GUIDANCE FOR INSOLVENCY PRACTITIONERS ON THE INTERACTION BETWEEN IP AND FCA REGULATION

The Insolvency Practitioners Association (IPA) is a regulator of work undertaken by licensed Insolvency Practitioners (IPs) under the Insolvency Act 1986, as amended, and is identified as such in the Act as a Recognised Professional Body (RPB) for this purpose. Regulated work in the context of dealing with consumers includes acting as Nominee and/or Supervisor of an Individual Voluntary Arrangement (IVA), Trustee in bankruptcy, or in Scotland Trustee of a Trust Deed, Protected Trust Deed or sequestration.

When responsibility for the regulation of activities relating to consumer credit was taken over from the Office of Fair Trading (OFT) by the Financial Conduct Authority (FCA) on 1 April 2014, the requirements regarding consumer credit authorisation for Insolvency Practitioners (IPs) changed.

Historically, IPs routinely provided advice to potential clients about the options that existed for dealing with their debts. In some cases, this would be as a precursor to their own appointment as Nominee, but in many instances, did not result in an appointment (for instance, as the practitioner did not consider an IVA to be the appropriate solution). Many such consultations were conducted on a pro bono basis. The individuals may have sought advice directly from the IP, or in some instances, been referred to them by a contact within the business community. In more recent years, there has been a marked growth in IPs receiving leads in larger numbers from businesses specialising in their generation, having collected information about potential IVA clients.

In undertaking this advisory work, many IPs relied on group consumer credit licensing schemes operated by their insolvency regulators, thereby avoiding the need to seek authorisation individually, though some (mainly those dealing with high volumes of personal insolvency cases) held their own licenses obtained directly from the OFT.

Since 1 April 2014, IPs must either seek direct authorisation from the FCA under the Financial Services & Markets Act 2000 (FSMA) regime if they wish to provide the full spectrum of advice services, or alternatively, operate within the boundaries of a more limited statutory exclusion which is afforded to them.

The ***exclusion*** for IPs operates such that where IPs are giving advice as an Office Holder (i.e. acting as an IP in respect of a formal appointment under the Insolvency Act 1986) or in the context of their pre-appointment obligations, and are doing so in *reasonable contemplation* of acting in a formal capacity[1], they and their firms[2] may provide debt counselling, debt adjusting and credit information services outside of the FCA regime. Their RPBs regulate the activities they conduct within this exclusion, and the advice they give is not considered to be activity regulated under the FSMA (provided they act within the parameters of the exclusion afforded to them).

These measures avoid duplication in regulation, and assist the many IPs who exclusively conduct insolvency appointments. However, IPs who wish to offer broader advice services or offer non-statutory solutions themselves (including informal negotiations on behalf of consumers), will be conducting regulated consumer credit activities which require direct FCA authorisation. It also raises questions

[1] Paragraph 52 of the Schedule to the Financial Services and Markets Act 2000 (Exemption) Order 2001, as amended by The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013
[2] Article 3(1) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, as amended by The Financial Services and Markets Act 200 (Regulated Activities) (Amendment) Order 2014

around upon whom an IP can reasonably rely in terms of the advice or other work conducted by others prior to the insolvency appointment.

Additionally, some membership bodies (Designated Professional Bodies (DPB)) operate schemes that permit certain of their members or firms to give advice under arrangements which *exempt* (as distinct from *exclude*) them from the need to seek direct FCA authorisation. However, that will only apply in circumstances where the provision of such advice is incidental to their main professional activities. The advice those professionals or firms give (e.g. accountants not engaged in insolvency practice) is regulated under the FSMA by the DPB, rather than by the FCA directly.

Our discussions with the FCA confirm that IPs are highly unlikely to benefit from such an exemption in view of the "incidentality" test, and so should consider whether the nature of the work they wish to undertake necessitates their applying for FCA authorisation (where they wish to provide a full range of regulated advice activities), or whether they wish to undertake a more limited advisory role, specifically related to their duties, or prospective duties, as an Office Holder. In formulating that view, practitioners should consider the limitations of the exclusion currently afforded to them, as described below.

Practitioners must also be mindful of the requirements placed upon them by the Ethics Code with regard to the acquisition of work, prohibition on the payment for the introduction of insolvency appointments and the requirements where they intend to rely on the advice or work of another.

