RESPONSE TO THE CALL FOR EVIDENCE:

FIRST REVIEW OF THE INSOLVENCY (ENGLAND AND WALES) RULES 2016

BY MICHELLE BUTLER

Overview

This response reflects my own views as an individual. I am drawing on my experience in working as a consultant to insolvency practitioners, assisting them to comply with existing insolvency legislation, including (via my work with the Compliance Alliance) providing them with document templates to enable them to administer cases in compliance with statute and other regulatory requirements and assisting them with technical questions on insolvency statute and other regulations.

On the whole, the Insolvency (England and Wales) Rules 2016 ("the Rules") have been a welcome improvement to their predecessors. However, the drafting has resulted in some gaps, inconsistencies and absences of clarity, not only in relation to the new policies and procedures but also in repeating the flaws of the Insolvency Rules 1986. Although the Insolvency Service took steps to consult with the profession prior to the Rules' implementation and I believe this helped to iron out a number of issues, the fact that some issues remain is to be expected in such a vast statutory instrument.

I am pleased to have this opportunity to feed into the next stage in improving the Rules. I would urge the Insolvency Service to raise its bar: while it may be aiming to resolve *material* issues in the Rules and particularly as regards the new policies and processes, it should be remembered that a large number of minor flaws also undermines the effective and efficient operation of insolvency processes and thus also erodes the confidence in the insolvency regime and the desire for stakeholders to engage and for new professionals to become licensed insolvency practitioners ("IPs"). Taking this opportunity to resolve as many issues with the Rules as possible surely would be time well spent.

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Consolidation and Restructuring of the Rules

Q1. Do the Rules provide an appropriate framework for the UK's insolvency regime?

On the whole, yes.

However, there are some gaps and inconsistencies that leave IPs with the dilemma of whether to work through the Rules as best they can or to apply to court for directions. Few of these gaps and inconsistencies give rise to material concerns, so in most cases IPs work with the Rules as best they can, albeit usually with the assistance of compliance providers, solicitors and/or the RPBs. While I understand the Insolvency Service's concern is to address material matters that may affect the operation of the regulatory system, surely it would be preferable to address all gaps and inconsistencies in order to enhance confidence in the insolvency regime and to ensure that IPs are working consistently and not incurring costs in deciding on their own (or with the assistance of solicitors) how to navigate inadequate Rules.

I attach at Schedule 1 some gaps and inconsistencies that I believe should be addressed. I would also recommend that the Insolvency Service reviews the posts to its Rules blog at https://theinsolvencyrules2016.wordpress.com/2016/11/30/any-questions/comment-page-1/#comments (and associated pages), as many of the observations listed on that blog remain relevant to the Rules as they currently stand.

Although my observations may appear relatively immaterial, the amount of time and effort spent by IPs and their advisers in attempting to interpret and navigate the Rules should not be underestimated. In addition, areas where the Rules are unclear are often the subject of the RPBs' regulatory attention and I believe this can detract from the RPBs achieving their fundamental objectives in regulating IPs. Inevitably, this all impacts on the costs of insolvencies and therefore, taken as a whole, these relatively minor issues *do* matter.

Q2. Is the framework provided by the Rules clear?

In general, yes, I believe the *framework* is clear.

You have asked for any "concerns relating to the clarity of specific areas that are not covered" elsewhere in the Call for Evidence. Please find these attached at Schedule 2 my concerns.

Q3. Does the updated language used in the new Rules improve upon that used in the Insolvency Rules 1986?

In general, yes, the updated language is an improvement. However, I do not believe that the Rules and the system they create are "easier to understand than their predecessors", but this is more a reflection of the need to accommodate complex policy changes such as the fees estimate regime introduced in 2015 and the alternative decision processes brought in by the Small Business, Enterprise and Employment Act 2015, rather than any material failing on the part of the drafters of the Rules.

I have detailed my concerns over the confusing nature of some of the Rules in my other responses.

Q4. What changes, if any, could be made to ensure that the Rules provide an appropriate framework for the insolvency regime or to improve their clarity?

I have no wholesale suggestions, but I trust that my observations on Schedules 1 and 2 make clear what could be changed to ensure that the gaps, inconsistencies, complexity and lack of clarity are addressed.

