INSOLVENCY AND CONSUMER CREDIT ADVICE

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

Historically, IPs routinely advise debtors about their options when they are faced with financial difficulties. 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 licences obtained directly from the Office of Fair Trading (which had responsibility for the regime prior to 1 April 2014). The group schemes effectively fell away on 1 April, leaving IPs to decide whether to seek permission from the FCA under the new Financial Services & Markets Act (FCMA) regime.

Fortunately, discussions between the regulators, Treasury and others resulted in a legislative *exclusion* for IPs, so that where IPs are giving advice as an Office Holder or in the context of their pre-insolvency obligations and are doing so in *reasonable contemplation* of acting in a formal capacity, they and their firms may provide debt counselling services outside of the FCA regime. Their insolvency licensing bodies (Recognised Professional Bodies (RPB)) will regulate their activities, and the advice they give is not considered to be activity regulated under the FCMA.

This is a sensible measure that avoids duplication in regulation, and will assist the many Insolvency Practitioners who conduct exclusively insolvency work. However, IPs who also have an interest in debt management companies, or wish to offer non-statutory solutions themselves, will be conducting regulated consumer credit activities requiring direct FCA authorisation.

Some membership bodies (Designated Professional Bodies (DPB)) will operate schemes that permit certain of their members 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 give (e.g. accountants not engaged in insolvency practice) is regulated under the FSMA by the DPB, rather than by the FCA directly.

IPs are very unlikely to benefit from such an exemption in view of the 'incidental' test, and so are faced with a choice between direct FCA authorisation where they wish to provide a full range of consumer credit regulated activities, or a more limited advice role specifically related to their duties as IPs. This position was confirmed by David Philpott, of the FCA's Consumer Credit Sector Team, when he spoke at the IPA's Personal Insolvency Conference in Manchester on 27 November 2014, and reinforces the position set out previously by the Insolvency Service in its *Dear IP* letters.

Mr Philpott also emphasised in his conference speech that the ground rules are clear and unlikely to change, and IPs should look to work within the spirit of those rules and not look for ways around them – in short, adopt a principles-based approach and ensure that any actions they propose to take are in accordance with those principles.

Picture: Dave Philpott of the FCA at the IPA Personal Insolvency Conference, Etihad Stadium, in Manchester, November 2014

A number of our members have raised queries with us in the period since April 2014, and we have sought to confirm our understanding of the position with the FCA, upon their behalf. Hopefully the answers set out below go some way to resolving any outstanding uncertainties.

These answers may also be found within the searchable FAQ facility in the Members' Area of our website: http://www.insolvency-practitioners.org.uk/faqs

Working within the IP Exclusion (where an IP does not wish to provide regulated debt advice of a type that would require him/her to be FCA authorised):

Q	A
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 Government's exclusion.
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.

Where 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 3.1 requirement to set out the advantages and disadvantages of all of the available options, the practitioner 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]
Can an IP advise that bankruptcy is the most appropriate course of action, given that they will be unable to take the appointment themselves?	An IP is likely to still be acting within the scope of the 'pre-appointment advice' element of the IP exclusion if he or she advises that an IVA is not an/the most appropriate solution, suggests to the debtor that they might wish to consider other potential debt solutions (such as bankruptcy or DROs for example) and then (and as soon as reasonably possible) signposts the debtor to an (FCA authorised) advisor who advises on/administers such solutions. 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. [See below re: signposting]
Can an IP negotiate directly up the debtor's behalf, as an alternative to proposing a formal IVA?	Not unless FCA authorised, athe exemption for insolvency practitioners conducting debt adjusting activity only extends to activities performed whilst in office as an insolvency practitioner, or when acting in reasonable contemplation of an insolvency appointment. The exemption does not extend to the provision of non-statutory solutions (e.g. full and final settlements, informal arrangements, debt management or DAS).
Can a practitioner 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 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 ground 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 Insolvency Practitioner who was not conflicted from assisting them in a personal capacity.
Appropriate signposting	Whenever signposting to another firm/advisor, regard should also be given to example 13 in the FCA's Perimeter Guidance (PERG 17.7) on what constitutes 'debt counselling'.

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 advice/assistance.
Post IVA completion: Can a practitioner 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
Is the position any different in Scotland?	The position for IPs when fulfilling their SIP 3.3 duties will be largely the same as outlined above, although 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 Debt Arrangement Schemes are not insolvency appointments within the scope of the exclusion.
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 the 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.
Would the responses to the above vary in the event the practitioner'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 insolvency practitioner, that are outside the scope of the Government exclusion, would be carried on in the course of providing the IPs professional services (rather than incidental to them). Therefore those services are unlikely to meet the criteria to benefit from an exemption under Part 20 FSMA.

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 insolvency office holder. 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"*.

The IPA will also seek to work with the Insolvency Service, FCA and the other RPBs in ameliorating some of the potential anomalies created by the interaction of these two regulatory regimes, with a view to ensuring that all insolvency practitioners are able to serve their debtor clients to the highest of expected professional standards.

If IPA members require any further assistance, they may contact the IPA's Ethical and Regulatory Helpline on: 0207 397 6407.