FAQs WHEN WORKING WITHIN THE IP EXCLUSION AND THE ETHICS CODE

To assist IPs and members generally and facilitate best practice and compliance with the legislation, we have produced a set of twenty questions and answers designed to cover many of the issues that IPs have raised since the introduction of the new regime.

1. What is "debt adjusting"?

This category of regulated activity may be encountered by IPs if they are seeking to negotiate on behalf of a client. Debt adjusting is defined as a regulated activity of the kind specified in article 39D of the Regulated Activities Order:

Debt adjusting

39D.—(1) When carried on in relation to debts due under a credit agreement—
(a) negotiating with the lender, on behalf of the borrower, terms for the discharge of a debt,
(b) taking over, in return for payments by the borrower, that person's obligation to discharge a debt, or
(c) any similar activity concerned with the liquidation of a debt,

is a specified kind of activity.

(2) When carried on in relation to debts due under a consumer hire agreement—
(a) negotiating with the owner, on behalf of the hirer, terms for the discharge of a debt,
(b) taking over, in return for payments by the hirer, that person's obligation to discharge a debt, or
(c) any similar activity concerned with the liquidation of a debt,

is a specified kind of activity

2. What is "debt counselling"?

This is the category of regulated activity most likely to be encountered by IPs when performing their pre-appointment functions. Debt counselling is defined as a regulated activity of the kind specified in article 39E of the Regulated Activities Order:

Debt Counselling
39E.—(1) Giving advice to a borrower about the liquidation of a debt due under a credit agreement is a specified kind of activity.

(2) Giving advice to a hirer about the liquidation of a debt due under a consumer hire agreement is a specified kind of activity.

IPs should have regard to the FCA's Perimeter Guidance (PERG 17.7) on what constitutes 'debt counselling'.

3. What are "credit information services"?

This category of regulated activity may be encountered by IPs when advising a client as to the potential consequences of entering into a formal insolvency or other debt solution. Providing credit information services is defined as a regulated activity of the kind specified in article 89A of the Regulated Activities Order:

Providing credit information services

89A.—(1) Taking any of the steps in paragraph (3) on behalf of an individual or relevant recipient of credit is a specified kind of activity.
89A.
(2) Giving advice to an individual or relevant recipient of credit in relation to the taking of any of the steps specified in paragraph (3) is a specified kind of activity.

(3) Subject to paragraph (4), the steps specified in this paragraph are steps taken with a view to—
(a) ascertaining whether a credit information agency holds information relevant to the financial standing of an individual or relevant recipient of credit;
(b) ascertaining the contents of such information;
(c) securing the correction of, the omission of anything from, or the making of any other kind of modification of, such information;
(d) securing that a credit information agency which holds such information—
(i) stops holding the information, or
(ii) does not provide it to any other person.

4. When is an insolvency practitioner excluded from the requirements of FCA authorisation?

Where an IP is giving advice as an Office Holder, or in the context of their pre-appointment obligations and is doing so in *reasonable contemplation* of acting in a formal capacity, they and their firms may provide debt counselling, debt adjusting and credit information services outside of the FCA regime.

Further exclusions in respect of other regulated activities exist when acting as an Office Holder pursuant to article 72H of the Regulated Activities Order. Practitioners in any doubt about these should seek specialist advice.

5. Where IPs advertise or use other forms of marketing to attract potential IVA clients, must they comply with FCA requirements?

Whist the precise requirements placed upon those directly authorised by the FCA do not directly apply (CONC 3), practitioners should be mindful of the Ethics Code requirements contained in paragraphs 65 – 69.

Practitioners should be satisfied that advertising and other forms of marketing has been fair and not misleading, avoids unsubstantiated or disparaging statements and complies with relevant codes of practice and guidance in relation to advertising. The practitioner is responsible for ensuring that third parties they use follow this guidance also.

6. Whose work does the IP exclusion cover?

The exclusion is framed to cover the practitioner themselves and work conducted by *their firm* in connection with their acting as an Office Holder or in reasonable contemplation of them becoming so.

Consequently, it is unlikely that the exclusion would extend to the work of a sub-contractor, agent or other third party supplier of services as neither the practitioner (nor their firm acting upon the practitioner's behalf) can divest themselves of responsibility for operating within the parameters of the exclusion and they remain, therefore, responsible for exercising appropriate levels of control over excluded activities.