Implementation of Primary Legislation

Q5. Have the policies in the Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015 been fully implemented in the Rules?

On the whole, yes.

Having regard for the changes listed in Section 5 of the Call for Evidence, I would make the following observations where the consequent Rules do not appear to work effectively in the "real world":

- While the move from final meetings to final accounts/reports has been welcome, the Rules do not provide for situations where something occurs after delivering the final account/report or proposed final account but before the end of the prescribed period, except where that "something" is a request for information under R18.9 or a challenge under R18.34. Some developments (including a challenge under R18.34) affect the office holder's receipts and payments: should the final report process (including the 8 weeks) begin again? Alternatively, should the office holder deal with the development before the prescribed period is ended? If the latter, in view of the fact that the final account/report is fixed as at the date of issuing it (in all cases other than MVL), how should the office holder disclose any dealings in the prescribed period?

- In view of the fact that the Insolvency Rules 1986 required one month's notice of a final meeting to be given, it is not helpful that the Rules prescribe an extended final period of 8 weeks. This increases the costs of insolvency processes as IPs remain in office for longer even though all case administration is completed, for example there are additional record-storage costs and bond premiums (where these are renewed annually).

- The Rules do not provide sufficient structure for establishing a creditors'/liquidation committee, especially in non-meeting decision processes. Under the Insolvency Rules 1986, committees were established at creditors' meetings with creditors attending (and those voting by proxy where the proxy form specifically covered the appointment of committee members) deciding on the membership. The Rules do not work for non-meeting decision processes, as creditors are only invited to nominate members and to decide on whether a committee should be established; they are not asked to vote in support of particular nominations (because of course these are not known until the invitation for nominations has been sent). The Rules also do not make clear whether resolutions on the membership of a committee can be determined at a meeting without first having listed details of that specific resolution on the R15.8 Notice.

Q6. Is the Rules' implementation of Deregulation Act and Small Business Act policies clear?

Except in relation to the matters raised in my answer to Q5, on the whole, yes.

In addition, there are some other Rules that appear to conflict or lack clarity:

- R15.8(3)(k) requires notices of decision procedures to include a statement that creditors may, within 5 business days of delivery of the notice, request a physical meeting. This is clearly incorrect when the notice is for a S100 deemed consent process or virtual meeting, as R6.14(6)(a) gives creditors up to the decision date to request a physical meeting.

- In Dear IP 76, the Insolvency Service stated that the policy intention was that requests for a physical meeting should be received before the decision date, and therefore the word "between" in R6.14(6)(a) was considered to mean "not including" the decision date. However, Dear IP 76 also states that the policy intention was to allow electronic voting to be made up to and including the decision date, but this would require "between" in R15.4(b) to mean "including" the decision date. This means that there appears to be two different meanings of "between", neither of which are made clear in the Rules.

- It seems inconsistent for the Rules to require a Gazette notice for meetings of creditors, but not for other decision processes. It also appears odd to give notice to the bankrupt of a meeting (R15.14(2)), but not for other decision processes.

- It seems inconsistent to require notices inviting creditors to decide on a committee to be sent every time a decision process is convened except in compulsory liquidations. The requirement to repeatedly invite creditors to consider forming a committee seems to go over and above the requirements of the Insolvency Rules 1986. This requirement is also inappropriate when seeking a decision from creditors on extending an Administration, as no committee is entitled to make this decision instead of the creditors (and in some cases there may already be a committee in place).

- It is understood that the Insolvency Service's view is that R6.19 applies to the directors' S100 decision process, even though R6.19 states that the committee invitation notice must be sent "where any decision is sought from the company's creditors **in** a creditors' voluntary winding up". If this is the policy intention, R6.19 appears to need amending.

- The Rules do not make clear whether a R3.39 invitation to decide on a committee is required in cases where a decision is being sought from preferential creditors only (e.g. under R18.18(4)(b)) and, if so, whether such an invitation should only be issued to preferential creditors.

