FINANCIAL CONDUCT AUTHORITY

Guidance for insolvency practitioners on how to approach regulated firms: Feedback on GC20/5

Feedback Statement
FS21/9

May 2021

This relates to

Guidance Consultation 20/5 which is available on our website at www.fca.org.uk/publications

Email:
GC20-05@fca.org.uk

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1 Summary

1.1 Minimising the impact of a regulated firm failure is a key priority for us. While we cannot stop firms failing, we aim to help minimise disorderly failures that cause serious harm to both consumers and markets. This involves working with insolvency practitioners (IPs) appointed over regulated firms to reduce such harm where possible. By 'regulated firms' we mean firms authorised under the Financial Services and Markets Act 2000 (FSMA) and firms authorised or registered under the Payment Services Regulations 2017 (PSRs) or Electronic Money Regulations 2011 (EMRs).

1.2 If an IP is appointed over a regulated firm, the IP takes control of the firm which continues to have regulatory obligations. It is therefore important that the IP ensures compliance with our rules and guidance and relevant legislation which aim to achieve better outcomes for consumers and market participants following a firm failure.

1.3 On 7 December 2020, we published a guidance consultation on how IPs should approach regulated firm failures (GC20/5). This feedback statement sets out our response to the feedback received and the changes made to the guidance as a result. Overall, respondents supported our proposed guidance and we are implementing it as consulted on in GC20/5, subject to minor changes.

Who this affects

1.4 The guidance is primarily aimed at IPs appointed (or looking to be appointed) over regulated firms. It may also be of interest to the Official Receiver, professional advisers, trade associations, firms and consumers.

Wider context

1.5 The guidance provides our view of how an IP should ensure regulated firms meet their ongoing financial services regulatory obligations following appointment. We supervise regulated firms, including those in insolvency proceedings, while they continue to be authorised or registered by us.

1.6 We are not the regulatory authority for IPs and IPs generally act as officers of the court. We have therefore engaged with the recognised professional bodies (RPBs) (who license and regulate IPs) and the Insolvency Service (oversight regulator of the RPBs on behalf of the Secretary of State for BEIS) on the guidance.

How it links to our objectives

1.7 The guidance will help us advance our operational objective of providing an appropriate degree of protection for consumers by setting out regulatory requirements which IPs should be aware of and good practice on how IPs should handle insolvencies of regulated firms. This includes, for example, treating customers fairly, returning client assets and customers' funds, and consumer redress.

Summary of feedback and our response

1.8 We received 22 responses to GC20/5, including from IPs, regulatory bodies, trade associations, consumer groups and individuals.

1.9 Respondents largely supported the proposed guidance with several noting their agreement that it was necessary and clearly set out. Although no respondents disagreed with the guidance, some made minor suggestions and comments in certain areas. Descriptions of the feedback are included within each topic of this feedback statement and have shaped the final guidance.

1.10 We would like to thank all respondents for their feedback.

Equality and diversity considerations

1.11 We have considered the equality and diversity issues that may arise from the guidance. Overall, we do not think that the guidance materially impacts any of the groups with protected characteristics under the Equality Act 2010.

Next steps

1.12 We have published the final guidance. We will continue our engagement with stakeholders on this area, including IPs, the RPBs and the Insolvency Service.

1.13 IPs appointed over regulated firms should follow the guidance to help them ensure regulated firms meet their ongoing regulatory obligations following appointment.

2 Feedback and response summary

2.1 In this chapter, we summarise and respond to significant areas of feedback we received on the proposed guidance. The feedback is presented under each of the questions posed in GC20/5. These are:

- 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?
- 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?
- 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?
- 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?