7. Professional referrals: Can an IP accept a referral from an IFA, solicitor or accountant who may have provided initial debt counselling services to the client?

It will ordinarily be acceptable for a practitioner to assume that a regulated professional or exempt professional has acted within the parameters of their regulatory infrastructure, unless they have some reason to believe otherwise.

The IP will remain responsible for ensuring that their own work, or that of their firm, does not exceed the parameters of the exclusion and, in the event that an IVA is proposed, that general requirements of Statement of Insolvency Practice (SIP) 3.1 are met. Practitioners are also reminded about the general prohibition on the payment for the introduction of insolvency appointment contained in paragraph 63 of the Ethics Code.

8. Lead introducers: Can an IP use a third party to provide initial advice services and/or collate information about a potential client?

Paragraph 53 of the Ethics Code provides that when an insolvency practitioner intends to rely on the advice or work of another, the Insolvency Practitioner should evaluate whether such reliance is warranted. The Insolvency Practitioner should consider factors such as reputation, expertise, resources available and applicable professional and ethical standards.

According to the FCA's Perimeter Guidance (PERG 17.7), where a person uses direct marketing and other forms of advertising (for example, on websites promoted on search engines) and cold calling, to gather personal information from debtors, which is then sold on to providers of debt advice it is not necessarily debt counselling if it does not involve advice to debtors about the liquidation of debts due.

However, a person providing such referrals will be debt counselling if during the course of communicating with a debtor he makes a recommendation to the debtor as to how he might liquidate, (in the language of the Perimeter Guidance) his consumer credit debt. (N.B. In this context, "liquidate" refers to the attempted resolution of the debt problem, as opposed the sense in which IPs will be more accustomed to using it.)

It is a criminal offence pursuant to S.19 FSMA for a person to carry out a regulated activity (such as debt counselling) unless authorised or exempt, or (in the case of an IP) subject to and operating within the limited scope of the exclusion. It follows that where the activity conducted by the third party is one which requires direct FCA authorisation, it would not be appropriate for the IP to procure such work from a party that was not duly authorised (or exempt). Doing so may itself amount to an offence and may also be a breach of the fundamental principle of professional behavior.

It will be incumbent upon IPs to ensure that any services they use meet expected legal and regulatory standards. Where an IP relies upon the advice or work of an FCA authorised third party, it is reasonable for them to assume that that party is acting in accordance with the prevailing regulation, unless they have reasons to believe otherwise. Where they utilise the services of parties not so authorised, the IP assumes an additional responsibility (and risk).

Paragraph 13(a) of SIP 3.1 requires that the insolvency practitioner ensures the debtor has had, or receives, the appropriate advice in relation to an IVA. The nature and scope of that initial advice is set out in paragraph 12. Where a supplier of packaged information has not provided the debtor with advice (for instance, by virtue of their not being appropriately authorised to do so), the responsibility will fall upon the insolvency practitioner to ensure compliance with this requirement and to appropriately document it.

In all cases, the IP will remain responsible for ensuring that their own work, or that of their firm, does not exceed the parameters of the exclusion and that the general requirements of SIP 3.1 are met.

In all cases, payments to third parties should reflect the value of the work undertaken and practitioners are also reminded about the general prohibition on the payment for the introduction of insolvency appointments contained in paragraph 63 of the Ethics Code. Practitioners may be required to evidence the value of the work undertaken by a third party and an inability to do so may constitute misconduct, to which sanctions may be applied.

9. When assisting a potential IVA client, in reasonable contemplation of an insolvency appointment, how does an IP fulfil their SIP 3.1 obligations without exceeding the scope of the IP exclusion?

The information and explanations provided to the debtor should set out clearly the advantages and disadvantages of each available option (SIP 3.1 paras 8(a) and 12(e).) The practitioner must also ensure that sufficient information is obtained to make a preliminary assessment of the solutions available and their viability (SIP 3.1. para 12(b)).

After this information exchange has taken place, what further recommendations or advice the practitioner can provide within the terms of the exclusion will be dependent upon any conclusion reached as to the solution best suited to the debtor's circumstances and the debtor's preferred option.