- R10.87(3)(f) states that the final notice to creditors in a bankruptcy should state that the trustee will vacate office (and (g) be released, if no creditors have objected) when the trustee files the requisite notice with the court, but there is no Section/Rule that actually requires the trustee to file such a notice at court. Also, in debtor-application cases the trustee does not need to send anything to court as it is considered that the trustee's office-vacation and release are effective when the requisite notice is sent to the Official Receiver (provided there are no creditor objections). It therefore seems incorrect for R10.87(3)(f) to require the final notice to state that this all happens when the notice is filed with the court.

- R6.28(2)(f) requires the final notice to state that the "liquidator will vacate office under Section 171 on delivering to the registrar of companies the final account and notice". However, S171 states that the liquidator vacates office once they have complied with S106(3), which is the requirement for the liquidator to send the account to the registrar. There is no reason why the word "send" in S106(3) should have anything other than its natural meaning, but R1.36(2)(b) defines "deliver" as the time when the document is received by the registrar. Therefore, R6.28(2)(f) would result in an incorrect statement being presented on the final notice, as it does not reflect the provisions of the Act.

- Similar conflicts arise regarding the timescales of the IP's vacation from office as set out in the Act and as set out in the final notice as a consequence of R5.10(2)(c) and R7.71(2)(f).

Q7. Does the Rules' implementation of Deregulation Act and Small Business Act policies operate effectively and efficiently?

As explained in my answers to Q5 and Q6, there are some areas that do not operate effectively and efficiently.

Q8. What changes, if any, could be made to improve the clarity, effectiveness or efficiency of the Rules that implement the Deregulation Act and Small Business Act policies?

I trust that my answers to Q5 and Q6 make clear what changes could be made.

New Policy

Q9. Are the new policies introduced by the Rules the right ones for a modern, efficient insolvency regime?

Not all of the new policies promote a modern, efficient insolvency regime.

While I understand the purpose behind the abolition of prescribed forms, this policy does not support efficiency. It has been extremely inefficient to require each IP to take their own steps to draft or to acquire a suite of forms that comply with the Rules' prescribed content. This has been disproportionately burdensome and expensive for smaller practices.

The removal of consumer creditors' and employees' addresses from Statements of Affairs filed at Companies House is an improvement. However, the corresponding policy to require full details to be circulated to creditors has led to inefficiencies, as it requires different treatments for effectively the same document. In addition, some individuals still object to IPs that their addresses and claim amounts have been circulated to creditors. It also seems inappropriate for a modern insolvency regime to treat shareholders and non-consumer creditors, e.g. self-employed workers, differently in requiring their personal details to be included in Statements of Affairs filed at Companies House. The Insolvency Service attempted to overcome some of these issues by explaining in Dear IP (chapter 13 article 97) that an office holder may choose not to disclose certain personal details where this was considered inappropriate on a case-by-case basis. While this pragmatic approach is welcome, it would appear to conflict with the Rules' requirements.

Q10. If the new policies introduced by the Rules are not fit for purpose, what alternative policy should be adopted?

It would be extremely valuable for the prescribed content of all forms (including notices) set out in the Rules to be demonstrated by freely-available templates (preferably in Word or odt format). The Rules would not need to be changed, so the prescribed content approach could persist in order to move with changes in technology, but I suggest that it will be many years yet before forms and notices are no longer produced in Word (or similar) so these templates could be used by generations of new IPs.

It would be more efficient and more in keeping with current data protection concerns for *all* personal details (including claim amounts) of individuals – consumer creditors, employees, other creditors and shareholders – to be omitted from Statements of Affairs, whether the Statement is to be filed at Companies House or made available to other stakeholders. I understand that the Insolvency Service still wishes creditors to be able to contact each other. While this is a legitimate concern, the protection of personal data, especially individuals' home addresses, surely must take priority.

Q11. Is the Rules' implementation of new policies clear?

On the whole, yes. However, there are some areas that lack clarity:

- Although the Rules explain how an office holder may rely on deemed consent to electronic delivery (R1.45(4)), this does not extend to deliveries by others, e.g. of a S100 notice by a director (R6.14), which would be useful.