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?***

Feedback received:

2.2 Most respondents agreed with our pre-appointment considerations and said that these were usefully articulated. We received minor comments in the following areas:

Early engagement with the FCA

2.3 Some respondents suggested that the guidance reflect that, prior to appointment, an IP is only advising the regulated firm and cannot ensure that the firm notifies us of certain events (e.g. service of a statutory demand). One noted that a liquidator is not required to send a winding-up resolution or their certificate of appointment to us as these documents are not required to be sent to creditors. A few respondents requested specific timeframes for providing information to us and our response to enquiries from IPs. Another asked for a dedicated insolvency contact in addition to the general firm.queries@fca.org.uk email address for enquiries.

Sufficient experience for an appointment over a regulated firm

2.4 Two respondents noted that appointments over regulated firms requires greater expertise than other appointments. One queried how to identify whether a firm is FCA regulated, while another requested example VREQs and OIREQs in the guidance.

Creditors' committees and insolvency costs

2.5 Several respondents suggested that the guidance reflect that an IP cannot ensure representation across all types of stakeholders on a creditors' committees, as creditors volunteer their nomination for membership and there is a cap on eligible members. Some commented that the guidance on creditors' committees and insolvency costs may overlap with insolvency legislation and existing Statements of Insolvency Practice (SIPs). Others suggested that these areas would be better placed in either Chapter 3 (Entering insolvency) or Chapter 4 (During insolvency). Two respondents queried when an independent cost assessor would be needed.

FCA consent to out of court administrator appointments

2.6 A few respondents queried our expectations on out of court appointments of administrators, including whether providing additional information would expedite our consent process; whether we would prefer the prospective administrator to advance one statutory administration objective over another; and examples of past conduct that we would consider as inappropriate. Another suggested that our consent is not required to be filed with the notice of appointment (NOA) where there is a preceding notice of intention to appoint (NOIA).

Other comments

2.7 Two respondents requested clarity on an IP's conduct while appointed as a liquidator over a members' voluntary liquidation (MVL). Another suggested guidance for IPs when appointed over credit unions.

Our response:

Early engagement with the FCA

2.8 We have amended the guidance to clarify that, prior to appointment, an IP should advise the regulated firm to notify and share documents with us as required by our rules and legislation. Once an IP (including a liquidator) has been appointed, the insolvency of a firm is a notifiable event under SUP 15 and the IP should ensure to send any relevant appointment documents to support this notification. We disagree with providing specific timeframes on information sharing and enquiries as this depends on the firm's specific circumstances and any potential consumer harm. We have not provided a dedicated insolvency contact address as a regulated firm failure involves multiple specialist teams at the FCA and we consider the general firm.queries@fca.org.uk email address to be the appropriate contact.

Sufficient experience for an appointment over a regulated firm

2.9 The Insolvency Code of Ethics requires that an IP should only accept an insolvency appointment where the IP has or can acquire sufficient expertise. Where an IP is appointed over a regulated firm, we expect the IP to understand the firm's regulated activities and know what regulatory requirements apply to it, or have a plan to gain an understanding of these. We have amended the guidance to clarify that an IP can search for a firm using the FCA Register to determine whether it is currently or was previously regulated by us. VREQs and OIREQs are tailored to the firm on whose permissions they

are imposed. These can be accessed using the FCA Register under 'What can this firm do in the UK?' and 'Restrictions' or, where it is not public, will have been received by the relevant firm.

Creditors' committees and insolvency costs

2.10 We have amended the guidance to clarify that an IP should take reasonable steps (in accordance with relevant legislation) to ensure appropriate representation from all types of creditors and clients. We are not imposing any new obligations over and above those set out in insolvency legislation and therefore IPs should already be adhering to our expectations. We have also engaged with the RPBs to ensure that the guidance is consistent with insolvency legislation and SIPs. We are retaining our guidance on creditors' committees and insolvency costs in Chapter 2 (Pre-insolvency) as we believe these areas should be considered before the firm enters an insolvency procedure. We have not prescribed the circumstances in which an independent cost assessor should be appointed as this will depend on the circumstances of the firm.

