Financial Conduct Authority
By email: gc20-05@fca.org.uk

Insolvency Oracle

17 January 2021

Dear Sirs

Guidance for insolvency practitioners on how to approach regulated firms

Thank you for providing an opportunity for insolvency professionals to comment on your draft guidance, GC20/5.

Q1: Do you agree with the considerations for IPs before a regulated firm's entry into an insolvency procedure in Chapter 2? If not, why not? Are there any other considerations that would be useful to consider?

Please see my comments in the table attached.

Q2: Do you agree with our expectations on IPs at the point of a regulated firm's entry into an insolvency procedure in Chapter 3? If not, why not? Are there any other considerations that would be useful to consider?

Please see my comments in the table attached.

Q3: Do you agree with our expectations on IPs during an insolvency procedure in Chapter 4? If not, why not? Are there any other considerations that would be useful to consider?

Please see my comments in the table attached.

Q4: Do you agree with our expectations when a regulated firm enters a restructuring procedure in Chapter 5? If not, why not? Are there any other considerations that would be useful to consider?

I have no comments on Chapter 5.

Yours sincerely

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Detailed comments on the draft guidance

Please note that the paragraph numbers relate only the text of Annex 1, but a number of the comments apply equally to the draft guidance provided as Annex 2.

Paragraph	Current text	Comments
CHAPTER 2		
11	An IP may often be involved with a firm before it becomes insolvent	It is not often the case that an IP gets involved before a firm becomes insolvent (i.e. when it can no longer pay its debts as and when they fall due), but it is often the case that an IP may be involved before a firm enters a formal insolvency process, which I think is what is intended in this paragraph.
12	We expect an IP to engage with us at an early stage, both prior to and after appointment to a regulated firm	Prior to formal appointment as an insolvency office holder, the IP probably will only be engaged by the firm to advise the firm. Although of course at this time the IP will have in mind how they may successfully carry out their statutory duties after formal appointment, their duties of client confidentiality may prohibit them from contacting the FCA and/or providing the FCA with all the information that it may desire.
19	An administrator must therefore share any court documentation, administration applications and other documents required to be sent to creditors of the firm with us.	Although in some circumstances an IP may assist with the pre-administration court documentation, they are not the applicant or party responsible for submitting notices to court – this may be the directors, the firm, or a creditor of the firm. Therefore, absent any statutory duty, it would breach client confidentiality for an IP pre-appointment to share such documents without the applicant's/ appointor's consent and sometimes the IP may not have access to such documents.
25	The service of a statutory demand on a regulated firm should be notified to the FCA. We therefore expect an IP engaged by a firm in this situation to ensure that the firm has notified the FCA if they have received a statutory demand.	Prior to appointment, an IP has no authority over the firm, so they could not ensure that this is achieved. If it is an FCA requirement that a regulated firm notify you of the service of any statutory demand, it would be useful for the guidance to cite the relevant regulatory requirement.
28	The appointment of liquidator documents, including copies of the resolution to wind up and the certificate of appointment must also be sent to firm.queries@fca.org.uk	S365(4) and S371(3) of FSMA state that "any notice or other document required to be sent to a creditor of the company [/body] must also be sent to the appropriate regulator". A liquidator is not statutorily required to send to creditors copies of the winding-up resolution or the certificate of appointment, so it is incorrect to state that these *must* be sent to the FCA.