- R3.35(1)(f)(i) also appears contrary to the apparent policy that creditors should be provided with the personal details of individuals, as this prohibits Administrators from providing to creditors the schedules of consumer creditors and employees that form part of the director's Statement of Affairs, whereas R3.35(1)(i) requires the Administrators to provide full lists if no Statement of Affairs has been submitted or the lists are considered less than full. Please also note my comments at Q10 regarding the preference that personal details be withheld from wholesale circulations.

- R1.5(3)(b) appears to prescribe the content of all forms to be completed by a corporate creditor or member to specify whether the individual signing is the sole member of the body corporate. However, there is no such prompt or note on the Insolvency Service's proof of debt form. It is not clear why R1.5(3)(b) exists and presumably R1.9(1)(b) would overcome any breach committed by the individual signing. Therefore, what is the point of R1.5(3)(b)?

Q12. Does the Rules' implementation of new policies operate effectively and efficiently?

Not all of the new policies have been implemented to operate effectively and efficiently. In addition to my observations set out above, I would make the following points:

- The Rules' prescribed content for forms is unnecessarily detailed. For example, R1.29 requires all notices to provide full identification details of the insolvent (i.e. including company registered number, court reference, debtor's address) and "the section of the Act, the paragraph of Schedule A1 or B1 or the rule under which the notice is given". This has required a substantial amount of time and effort to create Rules-compliant notices that appear to have little benefit, especially in view of the fact that a single circular to creditors may contain several notices each providing the requisite information. It also means that notices that provide the same messages need individual tailoring to ensure compliance – for example: the notice of intended dividend to the Gazette requires a different rule reference from that sent to creditors; and a different header is required to adapt a notice from a corporate to a personal insolvency.

- The Rules have also introduced a number of new forms – or rather, prescribed content for statutory notices – that were not considered necessary under the Insolvency Rules 1986. For

example, while delivery by website had been possible under the Insolvency Rules 1986, now a notice compliant with R1.49 (and the other rules on notices generally) must be issued.

- It is fairly commonplace for an Administration to move to CVL with the same IP acting in both capacities. R1.50 is not efficient in requiring the IP to issue a new notice in the CVL even if they continue to use the Administration website details to deliver documents in the CVL.

Q13. What changes, if any, could be made to improve the clarity, effectiveness or efficiency of the Rules that implement new policies?

I trust that my answers to Q5 and Q6 make clear what changes could be made.

In addition:

- R1.45(4) states that deemed consent to electronic delivery applies where the recipient and the insolvent had "customarily communicated with each other by electronic means before the proceedings commenced". It would be useful if this could be extended to where the **office holder** had already communicated with the recipient by electronic means: this would cover, for example, sending statutory notices to directors to whom the IP had been emailing or to creditors who are discovered after the insolvency has begun.

Questions on Specific Topics

Q14. (Rule 1.38) In your estimation, what percentage of creditors choose to opt out of receiving information?

In my estimation, far less than 1%.

Q15. (Rule 1.38) Could the creditor opt-out process be improved, and if so how?

The opt-out process seems largely redundant as many IPs are using the R1.50 website delivery process, so creditors who do not wish to be bothered by the IPs' communications need take no steps to avoid this. However, there remains a significant number of IPs who do not use R1.50 to delivery documents by website. This is particularly so in smaller practices where the economies of scale in arranging and maintaining website delivery do not make it commercially sensible.

The opt-out process could be significantly improved by removing the need for IPs to produce largely unnecessary circulars:

- As is the case in processes managed by the Official Receivers, is there really a need to produce annual and/or 6-monthly progress reports in all cases? Could this requirement be removed in inconsequential cases?

- Similarly for final accounts/reports, could the requirement for these be removed in inconsequential cases? Could IPs in England & Wales have a similar process to the Scottish S204 early dissolution process?

- A great amount of effort is expended by IPs attempting to get creditors' approval to small amounts of fees, especially where the insolvent's assets are insufficient to cover the costs and fees in full. Could not IPs be provided with the ability to draw fees up to a modest threshold – say, £6,000, as is the case for Official Receivers – without needing to seek creditors' consent?

