Guidance consultation

Proposed amendments to FG21/4 - Guidance for insolvency practitioners on how to approach regulated firms

GC24/1

March 2024

1 Introduction

1.1 In 2021 we published FG21/4 Guidance for insolvency practitioners on how to approach regulated firms (the Guidance) to help insolvency practitioners (IPs) comply with our rules and guidance as well as relevant legislation which aim to achieve better outcomes for consumers and market participants following a failure of a regulated firm.

1.2 We are now proposing to amend the Guidance to update and improve it.

1.3 Minimising the impact of a regulated firm failure is a key priority for the FCA and we made a commitment in our current Strategy to reduce harm from firm failure. 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 IPs appointed over regulated firms[1] to reduce such harm where possible.

1.4 If an IP is appointed over a regulated firm, the IP takes control of the firm which continues to have regulatory requirements and responsibilities.

1.5 The Guidance, among other things, highlights and raises awareness of regulated firms' regulatory obligations and our expectations of IPs when taking appointments. We have received feedback from stakeholders that the Guidance has been helpful to IPs in ensuring regulated firms meet these ongoing obligations following appointment.

[1] References to regulated firms refers to firms authorised under the Financial Services and Markets Act 2000, the Payment Services Regulations 2017 and Electronic Money Regulations 2011 unless otherwise stated.

1.6 Given developments that have occurred since the Guidance was published in 2021, we decided to undertake an exercise to assess whether it remains relevant for when regulated firms fail. These developments included: changes in the legal framework affecting firm failure (for example, the coming into force of the Payment and Electronic Money Institution Insolvency Regulations 2021), changes in the regulatory framework (for example, the introduction of the Consumer Duty); and changes in the UK economic climate including significant changes in interest rates.

1.7 We concluded that the Guidance remained appropriate but would benefit from updating to reflect some of the changes referred to above. Having also received feedback from several stakeholders, including an insolvency trade body, one of the recognised professional bodies that authorises IPs, and the Insolvency Service, we identified aspects of the Guidance where we could improve clarity or provide further information. We are therefore consulting on proposed amendments to the Guidance.

1.8 The proposed guidance is aimed at IPs appointed over firms solely authorised or registered by the FCA. It may also be relevant for IPs appointed over firms that are dual regulated by the FCA and PRA[2].

2 The consultation

What we are consulting on

2.1 We set out the proposed amendments to the Guidance in the Annex.

2.2 Some of the more substantive amendments and the reasons for proposing them are summarised below:

- **Introduction of the Consumer Duty** - The Consumer Duty introduces higher and clearer standards of consumer protection across financial services and requires firms to act to deliver good outcomes for retail customers. Our rules require firms to consider the needs, characteristics and objectives of their customers – including those with characteristics of vulnerability – and how they behave, at every stage of the customer journey. As well as acting to deliver good customer outcomes, firms will need to understand and evidence whether those outcomes are being met. The Consumer Duty came into effect on 31 July 2023 for new and existing products and services that are open to sale (or renewal). From 31 July 2024, the Consumer Duty will apply to the products and services of firms held in closed books.

  Our rules, including those relevant to the Consumer Duty, continue to apply to firms in insolvency, up until their permissions are cancelled. We have

[2] The FCA is the competent authority for solo-regulated firms. The PRA is the competent authority for dual-regulated firms. The Bank of England is designated as the resolution authority for dual regulated firms and certain investment firms.

therefore made changes to the Guidance setting out our expectation that IPs conduct the affairs of the firm in a way that is compatible with the Consumer Duty.

- **Compromises Guidance** - In July 2022, we published guidance clarifying how we approach compromises in line with our statutory objectives to protect consumers and the integrity of markets. The aim of this guidance is to help firms understand what information we need and the factors we will consider when deciding if and what actions we will take.

  IPs may be involved in certain types of compromises (for example, acting as the statutory office-holder (the supervisor) in a company voluntary arrangement) or may consider them as an option for a firm in an insolvency proceeding. We have therefore made changes to the Guidance to ensure both sets of guidance are duly aligned.

- **Availability of Financial Services Compensation Scheme (FSCS) protection for customers of payment and electronic money firms where a credit institution holding safeguarding deposits fails** - In March 2023, the PRA amended its rules to make FSCS depositor protection available to eligible customers of an electronic money institution (EMI)/payments institution (PI) in respect of their relevant proportion of safeguarded funds should a credit institution holding the safeguarded deposits fail.

  We have made changes to the Guidance to reflect that whilst eligible customers of an EMI or PI may receive FSCS protection in certain circumstances where the credit institution that holds their safeguarded funds fails, IPs should avoid giving customers misleading impressions on the protection they can receive from the FSCS. This is because the availability of FSCS depositor protection depends on the particular facts of the case.

  In addition, we have updated the Guidance to reflect that, where FSCS protection is available following the failure of a PRA authorised credit institution holding safeguarded deposits, an IP should liaise with the FSCS, including to consider whether clients/creditors need to be involved.

- **The Court of Appeal decision in *In The Matter of Ipagoo LLP*** - The Court of Appeal in the *Ipagoo* decision held that the Electronic Money Regulations 2011 do not create a statutory trust over relevant funds held by an EMI but that the 'asset pool' includes relevant funds that have been properly safeguarded and an amount equivalent to relevant funds that should have been safeguarded but were not.

  We have made changes to the Guidance to reflect our understanding of the Ipagoo decision so that IPs are aware of and understand the need to top-up the asset pool where there is a shortfall in safeguarded relevant funds. We would however note that, as part of the Smarter Regulatory Framework

Payments work, working in conjunction with the Treasury, we are currently considering changes to strengthen safeguarding requirements for payment firms and are aiming to consult in summer 2024.

- **Dormant Asset Scheme expansion –** the Dormant Assets Act 2022 enables an authorised reclaim fund, which administers the scheme, to accept a wider range of dormant assets, including certain assets in the insurance and pensions, investment and wealth management sectors.

  In anticipation of making final rules this year to facilitate the expansion of the Dormant Asset Scheme, we have proposed new guidance to advise IPs that they should liaise with the authorised reclaim fund if the failed firm was a participant in the scheme and is holding customer records in relation to dormant funds transferred to the authorised reclaim fund.

2.3 In addition to the above, we have also made a number of other amendments in response to feedback received from stakeholders, including IPs, and our own experience of regulated firm failures since the Guidance was published in 2021. This includes the first uses of the Payment and Electronic Money Institution Insolvency Regulations 2021.

2.4 **We would like to receive consultees' views on the proposed amendments**.

Who does this consultation affect?

2.5 The Guidance and the proposed amendments to it are primarily aimed at IPs appointed (or looking to be appointed) over regulated firms. It may also be of interest to professional advisers, trade associations, firms and consumers.

Cost benefit analysis

2.6 The Financial Services and Markets Act 2000 (FSMA) does not require us to publish a cost benefit analysis (CBA) when proposing guidance. However, we produce a CBA for general guidance if a high-level assessment identifies an element of novelty which may be prescriptive or prohibitive such that some costs may be incurred.

2.7 In this CBA, we have assessed the potential impacts of amending the Guidance. Where it is reasonably practicable to do so, we have provided monetary values for the impacts. Where we have been unable to quantify the impact, we have provided a qualitative assessment of these elements.

Rationale for intervention

2.8 The proposed amendments provide our updated view of how an IP ensure regulated firms meet their ongoing regulatory obligations following appointment. We do not regulate IPs. However, given the regulatory principles of proportionality and transparency, we have assessed the impact of the proposed guidance on IPs in this CBA.

Firms affected

2.9 As at 1 January 2023, there were 1,542 licensed IPs in the UK, of which 1,273 were appointment takers (The Insolvency Service, Annual Review of Insolvency Practitioner Regulation 2022).

2.10 For this CBA, in the absence of known reasons for making material changes, we have made the same assumptions as those used when we originally consulted on the Guidance in GC20/5, in 2020. On that basis, we have assumed the affected population of IP firms to be 225 firms, consisting of 11 large and 214 smaller firms. We cannot predict the exact number of IPs that will be appointed over regulated firms for any given period in the future.

Costs to firms

2.11 The Guidance does not create new obligations on regulated firms but provides our view on how IPs should ensure firms meet their ongoing regulatory obligations during an insolvency process. There will be costs to IPs to familiarise themselves with the amendments to the Guidance and conduct a gap analysis on what, if anything, they need to do.

2.12 We assume that IPs will need to familiarise themselves with and undertake a legal gap analysis of approximately 60 pages of this guidance consultation document. We use standard assumptions to estimate firm costs based on the standardised costs model, of which further details can be found in Annex 1 'How we analyse the costs and benefits of our policies'. We estimate total industry-wide one-off costs at £801,000 or approximately £8,000 and £3,200 per large and smaller IP firms respectively.

2.13 We do not envisage any ongoing costs for IPs.

Benefits

2.14 The amended guidance is likely to improve outcomes on a firm failure and achieve the following:

• Reduce insolvency costs by raising awareness and provide easily accessible, up-to-date information to IPs on how to deal with regulated firm failures.

• Help IPs who have limited experience of regulated firm failures and who take appointments to progress such failures more effectively.

• Improve IPs' awareness and knowledge of dealing with regulated firm failures, our requirements and ensure effective engagement with the FCA.

• Encourage best practice in dealing consistently with regulated firms in insolvency scenarios with a view to promoting fair and consistent outcomes aimed at maximising returns to clients and creditors and promoting the public interest.

2.15 We consider it is not reasonably practicable to give an estimate of the resulting benefits from the above examples.

2.16 We expect the amended guidance to be net beneficial as IPs, regulated firms in insolvency proceedings, their clients and creditors will benefit from reduced insolvency costs and improved outcomes on a firm failure.

Compatibility statement

2.17 Section 1B(1) of FSMA requires the FCA, when discharging its general functions, as far as is reasonably possible, to act in a way which is compatible with its strategic objective, advances one or more of its operational objectives, advances its secondary objective of competitiveness and growth, and its general duty under section 1B(5)(a) of FSMA to have regard to the regulatory principles in section 3B of FSMA. The FCA also needs, so far as is compatible with acting in a way that advances the consumer protection objective or the integrity objective, to carry out its general functions in a way that promotes effective competition in the interests of consumers.

2.18 We are satisfied that the draft amended guidance is compatible with our general duties under section 1B of FSMA, having regard to the matters set out in section 1C(2) of FSMA and the regulatory principles in section 3B of FSMA.

2.19 The amended and updated guidance will help us advance our operational objective of providing an appropriate degree of protection for consumers by setting out some applicable regulatory requirements which IPs should be aware of and good practice on how IPs should handle insolvencies of regulated firms including, for example, treating customers fairly, returning client assets and customers' funds, and consumer redress. We also consider that the amended and updated guidance advances our secondary objective. A more orderly insolvency process contributes to both market stability and consumer trust in UK financial services, which in turn help to support economic growth and the UK's international competitiveness.

2.20 In producing the draft amended guidance, we have had due regard to the principles in the Legislative and Regulatory Reform Act 2006 (LRRA) and the provisions in the Regulators' Compliance Code for the parts of the proposals that consist of general policies, principles or giving guidance. We are satisfied that we have had regard to the principles in the LRRA and to the Regulators' Compliance Code to the extent that our proposals consist of guidance and we consider that our proposals are proportionate and will produce an appropriate level of consumer protection when balanced with their impact on firms.

2.21 We have also had due regard to the recommendations made by Her Majesty's Treasury under section 1JA of FSMA about aspects of the economic policy of Her Majesty's Government. The draft amended guidance takes into consideration the recommendations relating to better outcomes for all consumers. The purpose of the draft amended guidance is to set out the FCA's views on how to approach regulated firms in insolvency. When the guidance is final, IPs should have due regard to it when undertaking insolvency procedures which will promote best outcomes for clients and creditors.

Equality and diversity considerations

2.22 We have considered the equality and diversity issues through the development of the proposed amendments to the Guidance. We do not consider that this proposed amendments will adversely impact any of the groups with protected characteristics under the Equality Act 2010. Overall, we consider that consumers across all groups are likely to benefit from this guidance, as it seeks to protect all consumers from harm. However, we will continue to consider the equality and diversity implications as we finalise this guidance. We welcome your comments on this.

How to respond and next steps

2.23 We welcome views from respondents by 30 April 2024. Please send your comments using the online response form on our website or you can email your responses to: gc24-1@fca.org.uk

2.24 We will review all responses to this consultation and, subject to responses received, intend to publish the finalised amended guidance later this year.

2.25 We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure. Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

Annex – Draft amended guidance for insolvency practitioners on how to approach regulated firms

Introduction

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. Failure to do that, could mean the FCA intervening with the insolvent firm using its supervisory and/or enforcement toolkit.

1.3 This 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. 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 and Insolvency Service on this guidance.

1.4 This guidance is aimed at IPs appointed over firms solely authorised or registered by the FCA. It may also be relevant from the perspective of conduct regulation for IPs appointed over firms that are dual regulated by the FCA and Prudential Regulation Authority (PRA). The FCA is the competent authority for solo-regulated firms. The PRA is the competent authority for dual-regulated firms. The Bank of England is designated as the resolution authority for dual regulated firms and certain investment firms (i.e. ~~IFPRU 730k~~ investment firms designated by the PRA under the Financial Services and Markets Act 2000 (PRA-regulated Activities) Order or solo-regulated firms that are part of a group subject to the Bank of England's resolution power under the Banking Act 2009).

About this guidance

What does this guidance cover?

2.1 The guidance is set out at Annex 1 (for firms authorised under FSMA) and Annex 2 (for firms authorised or registered under the PSRs or EMRs).

a. The guidance is structured as follows:

- **Chapter 1 (Introduction)** explains the scope of the guidance and our role in regulated firm failures.
- **Chapter 2 (Pre-insolvency)** outlines considerations for IPs before a regulated firm's entry into an insolvency procedure, such as obtaining consent for out of court administration appointments and sharing court documentation with us.
- **Chapter 3 (Entering insolvency)** explains our expectations on IPs at the point of a regulated firm's entry into an insolvency procedure and shortly thereafter, such as communications with clients and creditors.
- **Chapter 4 (During insolvency)** explains our expectations on IPs during an insolvency procedure, such as treatment of client assets and treating customers fairly.
- **Chapter 5 (Restructuring procedures)** explains our expectations when a regulated firm enters into a company voluntary arrangement, scheme of arrangement or restructuring plan.
- **Chapter 6 (Checklist)** summarises the key steps from the guidance that an IP will need to consider when appointed over a regulated firm.