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28	Footnote 22: Section 370 of FSMA	I believe this is an incorrect reference. S370 relates to a liquidator's duty to report in the event of regulated activity in contravention of statutory standards. As mentioned above, I believe S365(4) and S371(3) are more relevant.
33	Footnote 25: … under Part 17 of the Insolvency (England and Wales) Rules 2016	It would seem appropriate also to refer to the Scottish equivalent.
34	… there should be appropriate representation from across all types of clients for whom the firm is holding client assets and, where relevant, the FSCS on the committee.	The insolvency office holder has no power to dictate or influence who is elected as creditors' or liquidation committee members. This is entirely in the hands of the creditors.
39	IPs should consider how they ensure appropriate representation across all types of stakeholders of the failed firm on the committee	As mentioned above, creditors control the committee representation. I can think of no method by which an insolvency office holder could achieve this.
CHAPTER 3		
41	We would expect updates on items including… any intelligence or information arising from the insolvency or investigations into directors' conduct that could give rise to harm… interaction with… other UK authorities involved in the firm's insolvency process.	I believe that IPs should comply with such a request with extreme caution in view of the possibility that such information is covered by legal professional privilege. While, of course, IPs would like to help the FCA, voluntarily surrendering such information could lead to a waiver of privilege and could risk compromising the office holder's/ insolvent entity's claim. In addition, the Insolvency Service has instructed IPs to refer to them all requests (including from "investigating authorities") for information on submissions to its disqualification team in relation to directors' conduct (Dear IP chapter 10 article 24). The FCA's expectations therefore appear to conflict with the Insolvency Service's.
43	• Share draft versions of key client communications with the FCA (and other relevant authorities) for comment before finalising	Insolvency office holders are required to deliver certain documents to creditors "as soon as is reasonably practicable", for example notice of an Administrators' appointment (Para 46(3) Sch B1 Insolvency Act 1986) and the Administrators' Proposals (Para 49(5) Sch B1 Insolvency Act 1986). To delay issuing these documents would bring the IP in breach of the statutory requirements, given that they are not required by statute to allow the FCA (or other relevant authorities) time to review a draft.
44	We expect these to be… communicated to the FCA for	As explained above, some statutory deadlines are "as soon as is reasonably practicable" and, absent

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	comment in advance of publication and in good time so that the IP is able to meet any statutory deadlines for such communications.	any statutory requirement to give the FCA time to comment, the insolvency office holder would be required to issue such a document as soon as they have drafted it.
48	Usually, the FSCS ranks as an unsecured, ordinary creditor for FCA-related FSCS claims.	Is this correct? For example, Para 15B Sch 6 Insolvency Act 1986 categorises deposits covered by the FSCS as preferential claims.
55	… consider the terms of the contact…	I believe "contact" should be "contract"
56	Where an AR is removed… the IP should ensure the AR continues to treat customers fairly until all regulatory obligations have been met	Unless the IP has been appointed as liquidator or administrator of the AR, it is not clear how an IP can influence the AR to ensure this is achieved. Even if the insolvent principal firm over which the IP is appointed has a contract with the AR, any departure from the terms by the AR would only be a breach of contract, i.e. the IP could not *ensure* that the AR complies with the contract, and in any event the insolvent principal firm may already have breached the contract by reason of its insolvency. I would also have thought that, where the AR is removed, there is even less likelihood that an AR could be compelled to comply.
CHAPTER 4		
60	The FCA has statutory powers to participate in court proceedings in relation insolvency proceedings for a regulated entity. The IP should give us due notice of any intended court applications and, if requested, share draft documents with us	I believe "to" should be added between "in relation" and "insolvency proceedings". Although the footnote only refers to the sections relating to liquidations and administrations, the paragraph is not limited to these proceedings and of course there are other sections of FSMA that provide the FCA with powers to participate in court proceedings relating to other insolvency processes, such as CVAs. If a company in CVA were to engage in a court proceeding, most likely the Supervisor would not be party to those proceedings and they may not be involved in the day-to-day running of the proceedings, as the Supervisor's role is limited to the terms of the CVA Proposal (as approved). It also seems highly irregular to expect draft documents relating to court proceedings to be shared with a party that may decide to participate in those proceedings.
65 et al	Following appointment, an IP will need to take control of client assets (physical and electronic) and the books and records of the firm…	In several areas (paragraph 65 as an example), the guidance is not well-suited to VAs. In most CVAs, the IP does not take control of the company's business (or its books and records), but rather the company will continue to trade and make regular payments to the IP (as Supervisor), which they will