The advantages of removing largely unnecessary circulars would be far greater than simply avoiding creditors receiving unwanted correspondence. A great deal of time and effort goes into producing progress reports, final accounts and fee-related requests, which is money not at all well spent. Even if it were considered that complete removal of these documents is inappropriate, I believe that a great deal of time and money could be saved by reducing the prescriptive and fulsome nature of the reporting and fee-approval rules.

Q16. (Part 15 Chapter 2) What changes could be made to assist office holders with the decision-making processes?

I have set out above a number of factors that make decision-making processes burdensome:

- The Rules are overly prescriptive and excessively detailed as regards the information, forms and notices required to be issued for a decision process. While R1.9(1) appears a valuable rule to overcome any immaterial failures to comply with the Rules' minutiae, the Rules do not help IPs avoid the significant costs in trying always to comply.

- There are also some inconsistencies and lack of clarity as regards the content of notices and the process around forming a committee.

- Irrespective of the quantum of fees expected to be drawn, the Rules require office holders to seek creditors' approval to fees and they require substantial information to be provided in all cases. This is inefficient in cases where the assets are expected to realise modest amounts and it simply increases the amount of time the IP has to write off on that case (and thus how much the IP's charge-out rate must accommodate such write-offs). I suspect that it also angers some creditors when they see how much paperwork needs to be produced and how they are asked to approve fees in these cases where the actual fees to be drawn are minimal.

Therefore, the following changes could be made:

- Simplify the statutory content required for forms/notices and provide freely-accessible templates for IPs to use.

- Correct the inconsistencies and absences of clarity, as set out above.

- Provide for office holders to be able to draw a modest level of fees in each case without needing to seek creditors' approval. Alternatively, if this is considered a step too far, allow approval for such modest fees to be by the deemed consent process.

Q17. In your estimation, which changes to the Rules have made it easier or more difficult for creditors in an insolvency to engage with the process?

I believe that the plethora of notices and information required to be provided both before and during an insolvency process has made it more difficult for creditors to engage. In addition, as the content is prescribed in detail by the Rules, creditors receive a lot of jargon and Rules-speak, which does not help

them understand what is required of them. For example, I have seen a number of occasions where creditors have nominated themselves as a committee member without knowing what it all means simply because they have been presented with a form (R6.19 et al).

The Insolvency Rules 1986 had allowed a resolution to be proposed by correspondence simply by sending the proposed resolution and voting form, but R15.8 requires a separate notice to be sent, i.e. one more lengthy Rules-speak document that is not conducive to creditors' engaging.

Although R1.50 is a welcome provision in making the insolvency process more efficient and less costly, I do not believe that it has made creditors' engagement with the process easier: if they lose (or ignore) the website login details at the start, then they will not be reminded of the insolvency at all and it could be difficult for them to get up to speed.

SCHEDULE 1

GAPS AND INCONSISTENCIES IN THE RULES THAT ARE NOT RAISED SPECIFICALLY BY THE CALL FOR EVIDENCE

- The Rules introduced a new requirement that the Nominee's consent to act (which is now a statutory "notice") must be sent to all creditors in a proposed IVA (R8.19(4)(d)), but there is no equivalent rule for CVAs. The new requirement seems unnecessary.

- The Rules do not contain any provision for giving notice to Companies House that an IP has ceased to act as Supervisor or an IP has taken a new position as Supervisor of an ongoing CVA.

- The Rules seem inconsistent in providing for creditors to have delivered to the Official Receiver details of a proposed liquidator or trustee "within five business days of the date of the notice" (R7.52(5) and R10.67(6)). This is in stark contrast to all other notices to creditor which are measured according to the date of delivery of the notice. I have heard of occasions when creditors have only received the Official Receiver's notice far longer than 5 business days after the notice was dated. Should the Rules not define the timescale according to the date received (even if by deemed receipt)?

- 1986 Rs4.52(1) and 4.53 provided for more resolutions to be put to creditors' meetings than the current Rules, most notably resolutions on fees and "any other resolution which the chairman thinks it right to allow for special reasons", which had been used in the past to address the approval of (now)R6.7 expenses. These provisions still seem useful.