Who does this guidance apply to?

2.2 The guidance is primarily aimed at IPs appointed (or looking to be appointed) over regulated firms, including provisional and interim appointments (such as a provisional liquidator). It may also be of interest to the Official Receiver, professional advisers, trade associations, firms and consumers.

Equality and diversity considerations

2.3 We have considered 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.

Annex 1– Guidance for insolvency practitioners on how to approach firms authorised under FSMA

Chapter 1: Introduction

1. This guidance is for IPs on how to approach firms authorised under FSMA.

2. This guidance is not exhaustive, neither is it a substitute for reading or complying with our Handbook and other applicable legislative requirements and guidance.

The FCA's role in firm failures

3. We have a role in every regulated firm failure and this role will vary depending on the circumstances of the firm. Our role may be consenting to an out of court appointment of an administrator or part of our ongoing supervision of the firm.

4. While we are not able to stop firms failing, we aim to minimise harm to consumers and markets that may arise from a disorderly firm failure. This involves working with IPs to reduce such harm where possible.

5. We have a range of powers provided by FSMA which enables us to intervene and act in insolvency proceedings in relation to a firm to protect consumers and market participants. We may also act prior to a firm entering into an insolvency process; this can include imposing requirements on the firm to take specific actions such as preserving the firm's books and records, varying the firm's regulatory permissions or taking steps to make an application to the court to place the firm into an insolvency procedure.

Chapter 2: Pre-insolvency

Sufficient experience for an appointment over a regulated firm

6. The Insolvency Code of Ethics requires that an IP should only accept an insolvency appointment where the IP has or can acquire sufficient expertise. IPs should be aware that the firms we regulate cover a wide range of different businesses, of different sizes, operating in different areas of the financial services sector. These include: asset management firms, motor finance providers, insurance intermediaries, credit rating agencies, exchanges, debt advice firms and crowdfunders, to name a few. Some will focus on providing products or services to retail clients, while others will operate exclusively in wholesale markets. If a firm is conducting regulated business, we expect the appointed IP to understand the business model and its regulated activities, or have a detailed plan to gain a full understanding of these shortly after their appointment. This could, for example, involve engaging relevant specialists.

The way in which an IP will need to approach a firm will be driven in part by the specific characteristics of the firm and the market(s) in which it operates.

7. We expect the IP to know what regulatory requirements apply to the firm and identify any issues with compliance. The regulatory requirements may include:

   - **Principles for Businesses (PRIN)**: these apply, in whole or in part, to all FSMA authorised firms and set out high-level but fundamental obligations with which firms must comply under the regulatory systems regarding various aspects, such as treating customers fairly, conflicts of interest and how a firm should communicate with the regulator.

   - **Client Assets Sourcebook (CASS)**: these requirements apply to firms that hold or control client assets[3]. This includes distribution and transfer provisions in the event of a firm failure.

   - **Compensation Sourcebook (COMP) and Dispute Resolution Complaints Sourcebook (DISP)**: COMP contains the rules and guidance that set out the circumstances in which the Financial Services Compensation Scheme (FSCS) may pay claims for compensation where relevant and to whom. DISP sets out how complaints are to be dealt with by firms, the reporting of complaints to us and operation of the Financial Ombudsman Service (the Ombudsman Service).

   - **The Consumer Duty (Principle 12 and PRIN 2A)**: the Consumer Duty sets high standards of consumer protection across retail financial services. It came into effect on 31 July 2023 for new and existing products and services that were open to sale (or renewal). From 31 July 2024, the Duty applies to other, closed products and services held in closed books. In summary, the Duty is comprised of:

     - Principle 12: requiring firms to act to deliver good outcomes for retail customers

     - Cross-cutting rules: these require firms to:

       (a) act in good faith towards retail customers

       (b) avoid causing foreseeable harm to retail customers

       (c) enable and support retail customers to pursue their financial objectives

     - Rules in relation to four areas that represent key elements of the firm-consumer relationship (the four outcomes): these cover product and service governance, price and value, consumer understanding and consumer support.

     There is further guidance on the Duty in FG22/5.

[3] References in this guidance to client assets refers to both client money and custody assets unless otherwise stated.

- **Supervision Manual (SUP):** this sets out the relationship between the FCA and firms, key individuals within them, their appointed representatives and tied agents, and those who own or control the firm.

- **Individual requirements, variation of permissions and limitations**: we apply these to an individual firm to vary its regulatory permissions and/or restrict the firm's activities[4]. We may ask a firm to apply for a variation of permission (VVOP) or the imposition of a requirement (VREQ) or impose it via our own-initiative powers (OIVOP/OIREQ). A firm must continue to comply with these variations, requirements and limitations after it enters into an insolvency procedure.

8. We expect an IP to consider if they have the capacity to take on an appointment, bearing in mind their existing appointments, and the size and complexity of the proposed appointment. If the IP does not have in-house resources to cover this, they should consider how appropriate resources will be engaged. We also expect an IP to consider how they will engage effectively with us during the insolvency proceedings.

Pre-insolvency checks

9. A prospective IP should search the FCA Register to determine the regulatory status of a firm. They should also check for any previous or trading names that the firm may have had on the FCA Register in addition to the current registered name.

~~9.~~10. An IP may often be involved with a firm before it becomes insolvent and advise on whether the firm has the necessary arrangements in place to wind down in an orderly manner. This includes:

- **A wind-down plan:** this details the steps that a firm will take, prior to, or leading up to ~~in~~ the event of insolvency, any risks associated with the wind-down and mitigating actions for these. An IP may wish to consult our Wind-down Planning Guide when advising on the robustness of a wind-down plan to help ensure an orderly wind-down of the firm.

- **A CASS resolution pack for investment firms and debt management firms that hold client assets[5]:** this contains documents and records relating to a firm's client assets holdings, which will help the IP to return client assets more quickly following a firm failure.

Early engagement with the FCA

~~10.~~11. We expect an IP to engage with us at an early stage, both prior to (with appropriate consent) and after appointment over a regulated firm. If an IP is advising a firm pre-appointment, we expect them to advise the firm to engage with us as appropriate, including complying with any notification requirements (e.g. notifications required under Principle 11 and SUP 15).

[4] Sections 55J and 55L of FSMA

[5] CASS 10 (investment firms) and CASS 11.12 (debt management firms)

~~11.~~12. Our Handbook will continue to apply to a firm in an insolvency procedure while it remains authorised. We also have statutory powers to get involved and this differs depending on the insolvency procedure and type of regulated firm (that is, authorised or formerly authorised, appointed representative or a firm which is or has been carrying out regulated activities without permissions). ~~A prospective IP can search the FCA Register to determine the regulatory status of a firm. They should also check for any previous or trading names that the firm may have had on the FCA Register in addition to the current registered name.~~

Administration

FCA consent to out of court administrator appointments

~~12.~~13. Should a firm (or its directors) seek to appoint an administrator through an out of court process, the administrator cannot be appointed without our written consent. This consent must accompany the filed notice of appointment (NOA) or be filed with the court along with notice of intention to appoint administrators document (NOIA), as applicable[6]. Consent should be requested by completing a template letter (see Appendix) and sending it to firm.queries@fca.org.uk or the firm's supervisory contact at the FCA. Where there is urgency to the appointment (where the appointment is proposed to take effect within 48 hours), requests marked 'Urgent' may be sent to resolution@fca.org.uk, otherwise the normal process should be followed.

~~13.~~14. Consent requests should be submitted by the IP or their legal representatives in a timely manner to ensure that we have sufficient time to consider the request and, where applicable, grant consent before the appointment takes place.

~~14.~~15. When assessing the consent request, we will consider the IP's ability to take on the appointment. This assessment is likely to include (but not limited to) the following factors:

- the IP's expertise in taking appointments as administrator
- whether the IP is satisfied that their strategy to achieve the proposed administration objective is reasonably practicable
- whether to our knowledge, anything calls into question the IP's independence from the firm when taking on the appointment (an IP will need to conduct their own conflicts and independence checks before accepting an appointment), ~~and~~
- whether the IP has given requisite consideration to the Insolvency Code of Ethics in accepting the appointment, and
- the IP's past conduct if they have taken previous appointments over regulated firms (e.g. wilful disregard of regulatory regimes or requirements).

[6] Section 362A of FSMA

~~15.~~16. Depending on the circumstances of the prospective appointment, we may ask additional questions, which must be answered to a satisfactory standard before consent can be issued.

~~16.~~17. Upon appointment, we expect the administrator to send their NOA to us at firm.queries@fca.org.uk. This will enable us to update our records on the firm, such as the FCA Register of regulated firms and individuals.

~~17.~~18. Where an administrator has been purportedly appointed and our consent has not been obtained, the administrator should contact us to request consent with an explanation of why consent was not sought earlier. This should be done as soon as the administrator becomes aware that consent should have been sought. If consent is provided, the FCA should not be taken to be opining on the validity of the administrator's appointment, or ratifying, agreeing to or with, and/or endorsing any of the actions taken between the administrator's appointment and the date on which the FCA's consent is provided. The administrator should seek legal advice on the validity of their appointment in these circumstances.

Sharing of court documentation with us

~~18.~~19. We are entitled to participate in court proceedings in relation to the regulated firm, such as the hearing of an administration application[7]. A prospective administrator should therefore advise the firm to engage with us and share any court documentation, administration applications and other documents required to be sent to creditors of the firm with us. The prospective administrator should advise this at the earliest opportunity, so that we have sufficient time to decide if our participation in the administration is appropriate.

The FCA's ability to apply for an administration order

~~19.~~20. If appropriate, we can apply to the court for an administration order in respect of a regulated firm.

Special administration

~~20.~~21. The Investment Bank Special Administration Regime (IBSAR) is a bespoke insolvency regime for investment firms that hold client assets. The IBSAR establishes three objectives for the special administrator: return client assets as soon as is reasonably practicable; timely engagement with market infrastructure bodies; and rescue the investment firm as a going concern or wind it up in the best interests of the creditors[8].

~~21.~~22. The IBSAR interacts closely with our CASS rules to provide a mechanism under which client assets can be returned to clients more efficiently in the event of an investment firm failure. The IBSAR is currently available for firms which meet the definition of 'investment banks', which includes a range of firms conducting investment business while holding client assets[9].

[7] Sections 362 of FSMA

[8] IBSAR Regulation 10(1)

[9] Section 232 of the Banking Act 2009

~~22.~~23. We are entitled to be heard at a hearing of a special administration order and any other court hearing in relation to the firm[10]. The prospective special administrator should therefore advise the firm (or applicant where this is a third party) to share court documentation with us at the earliest opportunity, so that we have sufficient time to decide if our attendance is appropriate. We are also able to direct the special administrator to prioritise one of the special administration objectives over the other objectives[11].

~~23.~~24. If a firm is eligible to enter special administration but is considering entering a different insolvency procedure, an IP cannot be appointed over the firm unless we are notified of preliminary steps taken in respect of that procedure. Following receipt of the notice, we have a period of two weeks to inform the person who gave notice whether we consent to the insolvency procedure to which the notice relates, whether we intend to apply for that (or an alternative) insolvency procedure or whether we intend to apply for a special administration order[12].

Statutory demands

~~24.~~25. The service of a statutory demand on a regulated firm should be notified to us. We therefore expect an IP engaged by a firm in this situation to advise the firm to notify us if they have received a statutory demand[~~13~~].

Winding-up petitions

~~25.~~26. We have the right to present a winding-up petition to the court in respect of a regulated firm[14]. In addition, where a party (other than the FCA) presents a petition to wind up a regulated firm, including where there is an application to have a provisional liquidator appointed, the firm must notify us about this[15]. If an IP is subsequently appointed to the firm, we would expect the IP to engage with us and ensure that a copy of the winding-up petition has been provided to us.

Liquidation

~~26.~~27. The appointment of a liquidator must be notified to us[16] in all cases, whether the proceedings are a voluntary liquidation (either a Members' Voluntary Liquidation (MVL) or a Creditors' Voluntary Liquidation (CVL)) or a compulsory liquidation, and whether the liquidator is an IP or the Official Receiver. We therefore expect a liquidator to notify us of their appointment as soon as possible. The appointed liquidator should ~~ensure to~~ send any relevant appointment documents to support their notification. These might include, depending on the type of liquidation proceedings, ~~C~~copies of the winding-up order, resolution to wind up, and the certificate of appointment. Documents should ~~also~~ be sent to firm.queries@fca.org.uk.

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[10] IBSAR Regulation 5(2)

[11] IBSAR Regulation 16

[12] IBSAR Regulation 8

[~~13~~] ~~As at the date of publishing this guidance, statutory demands and winding-up petitions are restricted until 30 June 2021 following the Corporate Insolvency and Governance Act 2020.~~

[14] Section 367 of FSMA

[15] SUP 15.3.21R

[16] SUP 15.3.21R and Principle 11.

~~27. In cases where a winding-up petition is presented and a firm subsequently enters into compulsory liquidation, the Official Receiver will be appointed over the firm as liquidator. We expect the Official Receiver to notify us in this case.~~

28. We have the right to participate in any court proceedings in relation to a liquidation, attend creditors meetings and participate in the decision procedure[17]. We therefore expect a liquidator to ensure that court and creditor documentation is shared with us at the earliest opportunity, so that we have sufficient time to decide if our participation is appropriate.

Notice if a firm is in the same group as a bank

29. An IP should be aware that, where a firm is in the same group as a bank (whether established in the UK or another ~~EU member~~ state), the firm is required to notify us, the PRA and the Bank of England seven days before entering an insolvency procedure[18]. An insolvency application cannot be determined until the Bank of England has informed the firm that they do not intend to exercise a stabilisation power over the firm under the Banking Act 2009 or, if the firm is a bank, the PRA and the Bank of England have confirmed that they do not intend to apply for bank insolvency under the Banking Act 2009.

Members' voluntary liquidation and creditors' voluntary liquidation

30. If a ~~members' voluntary liquidation (~~MVL~~)~~ is being considered for a firm, the prospective IP must consider all prospective and contingent liabilities, including complaints, potential litigation, and other redress claims, and whether they are appropriately reflected in the directors' declaration of solvency. This should involve assessing the firm's solvency, including querying any prospective contingent liabilities and complaints made to the Ombudsman Service with the firm's management.

~~30.~~31. Where a firm holds client assets, entry into a MVL will have certain consequences under the CASS rules, including triggering a pooling event (for more information, see para 71 onwards). IPs advising a firm on a prospective MVL should consider the impact and whether better outcomes could be delivered if client assets can be returned to clients prior to entry into MVL.