FCA consent to out of court administrator appointments

2.11 We have made minor amendments to the guidance to clarify our expectations on consent requests. Unless requested by us, it is at an IP's discretion as to how much information they supply with their consent request. We have also amended the guidance to clarify that our consent must accompany the filed NOA or filed with the court along with the NOIA as applicable.

Other comments

2.12 We have amended the guidance to remind IPs of the actions that should be taken if appointed over firms that have entered MVLs, particularly regarding contingent liabilities. We have not introduced specific guidance for IPs appointed over credit unions as aspects of the guidance are already applicable to them from the perspective of conduct regulation.

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?***

Feedback received:

2.13 Most respondents agreed and welcomed our expectations on IPs. We received minor suggestions and comments in the following areas:

Updates to the FCA

2.14 A few respondents requested clarity in the guidance on the frequency, scope and detail of updates to us. Others noted that providing information to us could lead to a waiver of legal privilege or conflict with disclosure obligations to the Insolvency Service on directors' conduct.

Communicating with clients

2.15 Some respondents made suggestions on the content of client communications, including providing options for clients to communicate with the IP; reassuring that client assets are safe and estimated costs and time for returning these; and the FCA producing a standard template. Two were concerned that deadlines of statutory communications would not be met if an IP shared these with us before finalising.

Interaction with the FSCS and the Ombudsman Service

2.16 A few respondents suggested that the guidance clarify that, while the FSCS ranks as an unsecured creditor for most debts relating to a firm failure, it ranks as a preferential creditor for deposit and direct insurance claims. One noted that the FSCS takes a full assignment of the customer's rights and would usually seek to recover the full amount of the customer's calculated loss (rather than the amount of compensation paid). They also suggested retaining data in the long term as the FSCS may continue to receive claims after the IP's appointment ends. Another suggested that guidance on interactions with the FSCS and the Ombudsman Service would be better placed in Chapter 4 (During insolvency).

Notifying customers that they may have a claim for redress

2.17 One respondent suggested that the guidance reflect that an IP should only notify customers on potential redress claims if this is cost effective and there is likely to be a distribution to unsecured creditors. Another noted that, on appointment, the IP may not know which customers are due redress and notifying all customers may lead to confusion and increase costs in handling customer queries.

Appointed representatives

2.18 Two respondents queried how an IP can ensure an appointed representative (AR) treats customers fairly.

Other comments

2.19 A few respondents commented that the statutory duties of an IP involve handling the insolvency process in the interests of creditors (rather than clients). Another suggested including guidance on the IBSAR where there are open transactions on the stock market at the point of insolvency.

Our response:

Updates to FCA

2.20 We disagree with prescribing the frequency and detail of updates to us as this would depend on the firm's specific circumstances and any potential consumer harm. IPs should be mindful of their obligations on legal privilege and disclosure to other authorities when providing information to us and make us aware of any restrictions.

Communicating with clients

2.21 An IP must pay due regard to the information needs of their clients and communicate with them in a way which is clear, fair and not misleading. We have amended the guidance to reflect that an IP should highlight a client's options for communicating with them. We are not introducing a standard template for client communications as this will depend on the firm's specific circumstances. IPs should share statutory communications with us in good time so that they can meet any deadlines on time.

Interaction with the FSCS and the Ombudsman Service

2.22 We have amended the guidance to include exceptions to the FSCS's ranking as an unsecured creditor for deposits and direct insurance claims and that the FSCS would normally seek to recover the full amount of a customer's calculated loss. We have also reminded IPs of retaining data in the long term. We have retained the guidance on interactions with the FSCS and the Ombudsman Service in Chapter 3 (Entering insolvency) because we expect such engagement to happen as early as possible in the insolvency process.

Notifying customers that they may have a claim for redress

2.23 We consider it best practice for an IP to notify all potential customers if they have a possible claim for redress.

Appointed representatives

2.24 Where an authorised firm has appointed an AR, the firm takes full responsibility for ensuring that the AR complies with our rules. Where an IP is appointed over a regulated firm, the IP takes control of the firm and needs to make sure that the firm continues to ensure that the relevant AR complies with our rules.

