs 11 to 20 below.

*AiB conflict of interest*

- 11 ICAS remains concerned about the conflicting roles and responsibilities of the AiB as Scottish Government policy advisor, supervisor of debt management/debt relief services and supplier of debt management/debt relief services. This concern was raised previously with the Economy Energy and Tourism Committee of the Scottish Parliament by ICAS and others when the BADAS Bill was being considered. During the Committee's consideration of that Bill our concerns were taken on board and Government assurances were given that these would be addressed through the Regulations. It is our view that the concerns raised by the Committee, ourselves and others were not addressed adequately in the Regulations introduced in support of BADAS.
- 12 Our concerns were also raised when the Economy Energy and Tourism Committee considered the Protected Trust Deeds (Scotland) Regulations 2013 ("the 2013 PTD Regulations") at which time the AiB proposed to establish a Protected Trust Deed Review Board when the Regulations were commenced. At that time, we noted that this group would not address any of the conflict of interest issues as it would have no statutory basis of operation.
- 13 Provisions with The Bankruptcy (Applications and Decisions) (Scotland) Regulations 2016 relating to the carrying out of reviews provide little in the way of safeguards against conflicts of interest. The only safeguard is that the Accountant himself or a staff member involved in an original decision shall be prevented from being involved in a review decision (Regulation 22). This does not adequately address threats such as independence, confidentiality, familiarity, and adequate knowledge amongst others.
- 14 While the 2016 Act provides for the review to be further appealed to the sheriff and this acts as a safeguard against overall injustice, this is a costly route to be taken and a significant barrier to justice to those already in financial difficulty. It therefore has to be hoped that appeals to the court should be rare, but this will only happen if there is trust and confidence in the decision making and review process.
- 15 We acknowledge that the AiB have commenced steps to form a Review Committee, however that group has not yet met or had Terms of Reference agreed. The Review Committee has no statutory backing and is entirely at the discretion of the AiB both in formation and operational ability. It is our view that the Review Committee should be established within the Applications and Decisions Regulations providing it with a statutory basis of operation. The Review Committee should be comprised of persons entirely independent of AiB (or as a minimum as a majority independent of AiB) and who are suitably experienced persons with a knowledge and understanding of bankruptcy or legal matters.

*Inappropriate regulation of money advisers and loss of control over Scottish debt procedures*

- 16 The Regulations transfer control on a practical level over who may operate as a Money Adviser in Scotland to the Money Advice Trust ("MAT"), a charity established in England and Wales, rather than retaining this within the realm of the AiB and its supervisory functions or the regulatory regime of recognised professional bodies under the Insolvency Act 1986.
- 17 The Regulations require all Money Advisers to have a licence to use the Common Financial Statement from MAT. There are no safeguards that MAT is required to provide a licence to approved Money Advisers. In addition, the licencing for the Common Financial Statement is provided at an organisation level, but Money Advisor is an individual status. We understand that there are no intentions for MAT to change their licencing at this time and therefore there is a significant disconnect between the legislative requirements and the legal licencing position.
- 18 We remain concerned that without appropriate safeguards being written into the Regulations there is the possibility of the loss of a licence through one individual's actions within an organisation could result in implications for many individuals.
- 19 We are concerned about the lack of adequate safeguards to ensure appropriate regulation of approved money advisers. In particular, where the draconian measure of withdrawing approved

money advisor status is to be taken by the AiB (Regulation 5(2) of the Bankruptcy (Scotland) Regulations 2016) there is no provision either for notification of the proposed decision or for the right to make representations before the decision is made.

- 20 Our concerns are amplified at this time due to the current ongoing discussion regarding the proposed withdrawal of the CFS and the commencement of a replacement Standard Financial Statement (SFS) where it is unclear whether the SFS can or will be suitable for use as the CFT in Scotland. We are left with the undesirable position in legislation where an unelected and unaccountable body is dictating elements of the Scottish debt management and debt relief framework.
- 21 In our view, the arrangements between MAT and the Scottish Government for the use of the CFS offer inadequate protection to the Scottish debt management and relief legislative framework.
- 22 We have identified a number of more minor or technical amendments which we would suggest to the Regulations. These are detailed further in [Appendix 1](#).