~~31.~~32. An IP must take steps to convert the liquidation to a ~~Creditors' Voluntary Liquidation (~~CVL~~)~~ if they are of the opinion that the firm will be unable to pays its debts in full. Accordingly, an IP should continue to monitor the situation regarding contingent liabilities throughout the MVL. This should take into account relevant factors such as the volume of complaints to the firm or the Ombudsman Service. If the IP is uncertain on this, they should discuss the matter with us and, if applicable, the FSCS before accepting the appointment or as soon as they become aware.

[17] Sections 371 and 374 of FSMA

[18] Sections 120A of the Banking Act 2009

~~32.~~33. Where an IP is required to convert an MVL to a CVL, we expect the IP to consider whether there is a conflict for the same IP to act in both processes.

Creditors' committees

~~33.~~34. After a firm has been placed into administration or special administration, the administrator must, when seeking approval from the creditors on the administrator's proposals, invite the creditors to decide whether a 'creditors' committee' should be established. By 'creditors' committee' we mean any creditors' committee or, in the context of liquidation, liquidation committee established by an IP under Part 17 of the Insolvency (England and Wales) Rules 2016 (Part 10 of the Insolvency (Scotland) (Receivership and Winding up) Rules 2018 for Scotland).

~~34.~~35. The purpose of the creditors' committee is to assist the IP in the discharge of their functions. Creditors will include anyone who is owed a debt by the failed firm, including clients and customers, and their interests are significant to the IP in fulfilling their duties. Clients for whom the firm holds client assets should be represented on the creditors' committee and the IP should take reasonable steps (in accordance with relevant legislation) to ensure appropriate representation from all types of clients and, where relevant, the FSCS on the committee.

Insolvency costs

~~35.~~36. An IP's fees and expenses are matters for creditors and the court to oversee and approve. However, we would expect an IP to properly record insolvency fees and expenses throughout the insolvency process, and any fees and expenses charged to the client estate should be directly attributable to the distribution of client assets. We also expect the IP to be efficient in their work and take steps with the aim of reducing costs that would be borne by clients and creditors wherever possible.

~~36.~~37. Fees estimates and details of expenses that the IP considers will, or are likely to, be~~,~~ incurred should be realistic and communicated to clients and creditors in a timely and clear manner. An IP should carefully consider when they are in a position, having fully assessed the firm's business and understood the complexities of the insolvency, to seek approval for the basis of their remuneration and, where relevant, to provide a fees estimate and details of expenses to creditors and clients. If a creditors' committee is not formed, the IP's fees can be approved by the general body of creditors or the court.

~~37.~~38. We expect an IP to properly consider expenses that may be incurred (e.g. legal expenses). This should include factoring in any costs that may be incurred as part of ongoing engagement with regulatory bodies and authorities as relevant. It is important to note that if lawyers or other parties are working in conjunction with an IP, they will also need to be able to accurately account for their time, particularly for work directly attributable to the distribution of client assets.

~~38.~~39. We expect an IP to properly allocate costs to relevant estates and, where relevant, consult with, and seek approval from, the creditors' committees and/or seek directions from the court. We expect the IP to update us on the

costs that they are charging to the relevant estates, and report this clearly to clients and creditors. An IP should discuss this fully with the creditors' committee, if one is established, when gaining their approval to draw costs as set out in insolvency legislation. In some cases, the creditors' committee may wish to consider the appointment of an independent cost assessor.

~~39.~~40. Given the role of the creditors' committee in this process, if one is established, it is important that it appropriately represents the client base of the firm. An IP should therefore take reasonable steps (in accordance with relevant legislation) to ensure appropriate representation across all types of creditors and clients on the committee throughout the insolvency process.

Disclosures to the market in relation to firms that have listed or traded securities

~~40.~~41. Any firm with financial instruments that are traded on a UK ~~or EU trading venue~~ regulated market, such as the London Stock Exchange, needs to consider its disclosure (including inside information disclosure) obligations to the market on an ongoing basis. This would include any deterioration of its financial position and any decisions to appoint an IP. Any required announcements should be made without delay, although we would expect the firm or the IP to discuss the situation with our Primary Market Monitoring team at an early stage to ensure steps are taken to prevent a disorderly market.

Chapter 3: Entering insolvency

Interaction with the FCA

~~41.~~42. If a firm is considering entering or has entered into an insolvency process, we would expect an IP to engage as early as possible and to provide regular updates to us for a period agreed with us. In general terms, more complex cases will require a higher level of engagement, which an IP should take into account when considering the costs of the insolvency proceedings. We would expect updates on items including the following:

- client communications
- client contacts and questions
- progress in reconciling, distributing or transferring client money and custody assets in line with the CASS rules and relevant insolvency legislation
- engagement with any authorised reclaim fund in relation to the Dormant Asset Scheme (see paragraphs 104 and 105)
- client complaints and compensation claims (including interface with the Ombudsman Service and FSCS)
- quality of books and records
- the IP's post appointment strategy including possible sale of the client book or business (if contemplated) including the marketing process, the

ability of any proposed purchaser to take on the book, and the implications of any requirements over the firm

- staffing and supplier issues
- ability to maintain service provision where the firm provides key services of market importance
- adverse press or other commentary
- evidence of potential fraud or potential financial crime by the firm or committed against the firm
- issues relating to the firm's compliance with UK sanctions legislation
- any intelligence or information arising from the insolvency or investigations into directors' conduct that could give rise to harm, in particular risks of harm that relate to protection of consumers or market integrity
- insolvency costs, especially those relating to the client estate, and
- interaction with foreign regulators and/or other UK authorities involved in the firm's insolvency process.

Communicating with clients

~~42.~~43. If a firm is considering entering or has entered into an insolvency process, we expect an IP to have a communication strategy in place. This strategy should consider the key messages for clients, what their immediate concerns may be and the information they are going to need, the format of that information and how quickly it can be disseminated. Information about the practical effects of the appointment will be the most important initially and must be clear for clients.

~~43.~~44. In addition, the following practical issues should be considered:

- **Use language that is clearly understood by the audience of the communication**[19], particularly if they are retail or vulnerable consumers. This includes adapting template communications to help ensure they are clear, fair and not misleading to the recipient and are easy to understand. An IP should also consider using headings and highlighting key actions that need to be taken by the recipient. Given the rise in scams, any client communications should have a standard 'scam smart' messaging and make clear that a consumer is not required to use the services of a claims management company to pursue a claim. Key messages should not be hidden (i.e. they should be at the top of the communication).
- **Ensure sufficient resource is available for communications with the firm's clients**, particularly where there is a significant number of retail clients. This may require additional phone lines or a call centre, producing scripts for staff including frequently asked questions and, in some cases, providing communications in different languages. The communication

[19] This is in accordance with the firm's obligations under Principle 7 (communication with clients) for non-retail customers, and Principle 12 (Consumer Duty) and PRIN 2A for retail customers.

should also highlight options for clients to communicate their questions and concerns to the IP (e.g. email address, online forms, telephone number(s) and/or postal address).

- **Share draft versions of key client communications with us (and other relevant authorities) for comment before finalising**, particularly communications regarding high profile or complex regulated firm failures (e.g. firms that have significant client assets holdings or vulnerable clients). Whilst it is not for us to approve client communications (and an IP is responsible for the accuracy, transparency, completeness and fairness), sharing ~~Sharing~~ ~~client communications~~ drafts with us would also help to ensure these are consistent with our press releases, where relevant, upon an IP's appointment.

45. We are aware that there are statutory communications, including notices, letters and reports, that an IP must issue before and during their appointment. If any communication contains references to the FCA, we expect these to be factual, necessary and, in the case of high profile and complex failures or if requested, communicated to us for comment in advance of publication and in good time so that the IP is able to meet any statutory deadlines for such communications. These communications should be sent to the FCA team dealing with the firm.

~~44.~~ Where relevant, when communicating with retail customers, and more broadly, when taking decisions that affect them, IPs should consider the requirements of the Consumer Duty, which requires firms to act to deliver good outcomes for retail customers.

Interaction with FSCS

~~45.~~46. The FSCS is the UK's compensation scheme when a protected regulated firm is unable, or likely to be unable, to pay claims against it. Broadly speaking, the FSCS covers deposits, ~~dormant accounts,~~ insurance provision and distribution, investment business, home finance advice, ~~and~~ debt management business and funeral plans.

~~46.~~47. The PRA makes the rules governing the compensation scheme relating to claims for a deposit, under a contract ~~or~~of insurance or in respect of Lloyd's managing agents. The PRA's rules are in the Depositor Protection and Policyholder Protection parts of its Rulebook. The FCA makes the rules so far as other claims are concerned. The FCA's rules are in the COMP section of the FCA Handbook. Firms are required to deal with the FSCS in an open, cooperative and timely way[20].

~~47.~~48. If the conditions for FSCS payment are met, the FSCS can pay this amount – generally up to £85,000 per eligible person per firm to customers that meet the FSCS's eligibility criteria and who have a valid claim. For general insurance firms and intermediaries, there is a limit of 90% of the value of the insurance claim and in some cases 100% of the claim. The limits on the maximum compensation sums payable by the FSCS for protected claims are set out at COMP 10.2.3R.

[20] COMP 1.6.1R

~~48.~~49. Upon payment of compensation, the FSCS takes a full assignment of the customer's rights and would normally seek to recover the full amount of the customer's claim (i.e. FSCS's recoveries are not limited to the amount of compensation paid where the customer's loss exceeds what FSCS can pay under its compensation limits). The FSCS will, where appropriate, pay any 'distribution of surplus' funds back to the customer.

~~49.~~50. The FSCS ranks as an unsecured, ordinary creditor for FCA-related FSCS claims, subject to the following exceptions: in the case of deposits the FSCS's claim has a 'super-preferred' status; in the case of direct insurance claims the FSCS has a priority status within the class of unsecured creditors[21].

~~50.~~51. If FSCS compensation is available for clients, an IP should engage with the FSCS at the start of an insolvency process and, if possible, prior to appointment, to issue initial communications and to work with the FSCS so that they may declare the firm to be in 'default'. An IP should also engage with the FSCS to agree what information the FSCS will need regarding the firms' records and operations, and to agree how to provide this. An IP may consider whether the necessary data can be extracted from the firm's systems and identify whether any employees of the firm may be needed to access any information to be provided. A suitable approach to enable the FSCS to validate eligibility and process claims for compensation should be agreed. As the FSCS will likely continue to receive claims after the IP's appointment ends, suitable provision for the long term sharing or transfer of information/data should be made so that FSCS can continue to process claims.

~~51.~~52. Following appointment, an IP should liaise with the FSCS to communicate to clients and creditors explaining FSCS eligibility rules and the levels of compensation that may be payable by the FSCS. This may be, for example, within the IP's communications or a separate communication from the FSCS. The IP should agree with the FSCS whether and when it would be appropriate to tell clients of the firm to contact the FSCS to register claims for compensation.

Interaction with the Ombudsman Service

~~52.~~53. The Ombudsman Service is an independent service for resolving disputes between consumers and businesses, and with a minimum of formality on a fair and reasonable basis. The rules and guidance relating to the operation of the Ombudsman Service is set out in the DISP rules of our Handbook.

~~53.~~54. We would expect an IP to engage with the Ombudsman Service at the beginning of an insolvency process to establish the number of complaints against the failed firm and to agree how those complaints will be dealt with going forward. An IP may also need to engage with the FSCS (if applicable) to enable them to deal with any of the complaints.

Notifying customers that they may have a claim for redress

~~54.~~55. If a firm's conduct has been such that customers may have a claim for redress against the firm, we expect an IP to invite claims from the entire

[21] See Insolvency Act 1986, Schedule 6.

population of customers who may be eligible for redress. The IP should send all documents regarding the insolvency to all relevant customers.

Appointed representatives

~~55.~~56. An appointed representative (AR) is a firm or person who undertakes regulated activities on behalf of a firm that is directly authorised by us. The authorised firm is known as the AR's 'principal'. There must be a written contract between the principal and the AR documenting the arrangement. The principal takes full responsibility for ensuring that the AR complies with our rules.

~~56.~~57. Where an IP is appointed over a firm that is an AR, the IP should notify the principal of the AR and consider the terms of the contract between the AR and its principal firm. The principal should be allowed access to the AR's staff, premises and records where required to enable it to meet its regulatory obligations in respect of the AR. The AR may not be able to continue to undertake regulated activities following the insolvency and the IP should request that the principal take the required steps to remove the AR from the FCA Register. The IP should also consider our expectations when considering the sale of a client's data (see paragraph 129).

~~57.~~58. Where an IP is appointed over an FCA authorised firm that is the principal firm in respect of one or more ARs, the IP should be aware that the ARs undertake regulated activities on behalf of the authorised firm and the authorised firm is fully responsible for ensuring that the ARs comply with our rules. Where an AR is removed and/or its customers are transferred to another AR or authorised firm, the IP should ensure the AR continues to treat customers fairly until all regulatory obligations have been met and should act to remove the AR from the FCA Register in a timely manner.

Chapter 4: During insolvency

Claims process

~~58.~~59. We expect an IP to have a suitable claims process in place for clients and creditors. An IP should consider how this claims process is structured to ensure that it is easy to handle from both a client and the IP's perspective. For example, an IP may want to explore handling the claims process via a web portal (if appropriate, taking into account the characteristics of the customer base).

~~59.~~60. We expect an IP to consider the following when designing their claims process:

- how statements to clients are issued
- how clients and creditors validate their claims
- how an application to the FSCS can be built into this
- validation of KYC details
- how non-responders are treated

- the process should client address details be incorrect
- the need for clients and creditors to add bank account details
- communication to clients on access to the claim portal
- any translations required for non-English speakers and other accessibility needs for clients
- the process if clients choose to abandon small claims, and
- information to be collected regarding engagement with the claims process.

~~60.~~61. An IP may need to consider demonstrating the claims process with the creditors' committee before making it available. They should also consider using the technology systems of the failed firm if suitable (avoiding unnecessary costs). In any case, an IP should consider the need to maintain IT contracts, the resilience and usability of the systems and data security considerations for migration, including backing up any data in accordance with relevant legislation.

~~61.~~62. An IP should manage clients' expectations at the outset of the claims process by informing them of any FSCS coverage that may be available for distribution costs with the relevant eligibility criteria set out. An IP should also consider necessary steps throughout the insolvency procedure to mitigate any risks relating to money laundering. This may include a review of the firm's KYC policy and procedures that were in place before the IP was appointed.