Other comments

2.25 We note the comments on IPs' statutory duties on handling the insolvency process. We believe there is a balance to be found between the statutory objectives of the insolvency regime, and the consumer protection objectives set out in the financial services regime. Our guidance is designed to help an IP understand how to approach insolvencies of regulated firms and how they should ensure regulated firms meet their ongoing financial services regulatory obligations following appointment. We are not introducing any specific guidance on open market transactions but remind IPs to review their obligations under the IBSAR, in particular Objective 2 which requires timely engagement with market bodies and authorities.

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?***

Feedback received:

2.26 Many respondents agreed and welcomed our expectations on IPs. We received minor suggestions and comments in the following areas:

Claims process

2.27 One respondent noted that an IP is not legally required to establish a claims process. Another commented that an IP may not be able to ensure an "easy to handle" claims process for clients given the comprehensive protocol for proving claims in insolvency legislation. One suggested encouraging IPs to manage clients' expectations by stating whether they may suffer losses or not (e.g. if they can claim their money from the FSCS). Another suggested reminding IPs to consider money laundering issues when designing the claims process. One asked for a specific timeframe for clients to submit their claims after a bar date notice is published.

Creditors' committees and confidentiality

2.28 One respondent suggested that the guidance encourages IPs to identify specific information as confidential in a creditors' committee to avoid an IP being unable to communicate entirely to non-committee members on an administration.

Treatment of shortfalls and distribution costs

2.29 One respondent requested examples of when the FSCS would need to perform a "look-through" to underlying beneficiaries who may not have a direct contractual relationship with the failed firm. Another suggested that our expectations may be disproportionate in terms of the time and resources needed to meet them in smaller cases. One felt our expectations would be resisted by IPs and legislation should be introduced to change the behaviour of IPs. One suggested that the guidance confirm that general administration costs can only be paid from the general estate. Another suggested that an IP could minimise costs incurred in the distribution process by seeking our agreement on sums deducted from the trust pool.

Transfers of client assets

2.30 One respondent suggested that the guidance encourages IPs to ensure that the transferee has the resources and capability to deliver appropriate levels of service in line with customer expectations. They also raised that alternative options to the transfer should be made clear to clients. Another felt that the use of pre-pack administration should be discouraged by us. One suggested that we maintain a list of firms willing to acquire failed firms' books of business.

Continuity of supply

2.31 A few respondents requested that we make clear that certain essential supply provisions in insolvency legislation apply to liquidations, whereas others do not. One noted that the guidance on continuity of supply be updated with the reforms introduced by the Corporate Insolvency and Governance Act 2020.

Equitable set-off

2.32 Some respondents noted that our expectations on equitable set-off may not be aligned with mandatory set-off provisions in insolvency law.

Cancellation of permissions

2.33 Two respondents indicated practical difficulties in cancelling a firm's permissions, with one noting that an IP needs a cooperative firm representative to access Connect and asked that we provide an alternative way to seek the cancellation of permissions if access is not permitted. Another felt that cancelling a firm's authorisation meant that we could withdraw involvement and interest in the failed firm.

Reporting of unauthorised business

2.34 One respondent noted IPs have little understanding of the difference between unauthorised or authorised business. Another suggested to alert IPs to look for firms without authorisation conducting payment services through online marketplaces.

Phoenixing

2.35 Several respondents requested clarity on our definition of phoenixing, noting that there are different interpretations of the practice and it is legally permitted. One stated that we should make IPs legally responsible for reporting any phoenixing practices to us. Another suggested that the guidance encourages IPs to look at prior transactions to ensure good parts of a business have not been sold at an undervalue.