### **31 August 2016**

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## Appendix 1 – Detailed Comments

### Definitions:

BSR 2016 – The Bankruptcy (Scotland) Regulations 2016

PTDR 2016 – The Protected Trust Deeds (Scotland) (Forms) Regulations 2016

BADR 2016 – The Bankruptcy (Applications and Decisions) Regulations 2016

<b>Provision</b>	<b>Comment</b>
Reg 3(2)(b) BSR 2016	<p>We would suggest that Form 20 should not be excepted from the general provision of a manuscript signature sent electronically being permissible. As drafted, Form 20 is the only form which would be issued by a Trustee where an image of a manuscript signature could not be used. We consider that this singular exception is likely to increase the risk of errors being made by staff employed by a Trustee who will be used to using an image of a manuscript signature on all other forms. There does not appear to be any particular reason for this particular form to be excepted.</p> <p>It is unclear whether “sent electronically” restricts the use of an image of a manuscript signature to a situation where the form is then sent electronically or whether this allows images of a manuscript signature to be sent electronically onto a form which may then be printed. The latter is the most desirable position. We would suggest that “sent electronically” could be removed in order to achieve this clarity.</p>
Reg 5 BSR 2016	<p>The regulation refers to “approved money advisers”. This is inconsistent with section 4 of the 2016 Act which defines “money adviser” and also regulation 4 BSR 2016 which also only uses the term “money adviser”.</p>
Reg 5(1)(b) BSR 2016	<p>There is concern that this regulation restricts some IPs/their employees’ ability to act as a money adviser when part of a larger group. Not all IPs are solicitors or chartered/certified accountants and some will operate within a larger financial services business.</p>
Reg 5(2) BSR 2016	<p>There does not appear to be any mechanism for a money adviser to appeal a decision of the AiB to revoke or suspend their status. This would appear to be against natural justice.</p> <p>We note that Reg 5(3) requires the AiB to notify a debtor of the money advisor’s revocation or suspension but there is no requirement for the AiB to notify the money advisor.</p> <p>We would suggest that an explicit requirement for the AiB to notify the money advisor, provisions for appeal of an AiB decision be included and that notification to a debtor should only be carried out after any appeal period has expired or an appeal has been concluded.</p>
Reg 5(3) BSR 2016	<p>It is unclear which debtor or debtors are to be notified. Is this all debtors that the money adviser has advised, only those where an application is in progress and received by the AiB, or to include those where an application has not yet been received? It is unclear whether advice provided prior to revocation can be relied upon by the debtor or not. The regulation should be clearer in its terms and scope.</p>
Reg 10 BSR 2016	<p>We would suggest that consideration be given to amending the time period from 30 days to 1 month. We consider that this is much easier for debtors to understand and be aware of when the Certificate for Sequestration ‘expires’</p>

rather than having to calculate specific dates depending on the time within a month or indeed which month the Certificate has been granted.

- Reg 15(2) BSR 2016 The inclusion of "surplus" means that the regulation could be read such that the contribution is to be set at a level where the debtor's expenditure is allowed twice. The word "surplus" should be removed to ensure the regulation is unambiguous.
- Reg 17(1) BSR 2016 The regulation is applicable to applications by 'any interested person' as provided for by sections 92 or 97 of the 2016 Act. It would not be possible for an application for review or appeal by an 'interested party' to contain or be accompanied by the statement required. The regulation should be reworded appropriately to exclude applications by an 'interested party'.
- Reg 26 BSR 2016 See comments in main response at paragraphs 8 and 9.
- Reg 28 BSR 2016 Section 221 of the 2016 Act provides that regulations may provide for any bond or security "to be taken into account" in determining the outlays of the interim trustee or trustee in sequestration. We would suggest that the regulation therefore should reflect that the premium "must be taken into account..." rather than "may be taken into account..." to give effect to the provision of section 221 of the 2016 Act.
- Sch 1 BSR 2016 There is a general inconsistent use within the forms of "bankruptcy" and "sequestration". For example, Form 24 refer to "Bankruptcy of estate of.." while Form 11 refers to "Sequestration of estate of...". The terminology used should be consistent within legislation.
- Sch 1 BSR 2016 Form 1 We would suggest that the Money Adviser Declaration should include information on the qualification as a Money Adviser. This will not only inform future policy and resources based on evidence of where debtors are obtaining money advice from but would also be consistent with the DAS application form.
- Sch 1 BSR 2016 Form 3 In section 4, we would suggest that a note should be added to the top of this section indicating that the section does not require to be completed where the application is from a partnership which is apparently insolvent.
- The declaration at 4.4(c) refers to notes of the previous page but there are no such notes. This declaration should be removed or corrected to refer to the place where the notes are.
- Sch 1 BSR 2016 Form 4 The Form does not provide the ability to record details of any property which may be rented but not used for business purposes (e.g. rented premises which may have been used for business purposes but where trading has ceased). We would suggest that the question on page 21 of the form be amended to add "rent or" prior to "own" and a table added to record details of any rented property addresses, landlord details, etc.
- Sch 1 BSR 2016 Form 11 We would suggest that the form should request a contact email address for the creditor to facilitate electronic communication.
- We would suggest that details of the creditors bank account (Bank name, account number and sort code) be added to the form.
- We would suggest that a creditor reference number for the debtor/debt be added to the form.
- Both of the above would facilitate the payment of dividends to creditors and reduce the number of dividend payments being returned to trustees which subsequently may have to be consigned.