FCA participation in court cases and creditors' committees

~~62.~~63. We have statutory powers to participate in court proceedings in relation to 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 within an appropriate timeframe. We may request prior copies of any court papers or submissions made by the IP or the firm, to ensure references to the FCA are correct and appropriate, and consider whether we wish to make our own representations (e.g. if a precedent is being set or we wish to express a preference for one of several options put forward).

~~63.~~64. We have rights to make representations at creditors' committee meetings and are required to receive any documents sent to creditors[22]. We may do this depending on the case and should be informed of the creation of creditors' committee and be invited to meetings.

Confidentiality

~~64.~~65. We will not discuss any confidential aspect of the firm's regulatory history at creditors' committee meetings and if questions such as these are raised, they can be raised with us through firm.queries@fca.org.uk. We may also request copies of presentations and minutes taken at the meetings of the creditors' committee.

[22] Sections 362 and 371 of FSMA

~~65.~~66. An IP should ensure that the creditors' committee members are aware of the confidentiality of the meetings.

Client assets

~~66.~~67. CASS provides detailed rules for a firm to follow when it holds or controls client money and/or custody assets (collectively 'client assets') as part of their business. This is to allow client assets to be returned as quickly and as whole as possible to clients if a firm enters an insolvency process. CASS currently applies to the following types of firms: investment firms, general insurance intermediaries, debt management firms and claims management companies.

~~67.~~68. If a firm holding client assets enters an insolvency process, an IP should make sure that such assets continue to be treated in line with CASS and, in particular, follow the post-failure rules for returning client assets[23]. If the firm enters special administration, the IP will also need to comply with the IBSAR regulations and related rules.

Key steps to take immediately after appointment

Take control of client assets

~~68.~~69. Following appointment, an IP will need to take control of client assets (physical and electronic) and the books and records of the firm. The IP should also identify key individuals and systems required to manage client assets of the firm, including third party administrators, system suppliers and employees of the firms. This should be available in the firm's CASS resolution pack if applicable[24].

~~69.~~70. CASS sets out requirements on how and where a firm can hold client assets, including appropriate selection of third parties, diversification of client money holdings and when set-off arrangements with third parties over custody assets (e.g. under a lien) are permitted. An IP will therefore need to consider where client assets are held, who has access to them, diversification risks, operation of any set-off arrangements, and any other requirements over the client accounts.

~~70.~~71. Where a firm is holding client money, the appointment of an IP for certain insolvency procedures[25] constitutes a 'primary pooling event' (PPE)[26]. Broadly speaking, this means that all client money held by the firm in client bank accounts and client transaction accounts (if applicable) is notionally pooled, forming a client money pool (CMP). Any client money received after a PPE does not form part of the CMP and is required to be returned promptly to relevant clients (see below) or may be used to settle a pre-existing transaction to the extent such money relates to it[27].

Operate different estates

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[23] CASS 5.6 (for general insurance intermediaries), CASS 6.7 and CASS 7A (for investment firms), CASS 11.13 (for debt management firms), CASS 13.11 (for claims management companies)

[24] CASS 10 (for investment firms) and CASS 11.12 (for debt management firms)

[25] The appointment of a liquidator, receiver, administrator, special administrator or trustee in bankruptcy, or any equivalent procedure in any relevant jurisdiction.

[26] CASS 5.6.5R, CASS 7A.2.2R, CASS 11.13.4R and CASS 13.11.3R

[27] CASS 7A.2.7-AR(5)

~~71.~~72. We expect an IP to operate at least two separate estates: the client estate comprising client assets (against which only clients can claim) and the general estate comprising the firm's assets (against which all creditors can prove). The client estate is split in various ways – custody assets should be treated separately from client money, and client money should be split between pre- and post-PPE client money as described above.

~~72.~~73. An IP should accurately allocate costs between the estates. An IP should also accurately record time spent on the different estates and, in respect of the client estate, distinguish time and expenses spent on client money and custody assets as well as pre-and post-PPE client money.

Immediate reconciliation and final top-up/withdrawal (for firms in special administration)

~~73.~~74. If a firm has entered special administration and is holding client money, the IP is required to conduct a post-administration client money reconciliation immediately after being appointed and to make a transfer to or from the firm's client bank accounts following that reconciliation[28]. We expect IPs to conduct this reconciliation as soon as they can post appointment. This enables the IP to correct any shortfalls (or excesses) in the firm's client bank accounts using the firm's previous reconciliation method.

~~74.~~75. Where the reconciliation identifies a shortfall in client money, the IP must top-up the client bank account with monies from the firm's own bank account (where there are funds available). Where the reconciliation identifies an excess in client money, an IP must withdraw this from the client bank account and transfer it to the firm's own bank account.

Determine client entitlements

Calculate client entitlements

~~75.~~76. After taking control of client assets, the IP must identify and calculate each client's entitlement in accordance with the CASS rules. This will involve:

- carrying out client money and custody asset reconciliations (as relevant)[29] to determine the client assets positions as at the time of the firm's failure, and
- determining each client's entitlement to client money and custody assets as at the point of failure with reference to the reconciliations above.

~~76.~~77. In respect of client money, each entitlement must be established at the point of failure, except in relation to cleared open margin transactions by investment firms[30]. In respect of custody assets, if an IP uses the book value for establishing entitlements, the IP should manage clients' expectations that ~~they~~ there may be less value when it comes to the actual return of the asset.

[28] IBSAR Regulation 10H

[29] CASS 6.6.46R, CASS 7.15.15R and CASS 7.15.26AR

[30] CASS 7A.2.R(-2). CASS requires investment firms to apply the value achieved on close out of all cleared open margin transactions. That is, hindsight should be applied (the 'Hindsight Principle'). For all other open transactions at PPE, the rules require these to be valued using the notional closing or settlement prices prevailing at the PPE.

Manage currency risks

~~77.~~78. We expect an IP to have regard to all relevant insolvency rules and contractual documentation, including terms and debts in foreign currency, on deciding:

- what currency they should calculate each client's entitlement
- what currency they should continue to hold client money in, and
- what currency the IP should return client money in.

Treatment of shortfalls

~~78.~~79. A shortfall is the amount by which client assets held by the firm are not sufficient to meet all client entitlements. A shortfall may arise because the costs of distributing client assets may be deducted from client assets held by the firm and/or poor controls and record keeping by the firm before it failed.

~~79.~~80. A distribution cost is a cost directly attributable to the distribution of client assets. An IP should endeavour to minimise costs incurred in the distribution process and return client assets to the client as soon as reasonably practicable (see paragraph 90 regarding the costs of seeking directions from the Court for matters already addressed by CASS). Distribution costs should be recorded and recovered in accordance with insolvency legislation.

~~80.~~81. For shortfalls in client money, including distribution costs, an IP is required to allocate these to all clients of the firm on a pro rata basis[31]. For shortfalls in custody assets due to distribution costs, an IP should consider and agree the appropriate method for allocating these with the creditors' committee. The IP can explore various options for this, such as applying a percentage of the asset value, applying a fixed fee per client or allocating such costs on a pro rata basis.

~~81.~~82. For other shortfalls in custody assets, if the firm has entered into special administration, the IBSAR requires shortfalls in custody assets of a particular description in an omnibus account to be borne pro rata by all clients for whom the firm holds assets of that particular description in that account in proportion to their beneficial interest in those assets[32].

~~82.~~83. Clients should be considered contingent creditors in respect of any shortfall in client assets. To the extent that their claim is not satisfied by distributions from client assets held by the firm, clients may also have a claim against the general estate for any client assets that are not returned as part of the distribution and would usually be considered unsecured creditors in respect of such claims.

FSCS compensation for shortfalls

~~83.~~84. A client may be eligible to claim for compensation from the FSCS for any loss incurred because of a shortfall in client assets, if the criteria in COMP are

[31] CASS 7.17.2R(4), CASS 11.6.1R(3), CASS 13.1.3R(3)

[32] IBSAR Regulation 12

met. An IP should therefore liaise with the FSCS to notify clients if they are able to claim from the FSCS in respect of client assets shortfalls. Where there is eligibility, we expect the IP to liaise with the FSCS to set up the most efficient way in which the FSCS claims can be managed.

~~84.~~85. An IP should consider and work with the FSCS on claims where the FSCS is able to "look-through" to compensate underlying beneficiaries who may not have a direct contractual relationship with the failed firm[33]. Examples of categories eligible for a "look-through" include a trustee of an occupational pension scheme, stakeholder pension or personal pension scheme (e.g. a SIPP); a bare trustee holding assets for the benefit of absolutely entitled beneficiaries; a nominee company; an agent acting for one or more principals; or a collective investment scheme (CIS) or an operator, depositary, manager or trustee of a CIS.

Client money received by the firm after failure

~~85.~~86. A firm is likely to have unsettled or incomplete transactions at the point of entering an insolvency procedure, which may result in the firm receiving client money after it has failed. The IP is required to keep post-PPE client money separate from the CMP (e.g. in a separate bank account that does not contain money in the CMP) and promptly return these to relevant clients directly, or use such money to complete pre-existing transactions which the money relates to.

~~86.~~87. An IP should consider the costs of this process. CASS permits the IP to retain costs properly attributable to the distribution of post-PPE client money to each client from these monies. This is different to the treatment of distribution costs of the pre-PPE CMP, where costs are deducted from the CMP before distribution.

~~87.~~88. An IP should set up procedures to monitor and allocate receipts post failure. For example, the firm may continue to receive dividends for clients in respect of shares and these will need to be allocated promptly to the appropriate shareholders.

Distributions to clients and transfers to a solvent firm

Distributions of client money

~~88.~~89. After determining entitlements to the CMP, an IP must, as soon as reasonably practicable, distribute the client money to each client who is a beneficiary of the CMP rateable to their entitlement. In this process, an IP will need to consider the following issues:

- the statutory trust waterfall provisions of payments in CASS[34]
- how money is returned to the relevant client (e.g. whether it should go directly to the client, received by a receiving broker nominated by the client, or be part of a transfer of client assets to another firm)

[33] COMP 12

[34] CASS 5.3.2R (for general insurance intermediaries) and CASS 7.17.2R (for investment firms)

- if being returned directly to the client, verifying a client's bank details, and completing any required KYC, before returning client money
- costs of returning client money to each client, and
- if the client cannot be contacted or disclaims their entitlement.

90. Whilst there may be instances where an IP considers it appropriate to seek directions from the Court concerning the return of client assets, where such directions relate to matters already addressed by CASS, we do not think it is appropriate for clients to bear the costs of the IP having recourse to the Court.

~~89.~~91. We recognise that an IP needs to close the client estate and cannot retain unclaimed client money indefinitely but are equally mindful that clients must be given sufficient opportunity to claim their assets. For investment firms, CASS permits an IP to use allocated but unclaimed (or declined) client money entitlements and unallocated client money towards a shortfall in the CMP, providing certain reasonable steps have been taken to trace clients concerned[35]. See below for further details on closing the client estate.

Transfer of client assets

~~90.~~92. An IP should consider whether a transfer of client assets to a solvent firm is possible. A transfer is likely to incur lower costs of distribution than a direct return to clients. There are various ways that a transfer can be facilitated: for example, as a pre-pack administration or as part of distribution of client assets in accordance with the CASS rules post failure.

Pre-pack administration

~~91.~~93. A pre-pack administration is a sale of all or part of a firm's business and assets, which is negotiated prior to administration on the basis that the sale will be concluded immediately on or shortly after the firm enters administration. Once the plan is ready, the firm (or its directors or creditors) can appoint an administrator, who can then conclude the sale. Assets would be transferred to the purchaser, but generally not any liabilities, and consideration of the sale received by the failed firm may go towards any unpaid liabilities.

~~92.~~94. This type of sale may be better for clients and markets generally if the business of a failed firm, together with relevant client assets, is transferred to a different firm to help ensure continuity of service. Clients may then continue to receive services uninterrupted, avoid opportunity costs from having their assets stuck in the failed firm's insolvency and avoid loss of value arising from premature closure of positions or loss of tax wrappers.

Transfer of client assets as part of the distribution of client assets

~~93.~~95. The CASS rules permit an IP to transfer client assets to another entity providing certain conditions in CASS are met[36].

[35] CASS 7A.2.6AR, CASS 7A.2.6CE and CASS 7.17.2R

[36] CASS 5.5.80R(2), CASS 6.7.8R, CASS 7A.2.4R(4), CASS 11.13.7R – CASS 11.3.9R, CASS 13.11.6R – CASS 13.11.10R

~~94.~~96. An IP would need to consider the following practical issues when conducting a transfer of client assets:

- whether the transfer will be a whole or a partial transfer
- whether client consent is provided or needed
- what client communications, including notifications, are necessary
- whether there are any requirements on the firm that may affect the transfer (e.g. an asset requirement preventing a transfer without conditions being met[37])
- the type of firm which can take on the business and whether a firm has appropriate regulatory permissions
- the consideration for the transfer and how it will be structured
- warranties and indemnities (if applicable)
- whether the transferee has adequate resources and capabilities to manage the transferred accounts
- whether the transferee's systems are compatible and if any other arrangements need to be put in place (e.g. where the firm has outsourced functions to a third-party administrator)
- the timetable of the transfer
- the need for any applications for waivers (see paragraph 107)
- any alternative arrangements for clients, including arrangements to transfer out of the transferee, and ensuring these are communicated to clients
- arrangements for assets which cannot be transferred
- transfer of staff in accordance with the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) and whether there is a need for a transitional services agreement
- whether staff are needed to continue with the insolvency, and
- whether there are any phoenixing concerns (see paragraph 125).

~~95.~~97. Where an IP is transferring client assets as part of the distribution of client assets, the IP should use the creditors' committee to discuss the proposed transfer and keep us updated with their plans.

Bar dates

~~96.~~98. The bar date mechanism established in the IBSAR gives a special administrator the power to set deadlines for clients to submit claims for the return of their assets. A bar date gives certainty over the group of claimants for an upcoming distribution, ensuring that a distribution of client assets by the special administrator can progress smoothly without disruption from late

[37] Section 55P of FSMA

claimants. In general, a late claimant may not challenge a distribution that was made after a bar date, provided the special administrator carried it out in good faith.

~~97.~~99. In setting a bar date, the special administrator would have to allow a reasonable time (taking into account factors relevant to the case including the characteristics of the customer base) after the bar date notice has been published for clients to be able to calculate and submit their claims. The special administrator would then make a distribution of client assets in accordance with a distribution plan (if applicable) or according to clients' entitlements established under the claims received.