Sale of client or customer data

2.36 A few respondents suggested that the guidance be adjusted on how data should be handled when client or customer data is sold. This includes encouraging IPs to ensure data is backed up for future FCA/FSCS purposes; undertaking GDPR training to minimise the risk of data breaches; implementing measures to ensure accuracy of credit data and reflecting data restrictions in the PSRs and Data Protection Act. Another queried when and what should be provided in an IP's notification to us when they plan to sell a client book. One suggested that clients be provided with impartial information on CMCs to enable clients to make reasoned decisions.

Tax matters

2.37 Two respondents suggested that the guidance remind IPs to liaise with the HMRC to preserve the tax wrapper status for certain products. Another queried how prompt return of post-PPE client money under the CASS rules would maintain the tax status of ISA and SIPP accounts.

Other comments

2.38 One respondent suggested that IPs should always take expert legal advice, especially during a special administration, and for the guidance to provide legal directories to assist the IP with identifying an appropriate law firm. Another requested guidance on dealing with Subject Access Requests. Some observations were also made in respect of previous firm failures where an IP had not correctly approached the firm failure.

Our response:

Claims process

2.39 We believe it is generally a good practice for an IP to have a claims process in place for clients and creditors. Our expectations do not conflict with insolvency legislation and it is in the interests of clients and the IP to ensure that the claims process is practical and easy to handle. We have amended the guidance to encourage IPs to manage clients' expectations by informing them of any FSCS coverage that may be available for distribution costs and the eligibility criteria for this. We have also reminded IPs to consider any risks relating to money laundering. We have not provided specific timeframes on submitting claims after a bar date notice as this will depend on the IP's timetable for distribution (including a distribution plan if used).

Creditors' committees and confidentiality

2.40 It is the role of the IP to distinguish between information that is confidential and that which may be shared with non-committee members.

Treatment of shortfalls and distribution costs

2.41 We have included examples in the guidance of when the FSCS may perform "look-through" assessments. Our expectations are intended to provide clarity to IPs on how to comply with existing regulatory obligations on regulated firms following appointment. These obligations are designed to protect consumers and market participants. We do not regulate IPs and legislative changes are not within our remit (they are within the Government's remit). Our guidance confirms that distribution costs are costs directly attributable to the distribution of client assets and only these should be paid from client assets held by the firm.

Transfers of client assets

2.42 We have amended the guidance to encourage an IP to consider whether a transferee has adequate resources and capabilities to manage the transferred accounts and communicate to clients any alternative arrangements to the transfer. The guidance makes IPs aware of the availability of pre-pack administrations but does not comment on the effectiveness of these. We have not produced a list of firms for acquiring failed firms as this may change over time; the checks and balances we expect an IP to perform would help to ensure a suitable transferee.

Continuity of supply

2.43 We have amended the guidance to make clear that certain essential supply provisions in insolvency legislation apply to liquidations, whereas others do not. We have also made minor amendments to reflect the changes introduced by the Corporate Insolvency and Governance Act 2020.

Equitable set-off

2.44 The guidance does not intend to describe the different types of set-offs that may arise in an insolvency procedure. Instead, the guidance is intended to remind IPs to consider equitable set-off when it is applicable.

Cancellation of permissions

2.45 We expect an IP to ensure that a firm has the relevant permissions appropriate for the current state of the firm. If an IP is unable to access Connect, they should contact us by email to firm.queries@fca.org.uk. While firms remain authorised, they are subject to supervisory oversight.

Reporting of unauthorised businesses

2.46 The guidance explains the difference between unauthorised and authorised businesses and details our expectations of IPs in relation to reporting identified or suspected unauthorised business.

Phoenixing

2.47 We have amended the guidance to refer to our description of phoenixing set out on our dedicated webpage on phoenixing. We reiterate that what we consider unacceptable is firms or individuals avoiding any type of liabilities to consumers and continuing to trade under a different guise, and so we will take necessary steps to prevent such practices. The guidance also reminds IPs to consider any sales prior to the firm entering an insolvency procedure and investigate the propriety of those transactions.