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		then distribute to the company's pre-CVA creditors.
107	The continuity of supply provisions is not available for liquidations.	The footnote for paragraph 106 refers to S233 and S233A of the Insolvency Act 1986. While it is true that S233A does not apply to liquidations, S233 – and indeed also S233B – do apply to liquidations.
112 & 113	When a firm goes into an insolvency process, the appointed IP should consider when it is appropriate to cancel the firm's permissions… An application to cancel the authorisation of a FCA regulated firm can be made using our online system Connect.	If the insolvency office holder has cooperative firm representatives, this may well be possible. However, in some hostile cases, the IP will not be able to provide the information (e.g. on complaints and confirmation about run-off insurance, which in any event is unlikely to have been arranged in non-trading cases) and they will not be able to log in to Connect as if they were a firm representative. I note the wording in the draft is "consider", so it does not put the IP under any pressure to cancel the authorisation, but you may wish to consider whether to provide IPs with an alternative way to seek to cancel permissions so that they do not have to rely on the insolvent firm to access the system.
118 & 120	Phoenixing is a common term used to describe the practice of closing a firm and that firm re-appearing under a new guise to avoid liabilities arising from the old firm… If an IP becomes suspicious of phoenixing in respect of a failed firm, they should report those suspicions to firm.queries@fca.org.uk	It is true that phoenixing is a common term, but it is not defined in statute and means different things to different people. While the FCA has endeavoured to create its own definition of phoenixing, this may cause confusion given that, for example, the House of Commons' briefing paper (https://commonslibrary.parliament.uk/research-briefings/sn04083/) defines it differently and makes the clear statement that "it is not illegal to start up a phoenix company following the liquidation of the original company, but there are rules to be followed". Phoenixing is also a term that is usually only used to describe the emergence of a Newco once Oldco has gone into insolvent liquidation, as S216 of the Insolvency Act 1986, which incorporates the "rules" referred to in the briefing paper, only applies in insolvent liquidations. However, I wonder whether the FCA's definition of phoenixism is intended to reach also to other insolvency processes. Where the FCA's definition differs from most is in stating that the motive behind the closing down of the firm is "to avoid liabilities" of the old firm. If a company is insolvent, responsible directors will take steps to have it wound up (or rescued) and it is not an insolvency office holder's role to explore the directors' motive in starting the insolvency

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		process. Liquidators and Administrators provide to the Insolvency Service the *facts* regarding the directors' conduct and the company's insolvency and then it is the Insolvency Service's duty to determine whether to take steps to seek the directors' disqualification on the basis that they are unfit to act as directors. Although I appreciate the FCA's desire to take similar action to stop unfit persons from managing a regulated firm in future, as mentioned above regarding paragraph 41, IPs are required to keep such information confidential.
120 & 121	We are asking IPs to carefully consider the parties buying the business, and if there has been a sale prior to the entry into an insolvency to investigate the propriety of the transaction… We expect the IP to consider… • the sale is not facilitating phoenixing of the failed firm	It is pleasing to note that the draft guidance does not state that IPs should refuse to sell businesses to connected parties, as I am sure that you are conscious that the IP's role in many insolvencies is to maximise asset realisations: if an insolvency office holder believes that a connected party offer is the best offer available in the circumstances, then they might not be acting in the creditors' best interests if they were to reject that offer. With this in mind – as well as the existing regulatory requirement for liquidators and administrators to investigate the propriety of pre-appointment transactions – it is not clear what message the FCA is conveying with these sentences.
121	• Notice to the FCA: An IP should notify the FCA in good time, including sufficient details, if they are planning to sell a client book.	It is not clear whether the FCA wishes this information when the IP first plans to sell a client book or whether this should be done once the IP has settled on a purchaser. What does "in good time" mean? What will the FCA do with such information (i.e. how long does the FCA need to take action after having received such notice)? What "sufficient details" does the FCA expect?