Response of the Insolvency Practitioners Association
to the FCA Consultation Paper
"Consumer Credit – proposed changes to our rules and guidance"

Closing date: 06 May 2015

Overview and general remarks

The comments and opinions expressed below represent the views of the IPA's Personal Insolvency Committee, a committee comprised of practitioners with particular expertise in the area of personal insolvency, and are not intended to reflect the opinion of each individual and firm member of the Association (who remain at liberty to express their own views within their responses to this consultation).

It is noted that whilst peripheral to the work of insolvency practitioners, a large number of the consultation questions posed are not directly relevant to the ability of insolvency practitioner to properly perform their statutory functions. Therefore, we have responded to only those questions where the subject matter is considered to be of particular relevance or concern.

Response to consultation questions

Q18. Do you have any comments on our other proposals relating to debt?

Debt adjusting and debt counselling exclusion for advocacy and litigation service providers (and by analogy, Insolvency Practitioners)

We note the proposed extension to the ability of advocates to provide debt counselling in the absence of direct FCA authorisation. We are not opposed to this revision, however, would raise the related issue of the exclusion currently afforded to Licensed Insolvency Practitioners and how these exclusions contrast and compare.

An issue of considerable concern to the insolvency profession is that a Licensed Insolvency Practitioner may not recommend that a debtor file for their own bankruptcy, unless they are also authorised by the FCA. This is as a result of the "reasonable contemplation" requirement within the drafting of the current exclusion for Insolvency Practitioners.

To elaborate: In England, Wales and Northern Ireland (unlike in Scotland), a debtor may not select their own Trustee in Bankruptcy. The administration of the bankrupt's estate will either be performed by the Official Receiver, or a Trustee will be selected by creditors, or on a rota basis from amongst Licensed Insolvency Practitioners operating within the Official Receivers' rota area. On which basis, whilst a Licensed Insolvency Practitioner is the only person (other than the Official Receiver) who is qualified to act as Trustee in Bankruptcy, they cannot be said to be acting in "reasonable contemplation" of their own appointment when discussing the option of bankruptcy with an indebted individual, as they may not be subsequently appointed.

It is clearly of considerable concern to Insolvency Practitioners, who feel strongly that this fetters their ability to properly advise debtors and devalues their status as licensed professionals. It also means those less qualified and experienced in bankruptcy matters (such as Money Advisers) are better placed to advise a debtor to file for their own bankruptcy than the very persons who are professionally qualified to take an appointment as Trustee.

Similarly, the proposed changes to the exclusion for advocates will enable a High Street solicitor with little or no insolvency training or experience, to advise (and go so far as to assist with the preparation of a bankruptcy petition), when they are not themselves qualified to act as a Trustee.

Given the potentially very serious consequences that a bankruptcy may have for both the debtor and their family, we would suggest that it would be far more appropriate for such advice to be delivered by those persons who are licensed, insured and regulated and possess the highest levels of knowledge and experience as to the likely consequences of bankruptcy in the particular circumstances of the case.

A number of our practitioners work within large "free to client" debt solution providers (e.g. StepChange Debt Charity and PayPlan). They report that where a debtor is found to be unsuitable for an IVA, the debtor's 'journey' through advice provision may be adversely affected by having to be passed between departments. This is because the Licensed Insolvency Practitioner within the IVA operation is unable to advocate bankruptcy, in appropriate cases. This is a cause for concern and seems unlikely to be in the interest of the consumer to be passed back and forth in this way.

Of even greater concern is that this anomaly potentially exposes debtors to an unnecessary risk of consumer detriment in that the Insolvency Practitioner from whom they have sought assistance may not necessarily be able to provide tailored advice about the relative advantages and disadvantages of bankruptcy versus IVA (and their respective potential impact upon the debtor). Since the conclusion of the Group Consumer Credit Licensing regime, Insolvency Practitioners may no longer explicitly advocate bankruptcy where, taking into account the debtor's individual circumstances, they have formed the professional opinion that it is the most appropriate course of action. However, they remain at liberty to advocate an IVA. This is clearly unsatisfactory. It also effectively means that debtors are potentially being denied access to professional advice (which they must then obtain from potentially less qualified sources).