~~98.~~100. The special administrator can set two types of bar dates:

- A 'soft' bar date whereby the special administrator can set a deadline for clients to submit claims without having to seek court approval and make interim distributions[38]. Late claimants would lose the right to challenge a distribution made prior to the receipt of their claims to meet claims made before the bar date. This allows the special administrator to make necessary distributions and proceed with the special administration process, as they would not be required to wait for clients who had failed to submit claims in good time. However, in respect of client money, when determining the amount to be distributed, the special administrator must make allowance for entitlements, by way of a subsequent distribution from the CMP, of persons who have neither made a client money claim nor received any payment under a previous distribution of client money. They would also have to make a distribution to late claimants if there are client assets available to do so.

- A 'hard' bar date whereby the special administrator can set a final cut-off date for clients to submit claims, with court approval, after which clients can no longer claim on the client estate, any remaining assets can be moved to the general estate and the client estate can be closed completely[39]. Given that a hard bar date would remove a client's right to claim on the client estate, the CASS rules require the special administrator to take reasonable steps to notify all clients of the fact they may have a valid claim for client assets prior to the hard bar date taking effect (see below).

Closure of client estate

~~99.~~101. At the appropriate point, the IP will need to close the client estate. If the firm is in special administration, the IBSAR's hard bar date mechanism may be applied before this occurs. We expect an IP to begin planning for the winding-up of the firm, or the next phase of the insolvency, in advance, ensuring they give early thought to dealing with any residual matters, such as treatment of unclaimed client assets. Where compulsory liquidation is being considered and there are unresolved issues involving client assets, an IP may, for example, need to liaise with the Official Receiver.

[38] IBSAR Regulations 11 and 12A

[39] IBSAR Regulations 12B to 12C

~~100.~~102. For investment firms, the CASS rules require the IP to take reasonable steps to notify all clients of the fact that they may have a valid claim for client assets, prior to the closure of the client estate or a hard bar date taking effect. The CASS rules provide an evidential provision outlining the minimum client contact required[40]. Specifically, we believe it is reasonable for an IP to make at least two attempts to contact the client using different methods (e.g. an email and a phone call) for a professional client and three contact attempts for a retail client. The client must be notified that if no claim is made by the cut-off date, proprietary rights to the claim will be lost and any claims made will be as a general creditor.

103. Where client money is not claimed, we would expect this to go towards any shortfall in the CMP as outlined in paragraph 91 above.

104. The Dormant Asset Scheme (DAS) is a statutory scheme that seeks to reunite people with their assets. Eligible dormant assets[41] (such as dormant client money and investment assets) are reclaimable from the DAS in perpetuity.

~~101.~~105. Where the firm is a participant in the DAS, the IP should engage promptly with the relevant authorised reclaim fund[42] to address any arrangements in place relating to the firm's participation in DAS, such as: whether the firm is holding any customer records on trust for the authorised reclaim fund; the existence of any insolvency document pack dealing with customer records; and any dormant asset holders seeking to make reclaims of their dormant assets. Where the firm is an existing participant in the DAS, the IP may also consider whether it is possible to transfer unclaimed eligible dormant assets into the DAS (which the authorised reclaim fund would have absolute discretion to accept or refuse on a case-by-case basis). The IP would need to liaise with the authorised reclaim fund to discuss whether this would be practicable and acceptable in the relevant circumstances. The IP's communication strategy with clients should cover dormant assets which have been transferred to an authorised reclaim fund, for example, the IP should consider how to maintain clear information into the future so that dormant asset holders can find it and understand how to make a reclaim.

~~102.~~106. We would expect an IP to share any court documents with us in good time prior to closing the client estate.

Waivers process

~~103.~~107. Should an IP be unable to ensure a firm's compliance with certain rules in our Handbook, the IP may need to consider applying for a waiver or modification of the rule[43]. For example, a waiver or modification may be needed where there is a requirement to obtain client consent to a transfer to a new party (e.g. if clients have not previously consented to a transfer through the terms of business). General law and the terms of any relevant contract will also need to be considered by the IP in addition to obtaining a

[40] CASS 6.7.4E and CASS 7A.2.6C

[41] See Part 1, Dormant Assets Act 2022.

[42] Reclaim Fund Ltd is currently the only authorised reclaim fund.

[43] The FCA would not be able to grant a waiver of rules deriving from EU requirements.

waiver of a requirement in CASS. The IP should discuss any waiver or rule modification application with the firm's supervisor at the FCA in the first instance.

~~104.~~108. All waiver applications must be submitted through the FCA's Connect portal. We will grant the waiver if satisfied the following statutory conditions are met:

- compliance with the rule would be unduly burdensome, or would not achieve the purpose for which the rules were made, and
- the waiver would not adversely affect the advancement of any of our operational objectives.

~~105.~~109. Further information about applying for a waiver is available on our website.

Hardship policies

~~106.~~110. Until the IP is able to distribute client assets, these will not be returned or available to clients. In such situations, the IP should consider hardship cases to help ensure that they are identified and responded to in an appropriate and consistent manner, including liaising with the FSCS if applicable. An IP may be able to provide earlier distributions of client assets to clients who can demonstrate hardship (although this may not always be possible). We therefore expect an IP to identify and devise potential hardship policies and assess whether there is anything that can be done to support these cases, for example, exploring whether it is possible to make an early interim distribution from client money, in a prudent manner. Under the Consumer Duty, firms must design and deliver support to retail customers that meets their needs, including those of customers with characteristics of vulnerability. We expect firms to respond flexibly to the needs of customers with characteristics of vulnerability and they may need to support customers by adapting their usual approach. However, we recognise the ability of the IP to support will depend on the circumstances of the case. IPs should also refer to our guidance on fair treatment of vulnerable customers.

Corporate action policies

~~107.~~111. Where a firm holds client assets, clients will not be able to exercise their rights over the assets where there are corporate actions. This may include being unable to participate in a rights issue, exercise warrants or vote at a general meeting. In such situations, an IP should take reasonable steps to assess whether it is possible to offer clients the opportunity to participate in corporate actions prior to distribution, which assets and actions would be eligible and the relevant charge for doing this. We expect the IP to establish a corporate actions policy to ensure, so far as possible, that all clients with holdings of assets within the policy are aware of services offered in accordance with the policy.

Continuity of supply

~~108.~~112. We expect an IP to consider how they will make sure that the failed firm continues to comply with our regulatory requirements while it remains

authorised. If the firm loses a supplier, it is still required to comply with our rules.

~~109.~~113. The continuity of service provisions in the Insolvency Act (as amended by the Corporate Insolvency and Governance Act 2020)[44] assist an IP by enabling them to limit the terms that suppliers can impose as a condition for the continued supply of their service and/or compel continued supply by restricting the effect of existing insolvency-related terms in a supply contract (subject to certain exclusions[45]). If the firm has entered special administration, the IBSAR further restricts suppliers of the failed firm from terminating supply after commencement of the administration[46]. Continuity of supply also helps to facilitate distribution of client assets (e.g. where third party suppliers have been used to maintain client records and IT systems).

~~110.~~114. Certain continuity of supply provisions are not available for liquidations. An IP must therefore consider on an ongoing basis how they ensure the insolvency is conducted in compliance with our rules. The IP should be aware of which continuity or protection can be relied on in accordance with the law.

Equitable set-off

~~111.~~115. Equitable set-off occurs where a customer of the failed firm owes money to the firm and is owed money by the firm, and the mutual debts are related. It is up to each customer to exercise their right to equitable set-off if they wish, but an IP should consider broadly the ways in which a customer might assert a right of equitable set-off, ~~although an IP~~and should honour legitimate requests ~~for equitable set-off.~~.

~~112.~~116. An IP may set off redress amounts owed by the firm against amounts owed to the firm. Equitable set-off should be considered quickly by an IP as customers to whom it might apply could continue paying debts that would otherwise be set off.

Trading while in an insolvency process

~~113.~~117. An IP may decide that it is the best outcome for creditors if the failed firm continues to trade. We expect an IP to be aware that continuing to trade may mean using FCA permissions and, if this is the case, that the firm must remain authorised until the firm ceases to be carrying out regulated activities. When FCA permissions are no longer required, the IP should cancel the firm's permissions by liaising with us (see below).

~~114.~~118. We would expect ~~firms~~ an IP to tell us if they were continuing to cause the firm to trade while in an insolvency process and consider the impact on any client assets held (e.g. ensure that the CASS rules are complied with and pre- and post- PPE client monies held separately). IPs should be aware of our requirements on the firm (including any imposed on the firm's permissions through a VREQ or OIREQ) and make sure that they maintain the firm's organisational arrangements to comply with them (e.g. application of

[44] Sections 233, 233A and 233B of the Insolvency Act 1986

[45] Schedule 4ZZA of the Insolvency Act 1986

[46] IBSAR Regulation 14

the Senior Managers and Certification Regime). If the firm has retail customers, we expect IPs to conduct the affairs of the firm in a way that is compatible with the Consumer Duty.

Cancellation of permissions

~~115.~~119. When a firm goes into an insolvency process, the appointed IP should consider when it is appropriate to apply to cancel the firm's permissions. We expect an IP to consider early on in the insolvency what information we would need to cancel the firm's permissions so that this can be prepared at the relevant time (e.g. when the client estate is closed) rather than at the end of the process. It is only appropriate to apply to cancel the permissions of the firm if it has stopped carrying out all regulated activities and no longer holds any client assets.

~~116.~~120. An application to cancel the authorisation of a FCA regulated firm can be made using our online system Connect. For further information, see our guide for completing an application to cancel.

Suspension or cancellation of listing

~~117.~~121. Where a firm with securities admitted to the Official List has made a decision to appoint an IP, it gives rise to grounds for a suspension of listing in order to protect investors. To ensure an orderly market, consideration should be made at an early stage and a conditional suspension can be requested from our Primary Market Monitoring team in advance of any such decision being made, which can then smoothly be implemented should the event crystallise. Once control has passed from the firm to the IP, we can only deal with requests for suspension or cancellation of listing from the IP and expect due co-operation on such matters.

~~118.~~122. For urgent live market situations, our Primary Market Monitoring team can be contacted via the Emergency Line on 020 7066 8354 and suspension requests should be sent to PMOsuspensions@fca.org.uk.

Reporting of unauthorised businesses

~~119.~~123. An IP should report to us if they come across any unauthorised firms or individuals that they believe have carried on or are carrying out FCA regulated activities without the appropriate permissions to do so and any scams relating to financial services. Please note, however, that we are only able to look into scams and unauthorised ~~conduct~~ businesses involving the provision of financial services ~~firms regulated by us~~ or activities that fall within our regulatory perimeter.

~~120.~~124. An IP may also find that the firm over which they are appointed is being scammed or cloned. An IP should be vigilant to this and other scams and ensure to communicate to clients appropriately and report it to us at firm.queries@fca.org.uk.

Phoenixing

~~121.~~125. 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~~ owed by the old firm. Each time this happens, the insolvent

company's assets, but not its liabilities, are transferred to a new, similar 'phoenix' company. The insolvent company then ceases to trade and might enter into formal insolvency proceedings (liquidation, administration or administrative receivership) or be dissolved.

~~122.~~126. UK law does not prevent the director of a company that has failed from forming a new company, unless they are personally bankrupt or disqualified from acting in the management of a limited company. However, there is a risk that a company owing significant sums, often in the form of consumer redress awarded by the Ombudsman Service, will be placed into formal insolvency, leaving liabilities owed to the consumer unpaid or falling ~~on~~ to the FSCS. Directors, shareholders and senior staff who have engaged in financial misconduct may reappear, connected with a new firm of strikingly similar business. We consider this to be unacceptable practice. Where we find such individuals have deliberately avoided their responsibilities and not complied with previous redress awards made against their firms, we will question the fitness and propriety of these individuals and take necessary steps against them so that they do not cause further harm to consumers.

127. If an IP becomes suspicious of phoenixing in respect of a failed firm, they should report these suspicions to firm.queries@fca.org.uk immediately. IPs should 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.

Information requirements and investigations

~~123.~~128. We have various powers to require the provision of information or documents for the purposes of supervising or investigating regulated firms. While we will generally work with an IP to ensure that the scope of such requirements is proportionate, compliance with statutory information requirements is mandatory. Where a firm in an insolvency procedure is under investigation, we expect the IP to cooperate fully with the investigators and retain firm records.

Sale of client data

~~124.~~129. An IP may consider selling a client book or part of a client book (i.e. clients' personal data) as part of a transfer or sale of the business of the failed firm. We expect the IP to consider the following matters in this scenario and, where retail customers are concerned, conduct the affairs of the firm in a way that is compatible with the Consumer Duty:

- **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.
- **Customer outcomes and fair ~~Fair~~ treatment ~~of clients~~**: before transferring clients' personal data, an IP must consider whether this is in the interests of the clients and, for non-retail customers, treats them fairly[47] or, for retail customers, act~~s~~ to deliver good outcomes[48].

[47] Principle 6 (Customers' interests)

[48] Principle 12 (Consumer Duty)

- **Selling to a claims management company (CMC):** if an IP proposes to sell the client book to a CMC, the IP should consider our joint statement with the ICO on dealing with personal data.

- **Obtain legal advice on the application of data protection legislation**: data protection legislation applies to data controllers including IPs. Relevant legislation includes the Data Protection Act 2018, ~~General Data Protection Regulation (EU) 2016/679 (GDPR)~~ the UK General Data Protection Regulation and Privacy and Electronic Communications ~~Regulations~~ (EC Directive) Regulations 2003. An IP should obtain legal advice on their obligations under such legislation to ensure that they handle client data appropriately.

- **Communication to clients:** an IP must pay due regard to the information needs of t~~heir clients~~ customers and communicate with them in a way which is clear, fair and not misleading. For retail customers, IPs must also consider relevant Consumer Duty requirements for communications to be likely to be understood by customers and to equip them to make decisions that are effective, timely and properly informed. This includes clearly articulating the transaction with a suitable helpline/contact(s) being provided to support and respond to client queries. The IP should also encourage the buyer to inform clients on the sale and their rights, so that they can manage their rights appropriately.

- **The sale is not facilitating the practice of phoenixing of the failed firm described in paragraph 124.**

~~125.~~130. For further details on our expectations of handling client data more generally, please see our communication on this.