Sale of client or customer data

2.48 We are not the regulator of data protection matters and it is not appropriate for us to give guidance on how firms or IPs should comply with data protection legislation. We have reminded IPs to consider these obligations in the guidance. This includes backing up company data and systems in accordance with relevant legislation. We expect an IP to notify us in good time, with sufficient details, if they are planning to sell client or customer data. In practice, we would expect this notification as early as possible giving us enough opportunity to understand the implications before taking any action needed. The guidance does not make any judgement on CMCs; rather it details steps for the IP to take when considering to sell the client book to a CMC, including referring to our joint statement with the ICO on dealing with personal data.

Tax matters

2.49 We are not the regulator for tax matters and therefore it is not appropriate for us to give guidance on how firms or IPs should comply with tax legislation. An IP should consider the tax status of any ISA and SIPP accounts and take appropriate advice on such matters as needed.

Other comments

2.50 The guidance encourages IPs to consult with relevant specialists (including legal experts) during the insolvency process where necessary. The time and costs associated with dealing with Subject Access Requests is not a regulatory issue that we are able to provide steer on, but a matter for IPs to consider in accordance with the relevant legislation. We note the observations made in respect of IPs' conduct in previous firm failures. This guidance aims to clarify how IPs should approach a regulated firm failure and improve outcomes for customers and market participants.

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?***

Feedback received:

2.51 Many respondents agreed with our expectations on restructuring procedures. One asked for clarification around our potential concerns where an FCA regulated firm seeks to compromise claims (particularly redress-related claims) of customers through a scheme of arrangement or company voluntary arrangement (CVA). Another requested clarity on the frequency and detail of updates to us on the progress of restructuring procedures. One highlighted that schemes of arrangement and restructuring plans do not require an IP to be involved.

Our response:

2.52 We consider firms entering restructuring procedures on a case-by-case basis, which includes scenarios where a firm may seek to compromise claims. We will decide what actions to take based on the merits of each case, including the level of potential harm to consumers and markets. IPs should decide on a case-by-case basis as to how frequently they should update us on developments. We may require more frequent updates if there are material redress and/or material conduct issues. IPs should also be mindful of any notification requirements on firms that are set out in our Handbook, including SUP 15 and Principle 11. We have amended guidance to clarify that an IP will act as supervisor for CVAs only.

Annex 1
List of non-confidential respondents

British Insurance Brokers' Association

The City of London Law Society

Experian

Financial Services Compensation Scheme

Financial Services Consumer Panel

Insolvency Oracle

KPMG LLP

Leonard Curtis Business Solutions Group

Mazars LLP

New South Law Ltd

R3 Association of Business Recovery Professionals

ShareSoc (UK Individual Shareholders Society)

Transpact.com

Annex 2
Abbreviations used in this paper

Abbreviation	Description
AR	Appointed representative
BEIS	Department for Business, Energy and Industrial Strategy
CASS	Client Assets Sourcebook
CMC	Claims management company
CVA	Company voluntary arrangement
EMI	E-money institution
EMRs	Electronic Money Regulations 2011
FCA	Financial Conduct Authority
FSCS	Financial Services Compensation Scheme
FSMA	Financial Services and Markets Act 2000
HMRC	Her Majesty's Revenue and Customs
HMT	Her Majesty's Treasury
IBSAR	Investment Bank Special Administration Regime
ICO	Information Commissioner's Office
IP	Insolvency Practitioner
ISA	Individual Savings Account
KYC	Know Your Client
MVL	Members Voluntary Liquidation
OIREQ	Own-initiative imposition of a requirement
Ombudsman Service	Financial Ombudsman Service
PI	Payment institution

Abbreviation	Description
PRA	Prudential Regulation Authority
PSP	Payment service provider
PSRs	Payment Services Regulations 2017
RPB	Recognised Professional Body
SIP	Statement of Insolvency Practice
SIPP	Self-invested personal pension
SUP	Supervision Manual
VREQ	Voluntarily requirement

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