This also creates and undesirable tension with prevailing insolvency regulation (Statement of Insolvency Practice 3), which requires the practitioners to ensure *"the debtor is provided with an explanation of all the options available, the advantages and disadvantages of each, and the likely costs of each so that the solution best suited to the debtor's circumstances can be identified. This explanation should be confirmed to the debtor in writing."*

We would like to open a dialogue with the FCA and Treasury to see if a position can be reached whereby a Licensed Insolvency Practitioner may recommend bankruptcy, where they consider it to be in the debtor's interests in order that they may properly discharge their functions and provide the best possible advice to their debtor clients, without the burden of dual regulation. This is would be desirable for debtors and Insolvency Practitioners alike, and consistent with the principle of regulation to which we subscribe.

One option may be to extend the scope of the exclusion from FCA regulation to incorporate when the IP is acting in reasonable contemplation of their appointment, ***or that of the Official Receiver***. Alternatively, were the debtor able to nominate their Trustee in Bankruptcy (as they may in Scotland), this would potentially bring the advising insolvency practitioner within the scope of "reasonable contemplation". These are merely suggestions and other options may exist, which we would be happy to explore.

Q.23 Do you agree with our initial assessment of the impacts of our proposals on the protected groups? Are there any potential impacts we should consider?

The vast majority of our IPs (around 75% of practitioners, according to our most recent analysis), deal with small numbers of personal debtors by providing high quality, locally delivered professional services. Many of these practitioners operate within micro-businesses themselves. We believe that the dual regulation is unnecessarily burdensome and a hindrance to the proper performance of their functions. However, the effect of the current drafting of the Regulated Activities Order and Perimeter Guidance, (whether by intentional or otherwise) is to impose the burden of dual regulation on them, or alternatively, to force them to withdraw from personal insolvency advice provision, as we understand many have now done.

It cannot be in the interest of consumers to deny them access to professional assistance as a result of deficient drafting and we urge the FCA to consider a revision to the current term of the exclusion for Insolvency Practitioners.

About the IPA

The Insolvency Practitioners Association is a membership body recognised in statute for the purposes of authorising Insolvency Practitioners under the Insolvency Act 1986 and Insolvency (Northern Ireland) Order 1989. It is the only recognised professional body to be solely involved in insolvency and for over fifty years the IPA is proud to have been at the forefront of development and reform within the profession.

The IPA has approximately 2,000 members, of whom approximately 550 are currently licensed insolvency practitioners. In addition to its recognition under the Insolvency Act for the purpose of licensing IPs, the IPA is also a Competent Authority approved by the Official Receiver for the purpose of authorising intermediaries to assist with debtors' applications for Debt Relief Orders.

The IPA currently licenses approximately one third of all UK insolvency appointment takers, who are subject to a robust regulatory regime, applied by the IPA's dedicated regulation teams carrying out complaints handling, monitoring and inspection functions. Additionally, the IPA conducts inspection visits of those appointment-takers licensed by the Law Society (Solicitors Regulation Authority), one of the other recognised professional bodies under the Insolvency Act. The IPA also undertakes monitoring visit work for the Debt Resolution Forum, a membership body which sets standards for its members when involved in providing non-statutory debt solutions to insolvent individuals (such as Debt Management Plans), and for the Royal Institution of Chartered Surveyors under a joint voluntary regulation scheme for registered property receivers.

The IPA has a longstanding and continuing commitment to improving standards in all areas of insolvency (and related) work. It was the first of the recognised bodies to introduce insolvency-specific ethics guidance for IPs, and the IPA continues to be a leading voice on insolvency matters such as the development of professional standards, widening access to insolvency knowledge and understanding, and encouraging those involved in insolvency case administration and insolvency-related work to acquire and maintain appropriate levels of competence and skills.

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