It is acknowledged that during the course of this information exchange, there may be some fluctuation in the likelihood of an Insolvency Act appointment resulting. IPs should consider the FCA's Perimeter Guidance (PERG 17.5 in particular) on the difference between information and advice to avoid straying beyond the parameters of the exclusion. It should be noted that neither SIPs 3.1 nor 3.3 contain a requirement that practitioners *recommend* a particular solution, and the choice of solution should be *"the debtor's preferred option"*.

a) Where an IVA has been identified as the debtor's preferred option:

In such circumstances, there remains a reasonable contemplation that there will be a formal Insolvency Act appointment, and the exclusion will continue to be of application, through the Nominee and Supervisor stages. The practitioner may continue to advise and provide further recommendation, information or explanations as necessary throughout the course of the appointment.

b) Where a practitioner considers that an IVA is not the solution best suited to the debtor's circumstances:

In such circumstances, there will no longer be a reasonable contemplation of an insolvency appointment, (unless the debtor has indicated that an IVA remains their preferred option, notwithstanding the information and explanations with which they have been provided – see above).

Whilst it is a SIP 3 requirement to set out the advantages and disadvantages of all of the available options, the IP may not make a specific recommendation as to the solution best suited to the debtor's circumstances. They may, however, signpost the debtor to an FCA authorised provider who can advise them about the possible alternatives. [See below re: signposting]

Members have highlighted the tension between the provision of *"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"* and the providing of a recommendation which may exceed the scope of the IP exclusion. This may be particularly problematic in circumstances where one solution (such as bankruptcy) produces demonstrable advantages to the debtor over the other available alternatives.

Practitioners should carefully consider the wording they use to ensure that balanced information is provided to the debtor about all of their available options, whilst being mindful that, unless FCA Authorised, they may not specifically recommend a solution where there is no reasonable contemplation of their appointment as the Office Holder (such as Trustee in bankruptcy).

10. Can an IP advise that bankruptcy is the most appropriate course of action, given that they will be unable to take the appointment themselves?

No – not unless they are FCA authorised. The IP cannot go as far as recommending that bankruptcy is the most appropriate alternative as this would constitute debt counselling and would be outside the scope of the IP exclusion. Whilst this is a matter upon which the IPA has made representations to HM Treasury and the FCA, it is important that practitioners operate within the prevailing legislative framework unless or until it is changed.

However, an IP is likely to still be acting within the scope of the 'pre-appointment advice' element of the IP exclusion where he or she advises that an IVA is not the most appropriate solution, suggests that the debtor consider all other potential debt solutions, with the assistance of an FCA authorised advisor. [See below re: signposting]

11. Can an IP negotiate directly up the debtor's behalf, as an alternative to proposing a formal IVA?

No - not unless they are FCA authorised. The exclusion for IPs conducting debt adjusting activity only extends to activities performed as an Office Holder, or when acting in reasonable contemplation of an insolvency appointment. The exclusion does not extend to the provision of non-statutory solutions (e.g. full and final settlements, informal arrangements, debt management or Debt Arrangement Schemes (DAS)).

12. Can an IP advising with a view to a corporate insolvency appointment provide a company director with debt advice where they have also incurred personal debts (assuming there is no conflict of interest that would preclude them from doing so)?

To the extent that the individual's debts are within the scope of the consumer credit regime, the IP exclusion would apply in a similar way to advising any other individual. However, were it to be apparent at the outset that the IP would be unable to accept an insolvency appointment in respect of the individual (e.g. on grounds of conflict of interest), there would be no "reasonable contemplation" of an insolvency appointment.

The practitioner would not be precluded from signposting the individual to another IP who was not conflicted from assisting them in a personal capacity.

13. What is appropriate signposting?

Whenever signposting to another firm/advisor, regard should also be paid to example 13 in the FCA's Perimeter Guidance (PERG 17.7) on what constitutes 'debt counselling'.

Practitioners should note that whilst it is not specifically prohibited by the Ethics Code for a practitioner to derive a fee or commission from such a referral, they should be mindful of the provisions of paragraph 58 of the Code, and of the fundamental principles of integrity and objectivity when so doing. They should also consider the requirement of confidentiality and ensure that appropriate consent is obtained.