The text against item 2 on page 2 of the form (amount of the debt) could be amended to remove reference to showing separately the amount of VAT and whether VAT is being reclaimed from HMRC. VAT rules on bad debt are such that this information is no longer required for the purposes of the sequestration.

Sch 1 BSR 2016  
Form 12 With the introduction of partial authorisation, we would suggest that IPs should attach to the form a copy of their authorisation and also their bond in order that the AiB is able to verify that the IP is properly authorised to act as a Trustee.

If a copy of the authorisation were to be attached then, we would suggest that the words "Authorising professional body (or other authority)" could be removed as this will be evident from the authorisation. Alternatively, the wording should be replaced with "Authorising Recognised Professional Body". This reflects the terminology within s390A and s391 of the Insolvency Act 1986. Authorisation by competent authorities was repealed by the Deregulation Act 2015 with effect from 1 October 2015 (subject to transitional provisions) and ceases on 30 September 2016.

Sch 1 BSR 2016  
Form 14 Section 66 of the 2016 Act makes provision for a trustee to be replaced in more than one sequestration whereas section 69 of the 2016 Act makes provision for the trustee to resign (or where he dies in office). Both sections are in similar terms and have the same practical effect. We note that applications under s69 are dealt with through Form 14 whereas an application under s66 is dealt with under BADR 2016. We would suggest that by redesigning Form 14 this form would be able to be used in both circumstances. Having only 1 application process covering both scenarios within the one set of regulations would be more efficient and aid accessibility to legislation.

Sch 1 BSR 2016  
Form 15 We would suggest that to aid clarity, that Note 1 of the form could be removed and replaced with the form commencing with "To: [Insert debtors name]"

We would also suggest that Note 2 does not reflect the requirements of legislation and in particular the requirements of s89(9). This requires notice to be given to the debtor and a certified copy to be given to the Register of Inhibitions after the copy has been sent to the debtor. Note 2 states that the debtor is to receive a copy of the certified copy given to the Register of Inhibitions which creates a circular argument. We would suggest that for clarity after the first sentence in Note 2 the remainder of the note should be replaced with "The copy should be certified at the foot of the last page of the copy by inserting the words "Certified as a true copy" and signed by the trustee."

On page 2, the words "The Trustee certifies" is at odds with the style used in the first part of the form (third person rather than first person). We would suggest that this be replaced with "I certify" and that other references to "trustee" within the following statements are amended to the first person where appropriate.

Sch 1 BSR 2016  
Form 19 The form would be more appropriately entitled "Debtors payment instruction to employer or third person" as in relation to a third person the instructor is not an employee.

It would also be beneficial to rename the field "Employers reference number" to "Employer or third person reference number" to allow a third person reference to be included if appropriate.

A field for the trustee's case reference should also be added to the section containing the trustee's bank account details. The text above this makes reference to quoting the bankruptcy reference number but in practice it will be an internally generated code by the trustee which will be used to match the payments received. The text should also be amended accordingly.