- Given that a CVL cannot commence without a members' resolution to wind up, it seems to be a gap that R6.7 does not provide that the reasonable and necessary expenses of obtaining a members' resolution to wind up may also be paid as a liquidation expense. In addition, as there are a number of hoops to go through to seek approval of R6.7 costs as well as those to seek approval of the liquidator's fees – which R15.11 indicates it is possible to seek at the same time as the S100 decision on the liquidator – perhaps R6.7 should also address the costs of those pre-liquidation activities. Perhaps a better approach to pre-liquidation costs would be to define them in a similar manner to pre-administration costs (R3.1), i.e. those incurred by an IP pre-liquidation but "with a view to" the winding-up.

- R15.11 indicates that notice of decision processes in Administrations need only be sent to creditors whose claims have not subsequently been paid in full. In the event that preferential creditors have been paid in full, it is difficult to see how an extension to the Administration may be achieved in an Administration of the type set out in Para 98(2)(ba), as Paras 98(3)(b) and (3A) require the consent of preferential creditors by means of a decision process.

- Similarly, it is not clear how approval to excess fees may be sought in a Para 52(1)(b) Administration (except where R18.33 applies) in the event that the preferential creditors have been paid, given that R18.30(2)(b) and R18.18(4)(b) result in the decision lying with the preferential creditors.

- The Rules require an excess fee request to be directed to unsecured creditors where R18.33 applies, i.e. where a Para 52(1)(b) statement Administration has developed to a stage where the Para 52(1)(b) statement is no longer appropriate. However, this seems inconsistent when considering an Administration where a Para 52(1)(b) statement was not originally made but now appears appropriate: in such a case, an excess fee request would still be directed to the

unsecured creditors, rather than the preferential creditors (and/or secured creditors) who would appear to hold the primary economic interest.

- S298(8) and S299(3)(d) mean that a trustee has their release when they have given notice to "the prescribed person". The Rules do not make clear who this prescribed person is. R10.87(3)(f) suggests that the prescribed person is the court, however no notices are sent to the court where the bankruptcy order was made by the Adjudicator and there appears to be no Rule that specifies that the notice must go to the court (or the Official Receiver) – R10.87 merely sets out what the final notice should state.

- The Rules do not provide that a creditors'/liquidation committee can be simply done away with, e.g. where the members choose no longer to engage. R17.8 explains how a vacancy may be filled, but what if a new willing member cannot be found or what if the purpose for which the committee was primarily established has ended?

- The Rules provide that creditors may decide on new office holders, but R16.3(4) (as amended) does not allow a proxy to have "inserted into it the name" of any "nominee for the office holder". This is impractical when considering the decision that may be legitimately proposed to the creditors, e.g. "that AB replace CD as liquidator", perhaps even as part of a decision requisitioned by creditors seeking to remove the current liquidator. It also seems inconsistent with the position with non-meeting voting processes, where presumably it is acceptable to issue to creditors a form on which they may choose to vote for/against the appointment of a named person as office holder.

- R3.60(6) defines who is appointed liquidator following a Para 83 exit from Administration. This does not accommodate the most commonplace method for creditors seeking to put in their own choice of liquidator, which creditors propose as a modification of the Administrator's Proposals: in the event that a majority creditor voting on the Proposals seeks such a modification, it is usually taken as agreed. Rather, R3.60(6)(b) appears to require a full decision procedure where all creditors are asked about the nomination of a different person.

- R6.46A of the Insolvency Rules 1986 has not been included in the Rules. This appears a necessary protection for the IVA Supervisor.

- R8.24(2)(c) still requires the Nominee's report on the consideration of the IVA Proposal to "state whether the proceedings are main, territorial or non-EU proceedings and the reasons for so stating". In light of the end of the transition period, this appears to require changing in line with other rules changed in the Insolvency (Amendment) (EU Exit) Regulations 2019.

- R6.14(3) states that "the decision date for the decision of the creditors on the nomination of a liquidator must be… not later than 14 days after the resolution is passed to wind up the company". If the original deemed consent (or virtual meeting) decision date was set for a date within this timescale, but creditors' objections give rise to a need to call a physical meeting, it is quite possible that this cannot be held with sufficient notice to meet this timescale. The Insolvency Service has stated on its Rules blog that it is sufficient that the original decision date was set within the timescale, but it would seem necessary for the Rules to make such a provision.