Liaising with overseas regulators

~~126.~~131. Where an IP receives or issues correspondence to an overseas regulator in relation to the insolvency process, this information should be shared with the FCA at firm.queries@fca.org.uk. This would help us to keep abreast of the situation and inform any discussions that we may have or be required to have with the overseas regulator.

Chapter 5: Restructuring procedures

~~127.~~132. Firms may consider using other procedures to enable them to restructure and continue trading. These can include:

- Scheme of arrangement

- Company voluntary arrangement (CVA)

- Restructuring plan

133. We have issued separate non-Handbook guidance on our general approach to compromises[49] (where a firm uses one of the above procedures, typically to restructure debts). This guidance is aimed at firms authorised or

[49] FCA's approach to compromises for regulated firms FG22/4, July 2022

registered by us. This includes firms that are dual regulated by the FCA and PRA from the perspective of conduct regulation.

134. This guidance clarifies our general approach to compromises, including the factors we will consider when deciding if and what actions we will take in line with our statutory objectives to secure an appropriate degree of protection for consumers and to protect and enhance the integrity of UK financial markets. The guidance will help regulated firms (including those where an IP has been appointed) understand our expectations and ultimately help firms to avoid proposing compromises that are unacceptable to us because they threaten or adversely affect our statutory objectives.

135. We have rights to make representations at court and creditor meetings for all restructuring procedures. When a firm is considering proposing a compromise, in line with Principle 11 and relevant rules in SUP, PSRs and EMRs[50], the firm should notify us immediately and provide relevant information at an early stage to enable our assessment of the compromise. We consider proceeding with preparation for a compromise, without notifying us, to be a significant breach of Principle 11 and the notification requirement in SUP 15.[51]

~~128.~~136. ~~If an IP is advising a firm on their options or take forward a scheme of arrangement, CVA or restructuring plan in respect of a regulated firm, or which impacts on a regulated firm, the firm should notify us of their plans in good time.~~

~~129.~~137. ~~We have rights to make representations at court and creditor meetings for all restructuring procedures. We therefore expect appropriate notice.~~ We also expect the firm or an IP (in their capacity as supervisor of a CVA) to send reports on a regular basis regarding the progress of these procedures to us so that we can review as appropriate. Reports should be sent to firm.queries@fca.org.uk.

~~130.~~138. If a firm is likely to be placed into administration or liquidation while subject to one of these procedures, the firm is required to promptly notify us[52] .

Chapter 6: Checklist

~~131.~~139. The checklist below summarises the key steps from this guidance that an IP will need to consider when appointed over a regulated firm.

	Key step	**Tick**
1.	Understand the firm's business model and how FCA requirements apply to the firm before appointment.	

[50] SUP 15.3.21R(4) (for FSMA authorised firms) and regulation 37 of PSRs and regulation 37 of EMRs (for PIs and EMIs) as we consider a compromise to be a "substantial change in circumstance" for the purposes of those regulations.

[51] SUP 15.7 sets out the requirements for the form and method of notification

[52] SUP 15 (General notification requirements) and Principle 11 (Relations with regulators)

2.	Engage with the FCA and FSCS (if applicable) as early as possible, including sharing court documentation and consent requests, and throughout the insolvency process as appropriate.	
3.	Communicate appropriately with clients, taking into account, where relevant, the requirements of the Consumer Duty.	
4.	Treat client money and custody assets in accordance with the CASS rules.	
5.	Ensure costs are properly recorded and communicated to clients and creditors in an appropriate manner.	
6.	Do not facilitate phoenixing and notify the FCA promptly of any concerns.	
7.	Cancel the firm's permissions when the firm is no longer conducting regulated activities and all client assets have been returned or transferred.	

Appendix: Template letter for section 362A FSMA consent requests

Financial Conduct Authority
12 Endeavour Square
London
E20 1JN

For the attention of [ ]

[date]

STRICTLY PRIVATE & CONFIDENTIAL

Dear FCA~~Sirs~~,

[ ] ('the Company')

[I/ We] refer to the proposal that the directors of the Company are currently considering to place the Company into administration under paragraph [ ] of Schedule B1 of the Insolvency Act 1986.

[I/ We] have been advising the directors of the possible administration and understand that if they seek to place the Company into administration, they will ask me [and [ ]] to accept the appointment as [joint] administrators.

In connection with such a proposed appointment, [I confirm on behalf of myself and [ ]] [We confirm] that -

1. [I am a/ We are] licensed under the Insolvency Act 1986 as insolvency practitioner[s];

2. [I am / We are] satisfied that [I/ we] have the required professional qualification and experience to accept the appointment. [I/We] have experience and expertise of taking appointments as administrators, and indeed provisional liquidators, of companies, [including companies regulated by the Financial Conduct Authority]. [Given that the Company is authorised by the Financial Conduct Authority for the carrying on of regulated activities, [I/ we] confirm that persons with the relevant financial services experience will provide the necessary assistance]; and

3. [[I/ We] believe the company can be rescued as a going concern.] [I am/ We are] [satisfied that it is reasonably likely that administration will achieve a better result for the Company's creditors as a whole than would be likely if the Company were wound-up.] (if the purpose of the administration is the realisation of the company's assets) [[I/ We] believe that the distribution of the Company's assets to those entitled is not likely to be slower than would be the case if the Company were to be placed into liquidation.]

If you have any questions on the above, please do not hesitate to contact [me/ us].

Annex 2 – Guidance for insolvency practitioners on how to approach payments and e-money institutions

Chapter 1: Introduction

1. This guidance is for IPs on how to approach payments and e-money institutions (PIs and EMIs) authorised or registered under the PSRs or EMRs.

2. This guidance is not exhaustive, neither is it a substitute for reading or complying with our Handbook and other applicable legislative requirements and guidance.

~~3. This guidance reflects changes to the insolvency framework for PIs and EMIs that will be made by the Payment and Electronic Money Institution Insolvency Regulations 2021 (PEMIIR) which were laid in draft before Parliament on 26 April 2021. The PEMIIR introduces a bespoke special administration regime and applies the full suite of FCA insolvency powers under Part 24 of FSMA to PIs and EMIs. These changes were consulted on by HM Treasury on 3 December 2020 and are expected to come into effect in Summer 2021.~~

The FCA's role in firm failures

~~4.~~3. We have a role in every regulated firm failure and the role will vary depending on the individual circumstances of the firm.

~~5.~~4. While we are not able to stop firms failing, we aim to minimise harm to consumers and markets that may arise from a disorderly firm failure. This involves working with IPs to reduce such harm where possible.

~~6.~~5. PIs and EMIs are regulated by the PSRs and the EMRs respectively. We have certain powers provided under the PSRs and EMRs, which enable us to take certain actions prior to a firm entering an insolvency process. This can include, for example, imposing requirements on the firm to take specific actions such as the preservation of the firm's books and records, varying the firm's regulatory permissions, or taking steps to make an application to the court to place the firm into an insolvency procedure.

Safeguarding customers' funds

~~7.~~6. Authorised PIs and EMIs are generally required to safeguard funds belonging to customers[53] on receipt ('relevant funds'). The PSRs and EMRs set out how these funds must be safeguarded and distributed on the occurrence of an insolvency event[54]. See paragraph 56 on how relevant funds are defined and our expectations on how these funds should be treated following an insolvency event.

[53] References in this guidance to customers are to payment service users and e-money holders (as relevant) unless otherwise stated.

[54] Insolvency event is defined in regulation 23(18) of the PSRs and regulation ~~24~~ 22(3) of the EMRs.

Chapter 2: Pre-insolvency

Sufficient experience for an appointment over a regulated firm

~~8.~~7. The Insolvency Code of Ethics requires that an IP should only accept an insolvency appointment where the IP has or can acquire sufficient expertise. If a firm is conducting regulated business, we expect the appointed IP to understand the business model and its regulated activities, or have a detailed plan to gain a full understanding of these shortly after their appointment. This could, for example, involve engaging relevant specialists.

~~9.~~8. We also expect the IP to know what regulatory requirements and guidance that apply to the firm and identify any issues with compliance. The regulatory requirements and guidance may include:

- **Principles for Businesses (PRIN):** these apply, in whole or in part, to all firms and set out high-level but fundamental obligations with which firms must comply under the regulatory system itself regarding various aspects, such as treating customers fairly, conflicts of interest and how a firm should communicate with the regulator.
- **The Payment Services Regulations 2017 (PSRs):** these apply to all payment service providers (PSPs), including PIs and EMIs. They set out the authorisation, prudential and safeguarding requirements for PIs, as well as conduct requirements for all PSPs.
- **The Electronic Money Regulations 2011 (EMRs):** these apply to all electronic money issuers. They set out the authorisation, prudential and safeguarding requirements for EMIs and conduct requirements for all electronic money issuers.
- **FCA approach to payment services and electronic money:** this sets out our approach to implementing the PSRs and EMRs. This provides guidance on the requirements of the PSRs and EMRs and our regulatory approach.
- **The Consumer Duty (Principle 12 and PRIN 2A)**: the Consumer Duty sets high standards of consumer protection across retail financial services. It came into effect on 31 July 2023 for new and existing products and services that were open to sale (or renewal). From 31 July 2024, the Duty applies to other, closed products and services held in closed books. In summary, the Duty is comprised of:
  - Principle 12: requiring firms to act to deliver good outcomes for retail customers
  - Cross-cutting rules: these require firms to:

    (a) act in good faith towards retail customers

    (b) avoid causing foreseeable harm to retail customers

    (c) enable and support retail customers to pursue their financial objectives

- Rules in relation to four areas that represent key elements of the firm-consumer relationship (the four outcomes): these cover product and service governance, price and value, consumer understanding and consumer support.

There is further guidance on the Duty in FG22/5.

- **Disputes Resolution Complaints Sourcebook (DISP)**: DISP sets out how complaints are to be dealt with by firms, the reporting of complaints to us and the operation of the Financial Ombudsman Service (the Ombudsman Service).

- **Individual requirements and variation of permission**: we apply these to an individual firm to vary its authorisation or registration and/or restrict the firm's activities[55]. We may ask a firm to voluntarily accept a variation of permission (VVOP) or the imposition of a requirement (VREQ) on ~~is~~ its permission or impose it using our own-initiative powers (OIVOP/OIREQ). A firm must continue to comply with these variations and requirements after it enters into an insolvency procedure.

~~10.~~9. We expect an IP to consider if they have the capacity to take on an appointment, bearing in mind their existing appointments, and the size and complexity of the proposed appointment. If the IP does not have in-house resources to cover this, they should consider how appropriate resources will be engaged. We also expect an IP to consider how they will engage effectively with us during the insolvency proceedings.

Pre-insolvency checks

10. A prospective IP should search the FCA Register to determine the regulatory status of a firm. They should also check for any previous or trading names that the firm may have had on the FCA Register in addition to the current registered name.

11. An IP may often be involved with a firm before it becomes insolvent and advise on whether the firm has the necessary arrangements in place to wind down in an orderly manner. This includes the firm having a wind-down plan. A wind-down plan details the steps that the firm will take, prior to, or leading up to ~~in~~ the event of insolvency, any risks associated with the wind-down and mitigating actions for these. An IP may wish to consult our Wind-down Planning Guide when advising on the robustness of a wind-down plan to help ensure an orderly wind-down of the firm.

Early engagement with the FCA

12. We expect an IP to engage with us at an early stage, both prior to and after appointment to a regulated firm. In addition, if an IP is advising a firm pre-appointment, we expect them to advise the firm to engage with us, including complying with any notification requirements[56].

[55] Regulation 7, 8 and 12 of the PSRs and Regulations 7, 8 and 11 of the EMRs

[56] Regulation 37 of the PSRs and EMRs

~~12.~~13. The Payments and E-Money Special Administration Regime[57] (PESAR) provides a special administration is a bespoke insolvency regime for PIs and EMIs (see paragraph 22 onwards). Under Regulation 11 of the Payment and Electronic Money Institution Insolvency Regulations 2021, if a firm is eligible to enter special administration but is considering entering a different insolvency procedure, an IP cannot be appointed over the firm unless we are notified of preliminary steps taken in respect of that procedure. Following receipt of the notice, we have a period of two weeks to inform the person who gave notice whether we consent to the insolvency procedure to which the notice relates, whether we intend to apply for that (or an alternative) insolvency procedure or whether we intend to apply for a special administration order.

~~13.~~ The PSRs and EMRs, as well as our rules and guidance, will continue to apply to a firm in an insolvency procedure while it remains authorised or registered. We also have statutory powers to get involved and this differs depending on the insolvency procedure and the type of regulated firm (that is, currently or formerly authorised or registered or a firm which is or has been carrying out regulated activities without permissions). ~~A prospective IP can search the FCA Register to determine the regulatory status of a firm. They should also check for any previous or trading names that the firm may have had on the FCA Register in addition to the current registered name.~~

Administration

FCA consent to out of court administrator appointments

14. Should a firm (or its directors) seek to appoint an administrator through an out of court process (subject to Regulation 11 of the PESAR, where applicable), the administrator cannot be appointed without our consent. This consent must accompany the filed notice of appointment (NOA), or be filed with the court along with the notice of intention to appoint administrators document (NOIA) as applicable[58]. Consent should be requested by completing a template letter (see Appendix) and sending it to firm.queries@fca.org.uk or the firm's supervisory contact at the FCA. Where there is urgency to the appointment (where the appointment is proposed to take effect within 48 hours), requests marked 'Urgent' may be sent to resolution@fca.org.uk , otherwise the normal process should be followed.

15. Consent requests should be submitted by the IP or their legal representatives in a timely manner to ensure that we have sufficient time to consider the request and, where applicable, grant consent before the appointment takes place.

16. When assessing the consent request, we will consider the IP's ability to take on the appointment. This assessment is likely to include (but not be limited to) the following factors:

    - the IP's expertise in taking appointments as administrators

[57] See The Payment and Electronic Money Institution Insolvency Regulations 2021, SI 2021/716

[58] Section 362A of FSMA as applied by ~~PEMIIR~~ the PSRs and EMRs.

- whether the IP is satisfied that their strategy to achieve the proposed administration objective is reasonably practicable
- whether to our knowledge, anything calls into question the IP's independence from the firm when taking on the appointment (an IP will need to conduct their own conflicts and independence checks before accepting an appointment), ~~and~~
- whether the IP has given requisite consideration to the Insolvency Code of Ethics in accepting the appointment, and
- the IP's past conduct if they have taken previous appointments over regulated firms (e.g. wilful disregard of regulatory regimes or requirements).