- Sch 1 BSR 2016  
Form 20 and Form  
21 A field for the trustee's case reference should be added to the section containing the trustee's bank account details. The text above this makes reference to quoting the bankruptcy reference number but in practice it will be an internally generated code by the trustee which will be used to match the payments received. The text should also be amended accordingly.
- Sch 1 BSR 2016 We consider that a form should be provided to allow a Trustee to notify a variation in a deduction from income to an employer or third person. This would be used where a variation is required after a Form 20 has been submitted by a Trustee to an employer or third person.
- Sch 1 BSR 2016  
Form 22 The final field on the form (Court in which application made) suggests that the application has already been made when the notice is given. As notice requires to be given prior to the application being made we would suggest that the field be amended to read "Court in which the application will be made".
- Similarly, the field "Date of application" should be removed as it should not be possible to complete that field where notice is to be given prior to the application being made.
- We would suggest that provision also be made within the form for it to be signed by the trustee.
- Sch 1 BSR 2016  
Form 28 Reference to "Insolvency practitioner" in the form is inconsistent with the majority of other forms. We would suggest that "Trustees name" be used to ensure consistency and is more appropriate. This would also cover the situation where the Accountant in Bankruptcy is the trustee and therefore would also enable the 'delete as appropriate' option to be removed.
- Sch 1 BSR 2016  
Form 29 Reference to "Insolvency practitioner" in the form is inconsistent with the majority of other forms. We would suggest that "Trustees name" be used to ensure consistency and is more appropriate.
- Statements (iii) and (iv) make reference to Form 10 when this should refer to Form 29
- Sch 1 BSR 2016  
Form 31 Reference to "Insolvency practitioner" in the form is inconsistent with the majority of other forms. We would suggest that "Trustees name" be used to ensure consistency and is more appropriate.
- It is unclear what detail is required to be provided in respect of creditors. We would suggest that perhaps a table be inserted with column headings as appropriate (Name, address, reference, amount claimed, etc.) to make it clear what information is required to be provided.
- We would suggest that it would be useful for further information to be provided on the form which has been ascertained during the course of enquiries and would be necessary for the AiB to administer the case going forward. This would include for instance details of former addresses of the debtor, potential assets or assets abandoned, the trustee's claim for time costs/outlays (s142(6)(c)), etc.
- Sch 1 BSR 2016  
Form 32 We would suggest that "authority to resign" is only applicable in respect of the application (i.e. the request). Form 32 is notification of the granting of the effectual resignation. We would therefore suggest that the form would be more appropriately entitled "Notice granting trustees resignation from office" and the words "authority to resign office" above the debtors details be deleted and the words "the resignation from office of" be added after "grant" in line 1.



Sch 1 BSR 2016 Form 34	The final paragraph prior to the signature makes reference to section 196B. This should be section 196.
Reg 6 BADR 2016	The regulation does not provide a timescale within which the AiB is required to make a decision in respect of an application. We would suggest that it would be appropriate to include this. We would suggest that a period of 14 days after the expiry of the period within which representations can be made or where further evidence is required to be submitted by would be appropriate.
Reg 6(2)	<p>It is not possible to send a copy of an application before the actual application is made. It is suggested that the word “before” is replaced with “at the same time”.</p> <p>It does not appear to add to the initial application process for a copy of the application to be provided to a person who is only able to seek a review or appeal the application. We would suggest that reg 6(2)(a)(iii) should be removed.</p>
Reg 6(12) BADR 2016	There are practical difficulties in identifying the principal office of a partnership. There is no requirement in law for a partnership to designate or register such a place and therefore it is unclear in many situations what is the principal office. Is this the place where most partners are located, most employees work, the greatest turnover is generated, etc. etc. It would suffice for the application to be delivered to any place of business of the partnership.
Reg 7(4) BADR 2016	The Accountant should consider all applications based on the evidence submitted. It is not appropriate to refuse to consider an application on the basis that the evidence or information submitted is considered insufficient. An appropriate course of action is to consider the application and decide against it if there is insufficient evidence or information.
Reg 8(1) BADR 2016	It is our view that the exclusion of review applications is inappropriate. It is more appropriate in relation to a review process perhaps more than in relation to an initial application that there should be an opportunity to attend a hearing, etc.
Reg 11 BADR 2016	The regulation does not specify how quickly the Accountant requires to make a decision after the expiry of the period where written submissions may be made. We would suggest that provision is made to ensure that such decisions are made either “without delay” or within say “two business days”.
Reg 14(2)(a) BADR 2016	We note that no timescale is stated within which the decision of the AiB should be notified. We would suggest that provision should be included for the AiB to notify their decision within 7 days of the decision being made to be consistent with regulation 14(2)(b).
Reg 18 and 19 BADR 2016	We would suggest that the inclusion of a timescale within which a decision should be notified should be included. We would suggest that any decision of the AiB should be notified within 7 days of the decision being made.
Reg 22 BADR 2016	See comments in main response at paragraphs 13 to 15.
Form 1 BADR 2016	<p>Provision should be included within the form for details of the applicant’s representative to be provided (Reg 4(2) provides).</p> <p>We would also suggest that “the use of “craves” and “Plea(s) in law” is inappropriate terminology and would not be readily understood by lay applicants such as many debtors or creditors. We would suggest that “craves” be replaced with “requests”. We would suggest that “Plea(s) in law” should be replaced with “Legal basis upon which the order(s) sought are based” or similar.</p>