- A similar issue arises from R8.22(7), which states that a CVA decision date must be not more than 28 days from the date on which the nominee received the Proposal (or when the nominee's report was considered by the court). Given that 14 days' notice is required, it would be very possible for a physical meeting decision date to be outside this timescale. Again, it

would be valuable if the Rules provided that this was acceptable provided that the original decision date was inside it. R2.27 gives rise to a similar issue in IVAs.

- R17.5(4) seems to suggest that a *second* decision process needs to be conducted to "seek a decision from the creditors (about creditor members)". It is not clear *how* such a decision should be worded: if the office holder has six nominations, are all creditors asked to decide whether to accept/reject *each* nomination? Or does each creditor get one vote to decide on one candidate? Or can they split the value of their vote between their support of more than one candidate? Would it not be more sensible for the membership of committees to be decided on the basis of the voting value of the claim of the creditor who has made the nomination? Particularly in cases where an office holder has between three and five nominations, it seems unnecessary for a second decision process to be conducted if the majority of creditors have voted for the establishment of a committee.

SCHEDULE 2

AREAS WHERE THE RULES LACK CLARITY THAT ARE NOT RAISED SPECIFICALLY BY THE CALL FOR EVIDENCE

- R1.42(3) sets out timescales for when a posted document may be treated as delivered (unless the contrary is shown). These timescales seem inappropriate for many overseas deliveries. Although Dear IP 76 suggested how overseas deliveries should be treated, it is not clear where this leaves R1.42(3) and what impact this may have on some of the tight timescales set out in the Rules.

- There has been a great deal of debate about whether an office holder can ask creditors in an Administration or CVL (or members in an MVL) to approve their fees after 18 months. While I believe most now believe it is possible, some are still uncertain in view of R18.23, which blocks a court application for fee approval after 18 months. Clarity on this matter would be most welcome.

- Presumably, as R18.29(2)(e) specifically refers to fees "determined under R18.22", an office holder in a compulsory liquidation or bankruptcy can ask creditors to change the fees approved by default to the Schedule 11 rate even after 18 months. However, it is not clear how it could be the case that there has been "a material and substantial change in the circumstances which were taken into account in fixing" the fees, if they were fixed simply by reason of R18.22: no one took account of fixing the fees.

- More widely, the scope of R18.29 is unclear. R18.29(1) states that "the office-holder may request that the basis be changed". However, what if the basis of fees had been approved as a set amount of £10,000, but the material and substantial change has meant that a more appropriate fee is £15,000? As the basis (per R18.16(2)) is the "set amount", does this mean that the office holder can only seek to change the basis to a percentage or time costs fee? This seems nonsensical, in which case a change in the wording of R18.29 – to include a change in the rate or amount (as per R18.25) – would be most welcome.

- R18.16(4) and (6) state that office holders must "deliver to the creditors" certain fee-related information before the basis of the fees is determined. The Rules do not make clear if this means that all creditors must be sent this information or just the creditors who are being asked to approve the fee basis. For example, if R18.18(4)(b) applies, do only the preferential creditors need to be sent the information? Similarly, if there is a creditors'/liquidation committee, do all creditors need to be sent the information or only the committee members?

- R18.30 sets out how to seek approval for fees in excess of a previously-approved estimate. R18.30(2) states that "rules 18.16 to 18.23 apply as appropriate". It is unclear how to make some applications: for example, as mentioned above, must the information be sent to all creditors; also, does the office holder need to provide details of expenses (R18.16(4)(b))?

- R18.18(4) requires "each of the secured creditors" to consent to the basis of the Administrator's fees. Does this mean that fixed charge creditors can decide what fees are charged to floating charge assets? What about other secured creditors who have no economic interest in the assets because their value is outweighed by prior charges? What about a landlord with a secured rent deposit deed? Or what about a creditor who was secured at the start of the Administration but whose security has since been satisfied or otherwise relinquished? It would seem inappropriate for R18.81(4) to include all these secured creditors, but some amendments to the Rules would be required to make this clear.