17. Depending on the circumstances of the prospective appointment, we may ask additional questions, which must be answered to a satisfactory standard before consent can be issued.

18. Upon appointment, we expect the administrator to send their NOA to us at firm.queries@fca.org.uk. This will enable us to update our records on the firm, such as the FCA Register of regulated firms and individuals.

19. Where an administrator has been purportedly appointed and our consent has not been obtained, the administrator should contact us to request consent with an explanation of why consent was not sought earlier. This should be done as soon as the administrator becomes aware that consent should have been sought. If consent is provided, the FCA should not be taken to be opining on the validity of the administrator's appointment, or ratifying, agreeing to or with, and/or endorsing any of the actions taken between the administrator's appointment and the date on which the FCA's consent is provided. The administrator should seek legal advice on the validity of their appointment in these circumstances.

Sharing of court documentation with the FCA

20. We are entitled to participate in court proceedings in relation to the regulated firm, such as the hearing of an administration application[59]. A prospective administrator should therefore advise the firm to engage with us and share any court documentation, administration applications and other documents required to be sent to creditors of the firm with us. The prospective administrator should advise this at the earliest opportunity, so that we have sufficient time to decide if our participation in the administration is appropriate.

The FCA's ability to apply for an administration order

21. If appropriate, we can apply to the court for an administration order in respect of a regulated firm.

Special administration

[59] Section 362 of FSMA as applied by ~~PEMIIR~~ the PSRs and EMRs.

22. The ~~PEMIIR Payments and E-Money Special Administration Regime[60] (PESAR)provides a special administration~~ is a bespoke insolvency regime for PIs and EMIs. The ~~PEMIIR~~PESAR establishes three objectives for the special administrator: return customer funds as soon as is reasonably practicable; timely engagement with payment systems and authorities; and rescue the institution as a going concern or wind it up in the best interests of the creditors.

23. We are entitled to be heard at a hearing of a special administration order and any other court hearing in relation to the firm. The prospective special administrator should therefore advise the firm (or applicant where this is a third party) to share court documentation with us at the earliest opportunity, so that we have sufficient time to decide if our attendance is appropriate. We are also able to direct the special administrator to prioritise one of the special administration objectives over the other objectives.

~~24. If a firm is eligible to enter special administration but is considering entering a different insolvency procedure, an IP cannot be appointed over the firm unless we are notified of preliminary steps taken in respect of that procedure. Following receipt of the notice, we have a period of two weeks to inform the person who gave notice whether we consent to the insolvency procedure to which the notice relates, whether we intend to apply for that (or an alternative) insolvency procedure or whether we intend to apply for a special administration order.~~

Statutory demands

~~25.~~24. The service of a statutory demand on a regulated firm should be notified to us. We therefore expect an IP engaged by a firm in this situation to advise the firm to notify us if they have received a statutory demand[~~61~~].

Winding-up petitions

~~26.~~25. We have the right to present a winding-up petition to the court in respect of a PI or EMI. In addition, where a party (other than the FCA) presents a petition to wind up a regulated firm, including where there is an application to have a provisional liquidator appointed, the firm should notify us about this in accordance with Regulation 11 of the PESAR, where applicable. If an IP is subsequently appointed to the firm, we would expect the IP to engage with us and ensure that a copy of the winding-up petition has been provided to us.

Liquidation

~~27.~~26. The appointment of a liquidator should be notified to us in all cases (including in accordance with regulation 11 of the PESAR, where applicable), whether the proceedings are a voluntary liquidation (either a Members' Voluntary Liquidation (MVL) or a Creditors' Voluntary Liquidation (CVL)) or a

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~~[60] See The Payment and Electronic Money Institution Insolvency Regulations 2021, SI 2021/716~~

~~[61] As at the date of publishing this guidance, statutory demands and winding-up petitions are restricted until 30 June 2021 following the Corporate Insolvency and Governance Act 2020.~~

compulsory liquidation, and whether the liquidator is an IP or the Official Receiver. We therefore expect a liquidator to notify us of their appointment as soon as possible. The liquidator should send any relevant appointment documents to support their notification. These might include, depending on the type of liquidation proceedings, ~~C~~copies of the winding up-order, resolution to wind up, and the certificate of appointment. Documents should ~~also~~ be sent to firm.queries@fca.org.uk.

~~28. In cases where a winding-up petition is presented and a firm subsequently enters into compulsory liquidation, the Official Receiver will be appointed over the firm as liquidator. We expect the Official Receiver to notify us in this case.~~

~~29.~~27. We have the right to participate in any court proceedings in relation to a liquidation, attend creditors meetings and participate in the decision procedure[62]. We therefore expect a liquidator to ensure that court and creditor documentation is shared with us at the earliest opportunity, so that we have sufficient time to decide if our participation is appropriate.

Notice if a firm is in the same group as a bank

~~30.~~28. An IP should be aware that, where a firm is in the same group as a bank (whether established in the UK or another ~~EU member~~ state), the firm is required to notify us, the PRA and the Bank of England seven days before entering an insolvency procedure[63]. An insolvency application cannot be determined until the Bank of England has informed the firm that they do not intend to exercise a stabilisation power under the Banking Act 2009.

Members' voluntary liquidation and creditors' voluntary liquidation

29. If a ~~members' voluntary liquidation (~~MVL~~)~~ is being considered for a firm, the prospective IP must consider all prospective and contingent liabilities, including complaints, potential litigation, and other redress claims, and whether they are appropriately reflected in the directors' declaration of solvency. This should involve assessing the firm's solvency, including querying any prospective contingent liabilities and complaints made to the Ombudsman Service with the firm's management.

~~31.~~30. Where a firm safeguards 'relevant funds', entry into a MVL (subject to the provisions of Regulation 11 of the PESAR, where applicable) will have certain consequences under the PSRs and EMRs, including triggering an insolvency event, meaning an 'asset pool' is formed of the relevant funds held by the firm and the proceeds of any insurance policy/comparable guarantee (for more information, see para 60 onwards). IPs advising firms on a prospective MVL should consider the impact and whether better outcomes could be delivered if relevant funds can be returned to clients prior to entry into MVL.

~~32.~~31. An IP must take steps to convert the liquidation to a ~~Creditors' Voluntary Liquidation (~~CVL~~)~~ if they are of the opinion that the firm will be unable to pays its debts in full. Accordingly, an IP should continue to monitor the situation regarding contingent liabilities throughout the MVL. This should take into account relevant factors such as the volume of complaints to the firm or the

[62] Sections 371 and 374 of FSMA as applied by ~~PEMIIR~~ the PSRs and EMRs.

[63] Sections 120A of the Banking Act 2009

Ombudsman Service. If the IP is uncertain on this, they should discuss the matter with us.

~~33.~~32. Where an IP is required to convert an MVL to a CVL, we expect the IP to consider whether there is a conflict for the same IP to act in both processes.

Creditors' committees

~~34.~~33. After a firm has been placed into administration or special administration, the administrator must, when seeking approval from the creditors for the administrator's proposals, invite the creditors to decide whether a 'creditors' committee' should be established. By 'creditors' committee' we mean any creditors' committee or, in the context of liquidation, liquidation committee established by an IP under Part 17 of the Insolvency (England and Wales) Rules 2016 (Part 10 of the Insolvency (Scotland) (Receivership and Winding up) Rules 2018 for Scotland).

~~35.~~34. The purpose of the creditors' committee is to assist the IP in the discharge of their functions. Creditors will include anyone who is owed a debt by the failed firm, including customers, and their interests are significant to the IP in fulfilling their duties. Customers for whom the firm holds relevant funds should be represented on a creditors' committee and the IP should take reasonable steps (in accordance with relevant legislation) to ensure appropriate representation from across all types of customers for whom the firm is holding relevant funds.

Insolvency costs

~~36.~~35. An IP's fees and expenses are matters for creditors and the court to oversee and approve. However, we would expect an IP to properly record insolvency fees and expenses throughout the insolvency process, and any fees and expenses charged to the ~~client estate~~ asset pool should be directly attributable to the distribution of relevant funds. We also expect the IP to be efficient in their work and take steps with the aim of reducing costs that would be borne by customers and creditors wherever possible.

~~37.~~36. Fees estimates and details of expenses that the IP considers will, or are likely to be, incurred should be realistic and communicated to customers and creditors in a timely and clear manner. An IP should carefully consider when they are in a position, having fully assessed the firm's business and understood the complexities of the insolvency, to seek approval for the basis of their remuneration and, where relevant, to provide a fees estimate and details of expenses to creditors and customers. If a creditors' committee is not formed, fees can be approved by the general body of creditors or the court.

~~38.~~37. We expect an IP to properly consider expenses that may be incurred (e.g. legal expenses). This should include factoring in any costs that may be incurred as part of ongoing engagement with regulatory bodies and authorities as relevant. It is important to note that if lawyers or other parties are working in conjunction with an IP, they will also need to be able to accurately account for their time, particularly for work directly attributable to the distribution of relevant funds.

~~39.~~38. We expect an IP to properly allocate costs to relevant estates and, where relevant, consult with, and seek approval from, the creditors' committees and/or seek directions from the court~~, as relevant~~. We expect the IP to update us on the costs that they are charging to the relevant estates, and report this clearly to customers and creditors. An IP should discuss this fully with the creditors' committee, if one is established, when gaining their approval to draw costs as set out in insolvency legislation. In some cases, the creditors' committee may wish to consider the appointment of an independent cost assessor.

~~40.~~39. Given the role of the creditors' committee in this process, if one is established, it is important that it appropriately represents the customer base of the firm. An IP should therefore take reasonable steps (in accordance with relevant legislation) to ensure appropriate representation across all types of creditors and customers on the committee throughout the insolvency process.

Chapter 3: Entering insolvency

Interaction with the FCA

~~41.~~40. If a firm is considering entering or has entered into an insolvency procedure, we would expect an IP to provide regular updates to us for a period agreed with us. In general terms, more complex cases will require a higher level of engagement, which an IP should take into account when considering the costs of the insolvency proceedings. We would expect updates on items including the following:

- communications to customers
- customer contacts and questions
- progress in collecting in, reconciling or distributing relevant funds in line with the PSRs/EMRs and relevant insolvency legislation
- customer complaints including interface with the Ombudsman Service
- quality of books and records
- possible sale of the customer book (if contemplated) including the marketing process, the ability of any proposed purchaser to take on the book, and the implications of any requirements over the firm
- staffing and supplier issues
- ability to maintain service provision where the firm provides key services of market importance
- adverse press or other commentary
- evidence of potential fraud or potential financial crime by the firm or committed against the firm
- issues relating to the firm's compliance with UK sanctions legislation
- any intelligence or information arising from the insolvency or investigations into directors' conduct that could give rise to harm, in

particular risks of harm that relate to protection of consumers or market integrity

- insolvency costs, especially those relating to the client estate, and
- interaction with foreign regulators and/or other UK authorities involved in the firm's insolvency process.

Communicating with customers

~~42.~~41. If a firm is considering entering or has entered into an insolvency process, we expect an IP to have a communication strategy in place. This strategy should consider the key messages for customers, what their immediate concerns may be and the information they are going to need, the format of that information and how quickly it can be disseminated. Information about the practical effects of the IP's appointment will be the most important initially and must be clear for customers. This should include implications for inflight payments and whether e-money cards will continue to work.

~~43.~~42. In addition, the following practical issues should be considered factors:

- **Use language that is clearly understood by the audience of the communication**[64], particularly if they are retail or vulnerable consumers. This includes adapting template communications to help ensure they are clear, fair and not misleading to the recipient and are easy to understand. An IP should also consider using headings and highlighting key actions that need to be taken by the recipient. Given the rise in scams, any customer communications should have a standard 'scam smart' messaging and make clear that a consumer is not required to use the services of a claims management company to pursue a claim. Key messages should not be hidden (i.e. they should be at the top of the communication).
- **Ensure sufficient resource is available for communications with the firm's customers**, particularly where there is a significant number of retail customers. This may require additional phone lines or a call centre, producing scripts for staff including frequently asked questions and, in some cases, providing communications in different languages. The communication should also highlight the options for customers to communicate their questions and concerns to the IP (such as email address, online forms, telephone number(s) and/or postal address).
- **Information on treatment of relevant funds**. An IP should avoid giving customers misleading impressions on the protection they receive from safeguarding requirements. ~~An IP should also avoid suggesting to customers that any of the relevant funds held by the insolvent firm are protected by the Financial Services Compensation Scheme (FSCS) given FSCS is not currently available for customers of PIs and EMIs.~~An IP should also avoid giving customers misleading impressions on the protection they receive from the Financial Services Compensation Scheme (FSCS) given that the availability of FSCS depositor protection depends on the particular facts of the case

[64] This is in accordance with the firm's obligations under Principle 7 (communication with clients) for non-retail customers, and Principle 12 (Consumer Duty) and PRIN 2A for retail customers.

- Where FSCS cover is available following the failure of a PRA authorised credit institution holding safeguarding deposits, an IP should liaise with the FSCS, including to consider whether clients/creditors need to be involved.

- **Share draft versions of key customer communications with us (and other relevant authorities) for comment before finalising**, particularly communications regarding high profile or complex firm failures (e.g. firms that hold significant sums of safeguarded funds or vulnerable customers). Whilst it is not for us to approve client communications (and an IP is responsible for the accuracy, transparency, completeness and fairness), sharing drafts with us ~~This~~ would also help to ensure that customer communications are consistent with our press releases, where relevant, upon an IP's appointment.

43. We are aware that there are statutory communications, including notices, letters and reports, that an IP must issue before and during their appointment. If any communication contains references to us, we expect these to be factual, necessary and, in the case of high profile and complex failures or if requested, communicated to us for comment in advance of publication and in good time so that the IP is able to meet any statutory deadlines for such communications. These communications should be sent to ~~firm.queries@fca.org.uk.~~ the FCA team dealing with the firm.

44. When communicating with retail customers, and, more broadly, when taking decisions that affect them, IPs should consider the requirements of the Consumer Duty, which requires firms to act to deliver good outcomes for retail customers.

Interaction with the Ombudsman Service

45. The Ombudsman Service is an independent service for resolving disputes between consumers and businesses, and with a minimum of formality on a fair and reasonable basis. The rules and guidance relating to the operation of the Ombudsman Service is set out in DISP rules of our Handbook.

46. We would expect an IP to engage with the Ombudsman Service at the beginning of an insolvency process to establish the number of complaints against the failed firm and to agree how those complaints will be dealt with going forward.