Sch 1 PTDR 2016	We would suggest that the opportunity is taken to remove form numbering containing A, B, etc. For example, Form 1A should become Form 2, Form 1B should become Form 3, etc. with subsequent forms renumbered accordingly.
Sch 1 PTDR 2016	We consider that a form should be provided to allow a Trustee to notify a variation in a deduction from income to an employer. This would be used where a variation is required after a Form 4B has been submitted by a Trustee to an employer.
PTDR 2016 Form 1A	<p>Within the debtor's declaration on page 1, it is suggested that this is re-worded as it currently refers to obtaining the secured creditors consent to excluding the dwelling-house from the draft trust deed. The consent is of course required to exclude the dwelling-house from the (actual) trust deed.</p> <p>It is suggested that this is amended to read "...secured creditor's consent to exclude the dwelling-house from a trust deed for the benefit of my creditors, a draft of which is attached."</p>
PTDR 2016 Form 2	<p>We would suggest that details of the creditor's bank account (Bank name, account number and sort code) be added to the form.</p> <p>We would suggest that a creditor reference number for the debtor/debt be added to the form.</p> <p>Both of the above would facilitate the payment of dividends to creditors and reduce the number of dividend payments being returned to trustees which subsequently may have to be consigned.</p>
PTDR 2016 Form 3	<p>We would suggest that it is more appropriate to refer in Part 1 to Trustee's firm rather than company. (consistent with for example Form 4A)</p> <p>We would suggest that provision be made within the form for 'Other realisations' to take account of either third party payments, realisation of shares, investments or intellectual property (non-moveable assets), etc. This would require inclusion in the trustees fees section (% of asset realisation) as well as the actual realisation expected.</p> <p>It is unclear what is meant by "completed" – is this the expected date of the debtor's discharge or the trustee's discharge. It would be clearer to express this in such terms.</p>
PTDR 2016 Form 4	<p>After the date of the trust deed "conveying" should be "conveyed"</p> <p>It is unclear what is meant by "completed" – is this the expected date of the debtor's discharge or the trustee's discharge. It would be clearer to express this in such terms.</p> <p>The Note 4 requirement is inconsistent with the requirements of SIP 7 and reduces transparency to creditors. The asset realisations should be included gross with any costs of realisations or secured creditor payments shown within expenditure as relevant.</p>
PTDR 2016 Form 4A, 4B and 4C	The form refers to the amount to be deducted "on each pay day". This does not clearly express the expected frequency and amount such that the contributions received are in accordance with the contributions assessed using the Common Financial Tool.
PTDR 2016 Form 6	Included in the Statement is that the trust deed has "ceased to be operative". This is not terminology commonly used in relation to trusts generally or in relation to trust deeds. We would suggest that the statement is amended to either refer to the trust having "terminated" or that "administration of the trust

deed has been completed in all aspects other than relating to the discharge of the trustee.”

PTDR 2016 Form 7 We note that reference is made to “estate(s)”. It does not seem possible to have multiple estates in relation to a single debtor covered by a trust deed and therefore the form should simply refer to “estate” as is the case with the other forms.

We would suggest the opportunity is taken to modernise language used within the form, an objective which is consistent with the purpose of consolidation within the 2016 Act. We would suggest that “Averment” (a term which is not used elsewhere) be replaced with “Statement” or similar.