- It is unclear how R18.20(4) should be applied where the Administrator's fees have been fixed as a set amount (say, £20,000). It seems unlikely that R18.20(4) means that, when the IP becomes the Liquidator, they may draw a further £20,000 of fees as liquidator.

- The Rules do not appear to envisage that an office holder may seek approval for fees after some work has been undertaken. For example, R1.2 and R18.16(7) state that fees requests must include details of the work that the office holder proposes to undertake and expenses that they consider will be or are likely to be incurred. This is unhelpful in view of the RPBs' criticisms of IPs who have sought to obtain fee approval over speculative assets and activities. While it would seem compliant with the Rules for an office holder simply to set out their future anticipated work and expenses when seeking approval for the basis of fees, where the fees are proposed to discharge the costs of work already carried out, presumably this is not what the drafters envisaged.

- It is not clear how a creditor can vote on a proposed fees estimate to give the effect that they allow a lower amount of fees to be drawn. R18.16(2)(b) describes the fee basis as "by reference to the time properly given by the office-holder and the office-holder's staff in attending to matters arising" in the insolvency. Therefore, if an office holder asks creditors to agree to a decision that this be the basis of their fees and they provide a fees estimate for £50,000, how can the creditor inform the office holder that they approve of time costs but only to a fee of up to 30,000? It would seem inefficient for the creditor to vote to reject the proposed decision in full.

- Presumably, however, there must be a way for an office holder and creditors to agree to cap fees on a time costs basis at £30,000 even if the fees estimate were £50,000. In that case, it is difficult to see how the office holder could revert to creditors at a later date to seek approval to fees in excess of £30,000, say for another £10,000. R18.30 would appear not to apply, as it refers to "exceeding the fee estimate" and throughout to explaining work, time and fees in excess of "the fees estimate; however, in this case, the fees estimate was £50,000, it was just that creditors voted only to allow the office holder to draw £30,000. R18.29 also would not always apply, as there would not always be a "material and substantial change in circumstances" and in any event R18.29 only allows the basis of fees to be changed. This approach to fee-approval is particularly common when dealing with a creditors'/liquidation committee, who are usually content to approve office holders' fees on a milestone basis, requiring the office holders to report and seek approval for further fees periodically and usually in relation to work done. The Rules are not well-designed to cope with such milestone requests.

- What is meant by "remuneration charged" and "remuneration expected to be charged" in R18.4(1)(b) and R18.4(1)(e) when the remuneration has been fixed on a time cost basis? Does this mean: (i) the full amount of time costs incurred/expected; (ii) the full amount of time costs incurred/expected to the extent that the office holder expects/hopes to draw them as fees; or (iii) the full amount of time costs incurred/expected to the extent that creditors have approved them to date?

- R18.4(1)(e) requires reports to state whether the remuneration expected to be charged "is likely to exceed the fees estimate under rule 18.16(4) or any approval given". The word "or" is confusing: for example, if creditors have only approved £30,000 of a fees estimate of £50,000, what kind of statement is required if the "remuneration expected to be charged" is £40,000?

- Some requirements of Administrators' Proposals appear unnecessary and confusing: (i) the requirement for Proposals to contain the date that the Proposals are delivered to creditors (R3.35(1)(e)), i.e. before the Proposals are even sent and in view of the fact that there could be more than one delivery date, say, where the Administrator uses different methods of delivery; (ii) the creditors' details (if not provided by the Statement of Affairs) "must be given in [the] order" set out in R3.35(3); and (iii) the requirement for information on the Administrator's fees and pre-administration costs to be contained in "the document containing the statement of proposals" (R3.35(9) and (10)), i.e. giving the impression that the Proposals are an enclosure to an overarching document, although no other detail is provided as to what this overarching document should contain.

- It is not clear whether R3.35(1)(j)(ii)(aa) requires the name of the proposed liquidator to be included in the Proposals or whether it is acceptable to put, for example, "or alternatively any successor in office as Administrator at the time of the move to CVL" or perhaps "or alternatively any other licensed insolvency practitioner of [firm name]". These alternative approaches are of assistance to firms in managing changes in their licensed IPs, but it may be contrary to the assumed policy objective that creditors receive clear notice of the identity of the proposed office holder.