Irrespective of whether a fee or commission is received, it would be inappropriate for an IP to systemically utilise the exclusion from FCA authorisation for the purpose of generating such referrals/referral revenues, and were they to do so, it may be concluded that their activities are not being conducted *in reasonable contemplation* of an insolvency appointment. It is unlikely that concern will arise where referral is made to the not-for-profit sector.

14. Where Standard IVA terms require consideration of an equity release via a re-mortgage in year 4, can the IP refer the debtor to an FCA authorised mortgage broker?

Whilst credit broking is not an activity provided for within the terms of the IP exclusion, practitioners are not precluded from signposting debtors to an appropriate (FCA authorised) alternative source of credit broking assistance. Referrals directly to a lender are likely to amount to credit broking, which is an activity requiring appropriate authorisation.

Practitioners should be mindful of the provisions of paragraphs 60-62 of the Ethics Code, which provide that during the course of an insolvency appointment, accepting referral fees or commissions represents a significant threat to objectivity. Such fees or commissions should not therefore be accepted other than where to do so is for the benefit of the insolvent estate; not for the benefit of the practitioner or their practice. They should also consider making a disclosure to creditors.

15. Post IVA completion: Can an IP assist a debtor in corresponding with credit reference agencies that have not amended their files to reflect the completion of the IVA?

Assisting the debtor with credit repair once released from office would be outside of the scope of the IP exclusion. The practitioner may, however, signpost the debtor to an appropriate FCA authorised alternative source of advice/assistance. They may also supply a relevant public information publication, such as that produced by the Information Commissioners Office: https://ico.org.uk/media/for-the-public/documents/1282/credit-explained-dp-guidance.pdf

Advice given on this subject as Office Holder, i.e. whilst acting as Supervisor before completion, is covered by the exclusion.

16. Is the position described above any different when practicing in Scotland?

The FCA regime applies to the whole of the UK.

The position for IPs when fulfilling their SIP 3 (Northern Ireland) or SIP 3.3 (Scotland) duties will be largely the same as outlined above in connection is SIP 3.1, although in Scotland, there may be a greater scope to recommend sequestration as an alternative in instances, where the practitioner is acting in reasonable contemplation of their appointment.

Practitioners should note that acting in relation to a DAS is not an insolvency appointment within the scope of the exclusion.

17. Would the responses to the above vary depending upon the proportion of insolvency work conducted by the practice?

The proportion of insolvency work conducted by a practice may be relevant to evidencing that advice given to a potential client is provided in reasonable contemplation of an insolvency appointment. However, even where a practice conducts exclusively insolvency work, there must still be a reasonable contemplation of an insolvency appointment in respect of each potential client. There is not a blanket exclusion for advice whenever given.

18. Would the responses to the above vary in the event the IP's firm is a member of a Designated Professional Body (DPB) Scheme?

As clarified in Dear IP 63 Article 71 (October 2014), the provision of debt counselling and/or debt adjusting services by an IP, outside the scope of the exclusion, would be likely to be carried on in the course of providing the IPs professional services (rather than incidental to them). Therefore those services are highly unlikely to meet the criteria to benefit from an exemption under Part 20 FSMA.

19. How would breaches of the legislation be dealt with by regulators?

Where the IPA identifies activities it considers to be in breach of the FSMA, e.g an IP who is not FCA authorised acting outwith the scope of the exclusion, then in the first instance the IP would be asked to discontinue the activity with immediate effect (permanently or until such time as authorised). Our follow-up monitoring would be targeted to ensure compliance, and the IP may be required to meet the cost of a targeted inspection for that purpose. Serious or repeated breaches may be referred to the FCA's Unauthorised Business Department (UBD).

The FCA has its own regime for dealing with unauthorised business, and practitioners wishing to report unauthorised business to them may do so at:
https://www.the-fca.org.uk/consumers/report-scam-unauthorised-firm.

The UBD may also refer matters to the IPA and other regulators where it considers it appropriate to do so in the interests of ensuring that all necessary steps are taken to enforce compliance.

20. Where can an IPA-licensed IP obtain further advice?

If IPA members require any further assistance about their obligations, as IPs, they may contact the IPA's Ethical and Regulatory Helpline on: 0207 397 6407. This is a free service for members.

For information about how to apply for Consumer Credit Authorisation visit :
https://www.fca.org.uk/firms/authorisation/consumer-credit