Agents and distributors

47. Many PIs and EMIs provide payment services through agents. An agent is any person who acts on behalf of a PI or an EMI (i.e. a principal) in the provision of payment services[65]. These entities are required to be registered with us. An EMI may also engage distributors to distribute and redeem e-money. An EMI cannot provide payment systems through a distributor and distributors do not have to be registered by us. We expect an IP to be mindful of any agent and distributor arrangements as part of the insolvency process.

[65] Regulation 2 of the PSRs and regulation 2 of the EMRs

Chapter 4: During insolvency

Claims process

48. We expect an IP to have a suitable claims process in place for customers and creditors. An IP should consider how this claims process is structured to ensure that it is easy to handle from both a customer and the IP's perspective. For example, an IP may want to explore handling the claims process via web portal (if appropriate, taking into account the characteristics of the customer base).

49. We expect an IP to consider the following when designing their claims process:

    - how statements to customers are issued, including how to notify those customers that are recipients of e-money gift tokens
    - how customers and creditors validate their claims
    - validation of KYC details
    - how non-responders are treated
    - the process should customer address details be incorrect
    - the need for customers and creditors to add bank account details, including where relevant funds are held in joint names and the bank account details are in only one name
    - communication to customers on access to the claim portal if available
    - any translations required for non-English speakers and other accessibility needs for customers
    - the process if customers choose to abandon small claims, and
    - information to be collected regarding engagement with the claims process.

50. An IP may need to consider demonstrating the claims process with the creditors' committee before making it available. They should also consider using the technology systems of the failed firm if suitable (avoiding unnecessary costs). In any case, an IP should consider the need to maintain IT contracts, the resilience and usability of the systems and data security considerations for migration, including backing up any data in accordance with relevant legislation.

51. An IP should also consider necessary steps throughout the insolvency procedure to mitigate any risks relating to money laundering. This may include a review of the firm's KYC policy and procedures that were in place before the IP was appointed.

FCA participation in court cases and creditors' committees

52. We have statutory powers to participate in court proceedings in relation to 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 within an appropriate timeframe. We may request prior copies of any court papers or submissions made by the IP or the firm, to ensure references to the FCA are correct and appropriate, and consider whether we wish to make our own representations (e.g. if a precedent is being set or we wish to express a preference for one of several options put forward).

53. We have rights to make representations at meetings of the creditors' committee and are required to receive any documents sent to creditors[66]. We may do this depending on the case and so should be informed of the creation of creditors' committee and sent invitations to meetings.

Confidentiality

54. We will not discuss any confidential aspect of the firm's regulatory history at creditors' committee meetings and if questions such as these are raised, they can be raised with us through firm.queries@fca.org.uk. We may also request copies of presentations and minutes taken at the meetings of the creditors' committee.

55. An IP should ensure that the creditors' committee members are aware of the confidentiality of the meetings.

Treatment of customers' funds

56. PIs and EMIs are required to safeguard 'relevant funds'. Under the EMRs, these are funds that have been received in exchange for issued e-money[67]. Under the PSRs, relevant funds are sums received from, or for the benefit of, a payment service user for the execution of a payment transaction, or sums received from a payment transaction on behalf of a payment service user.

57. The safeguarding requirements apply to all authorised PIs, authorised EMIs and small EMIs[68]. Small PIs and small EMIs undertaking payment services unrelated to the issuance of e-money must comply with the safeguarding requirements if they choose to safeguard funds.

58. If a PI or an EMI that is holding relevant funds enters an insolvency process, an IP should make sure that such funds continue to be treated in line with the PSRs and EMRs (as applicable). If the firm enters a special administration, the IP will also need to comply with the ~~PEMIIR~~PESAR and related rules.

How are relevant funds safeguarded?

59. An IP should note that there are two ways in which a firm may have safeguarded relevant funds prior to entering into an insolvency process:

[66] Sections 362 and 371 of FSMA as applied by ~~PEMIIR~~ the PSRs and EMRs.

[67] Regulation 20(1) of EMRs

[68] The safeguarding requirements are set out in regulations 23 of the PSRs and regulations 20 to 27 of the EMRs. Our expectations on how firms should comply with these requirements are explained in Chapter 10 of the FCA's Payment Services and Electronic Money – Our Approach and the FCA's Coronavirus and safeguarding customers' funds: additional guidance for payment and e-money firms.

- **Segregation method:** this requires the firm to keep relevant funds separate from all other funds it holds and, if the funds are still held at the end of the business day following the day on which they were received, deposit the funds in a separate account with an authorised credit institution or the Bank of England or to invest the relevant funds in secure, liquid assets and place those assets in a separate account with an authorised custodian[69].

- **Insurance or guarantee method:** this requires the firm to arrange for the relevant funds to be covered by an insurance policy with an authorised insurer, or a comparable guarantee[70].

60. ~~As set out in a recent court judgment, PIs that safeguard using the segregation method hold safeguarded funds on trust. We also consider that this is true for EMIs.~~ In the *Ipagoo* case[71], the Court of Appeal held that the Electronic Money Regulations 2011 (EMRs) do not create a statutory trust over relevant funds held by an EMI but that the 'asset pool' includes relevant funds that have been properly safeguarded and an amount equivalent to relevant funds that should have been safeguarded but were not. We understand this to mean that, where there is a shortfall in the properly safeguarded relevant funds, the asset pool should be topped-up accordingly. The court subsequently confirmed that the analysis in the *Ipagoo* case also applies to the safeguarding requirements in the Payment Services Regulations 2017[72].

Key steps to take immediately after appointment

Take control of relevant funds

61. Following appointment, an IP will need to take control of relevant funds and assets, and the books and records of the firm. The IP should also identify key individuals and systems required to manage relevant funds of the firm, including third party administrators, system suppliers and employees of the firms. Furthermore, the IP should cooperate with any payment systems to facilitate settlement or completion of inflight payments.

62. On the occurrence of an insolvency event (as defined in the PSRs and EMRs), an 'asset pool' is formed of the relevant funds held by the firm[73] and the proceeds of any insurance policy/comparable guarantee. To constitute the asset pool, the IP will need to collect all relevant funds safeguarded by the firm. This includes checking the terms of any safeguarding insurance or guarantee policy and, if a claim should be triggered, exercising the relevant provisions that enable the pay-out of proceeds for the asset pool. The IP

[69] Regulation 21 of the EMRs 2011

[70] As defined in regulation 24 of the EMRs 2011 and regulation 23 of the PSRs 2017.

[71] https://www.judiciary.uk/judgments/in-the-matter-of-ipagoo-llp-in-administration/

[72] See Re: Allied Wallet Limited (in Liquidation) [2022 EWHC 1877 (Ch) paragraph 8)

[73] Where the PI or EMI is a participant in a designated payment system, this may include funds received into a settlement account in the circumstances described in regulation 23(9) of the PSRs.

should also take reasonable measures to include all identifiable relevant funds in any other account held by the firm (e.g. unsegregated funds).

63. For relevant funds which have been segregated by investing in liquid assets, the IP may consider there being benefit in holding the relevant funds in those liquid assets until it is necessary to distribute the funds to customers.

64. EMIs may undertake both e-money issuance and unrelated payment services – in this scenario, there would be two types of customers (e-money holders and payment service users) and two asset pools (one for e-money issuance and one for unrelated payment services).

Operate different estates

65. We expect an IP to operate at least two separate estates: the client estate comprising the asset pool (against which claims of customers are paid in priority to all other creditors) and the general estate comprising the firm's assets (against which all creditors can prove). The estates may be further split if the firm is operating two asset pools (as described above).

66. An IP should accurately allocate costs between the two estates. An IP should also accurately record time spent on the different estates and, in respect of the client estate, distinguish time and expenses spent on each asset pool.

67. It is possible that a firm holds both client money under the FCA's Client Assets Sourcebook (CASS) and relevant funds under the PSRs/EMRs. CASS client money must be segregated from relevant funds and separate pools following insolvency.

Immediate reconciliation and final top-up/withdrawal (for firms in special administration)

68. If a firm has entered special administration and is holding relevant funds, the IP is required to conduct a post-administration reconciliation (based on the reconciliation method previously adopted by the institution) immediately after being appointed and to make a transfer to or from the firm's safeguarding accounts following that reconciliation. We expect IPs to conduct this reconciliation as soon as they can post appointment. This enables the IP to correct any shortfalls (or excesses) in the firm's safeguarding accounts using the firm's previous reconciliation method.

69. Where the reconciliation identifies a shortfall in relevant funds, the IP must top-up the safeguarding account with monies from the firm's own bank account (where there are funds available). Where the reconciliation identifies an excess in relevant funds, an IP must withdraw this from the safeguarding account and transfer it to the firm's own bank account.

Determine entitlements

70. After forming the asset pool, an IP should identify customers with an entitlement to relevant funds owed by the firm at the time of failure. This could involve looking at records of the firm's previous reconciliation, customer database and transaction history.

Manage currency risks

71. We expect an IP to have regard to all relevant insolvency rules and contractual documentation, including terms and debts in foreign currency, in deciding:

    - what currency they should calculate each entitlement
    - what currency they should continue to hold the relevant funds in the asset pool in, and
    - what currency the IP should return relevant funds in the asset pool in.

Treatment of shortfalls

72. A shortfall is the amount by which relevant funds and assets held by the firm are not sufficient to meet all customer entitlements. A shortfall may arise for various reasons including deductions from the asset pool because of distribution costs and/or poor controls and record keeping by the firm before it failed. As noted above, we understand applicable court decisions to mean that where there is a shortfall in the properly safeguarded relevant funds, the asset pool should be topped-up in line with the judgment in *Ipagoo* and, if applicable, the PESAR.

73. It is our view that a distribution cost is a cost directly attributable to the distribution of the asset pool. For example, this may include gathering in, reconciling, calculating entitlements and transaction costs of sending the money. An IP should endeavour to minimise costs incurred in the distribution process and return relevant funds and assets to the customer as soon as reasonably practicable. Distribution costs should be recorded and charged appropriately following authority from the creditors' committee or court as appropriate.

74. For shortfalls in the asset pool, an IP should consider and agree with the creditors' committee on the appropriate method for allocating these or obtain directions from the court. The IP should explore various options, such as applying a fixed fee per customer or allocating such costs on a pro rata basis. If the firm has entered into special administration, the ~~PEMIIR~~PESAR requires shortfalls to be borne pro rata by all customers within the asset pool.

75. Customers should be considered contingent creditors in respect of any shortfall. To the extent that their claim is not satisfied by distributions from relevant funds, customers may also have a claim against the general estate for any relevant funds that are not returned as part of the distribution of the asset pool and would usually be considered unsecured creditors in respect of such claims.

Relevant funds received by the firm after insolvency

76. A firm is likely to have unsettled or incomplete transactions at the point of entering an insolvency procedure, which may result in the firm receiving relevant funds after it has failed. This may include transfers of funds from payment systems. An IP should consider setting up procedures to monitor and allocate receipts post failure and return these promptly to customers. An IP

should also engage and cooperate with the relevant payment system operators to facilitate appropriate treatment of inflight transactions in a timely manner.

Distributions of the asset pool and transfers to a solvent firm

77. The IP is required to pay claims of customers from the asset pool in priority to all other creditors[74]. In this process, an IP may need to consider the following issues:

    - how relevant funds are returned to the relevant customer (e.g. whether it should go directly to the customer or as per the customers' instructions, or be part of a transfer of relevant funds to another firm)
    - if being returned directly to a customer, verifying a customer's bank details and completing any required KYC before returning relevant funds
    - costs of returning relevant funds to each customer, and
    - if the customer cannot be contacted or disclaims their entitlement.

Transfer of relevant funds as part of the distribution of relevant funds

78. An IP may decide to transfer relevant funds to another entity. If a firm has entered into special administration, the ~~PEMIIR~~PESAR enables the special administrator to do a swift whole or partial business transfer by removing some of the restrictions that usually occur when transferring relevant funds and contracts.

79. An IP would need to consider the following practical issues when conducting a transfer of relevant funds:

    - whether the transfer will be a whole or a partial transfer
    - whether customer consent is provided or needed
    - what customer communications, including notifications, are necessary
    - whether there any requirements on the firm that may affect the transfer (in particular, a requirement preventing a transfer without conditions being met[75])
    - the type of firm which can take on the business and whether a firm has appropriate regulatory permissions
    - the consideration for the transfer and how it will be structured
    - agency arrangements and whether these need to be re-registered to facilitate the transfer
    - warranties and indemnities (if applicable)

[74] The exception is expenses of the insolvency proceedings which take priority so far as they are in respect of the costs of distributing the asset pool.

[75] Regulation 7 of the PSRs and EMRs

- whether the transferee's systems are compatible and if any other arrangements need to be put in place (e.g. where the firm has outsourced functions to a third-party administrator)
- the timetable of the transfer
- any alternative arrangements for customers, including arrangements to transfer out of the transferee, and ensuring these are communicated to customers
- arrangements for funds which cannot be transferred
- transfer of staff in accordance with the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) and whether there is a need for a transitional services agreement
- whether staff are needed to continue with the insolvency, and
- whether there are any phoenixing concerns (see paragraph 97).

80. Where an IP is transferring relevant funds as part of the distribution of relevant funds, the IP should use the creditors' committee to discuss the proposed transfer and keep the FCA updated with their plans.

Bar dates

81. The bar date mechanism established in the ~~PEMIIR~~PESAR gives a special administrator the power to set deadlines for customers to submit claims for the return of their funds. A bar date gives certainty over the group of claimants for an upcoming distribution, ensuring that a distribution of relevant funds by the special administrator can progress smoothly without disruption from late claimants. In general, a late claimant may not challenge a distribution that was made after a bar date, provided the special administrator carried it out in good faith.

82. In setting a bar date, the special administrator would have to allow a reasonable time (taking into account factors relevant to the case including the characteristics of the customer base) after the bar date notice has been published for customers to be able to calculate and submit their claims. The special administrator would then make a distribution of relevant funds in accordance with a distribution plan or according to clients' entitlements established under the claims received.

83. The special administrator can set two types of bar dates:

- A 'soft' bar date whereby the special administrator can set a deadline for customers to submit claims without having to seek court approval and make interim distributions. Late claimants would lose the right to challenge a distribution made prior to the receipt of their claims to meet claims made before the bar date. This allows the special administrator to make any necessary distributions and proceed with the special administration process, as they would not be required to wait for customers who had failed to submit claims in good time. However, when determining the amount to be distributed, the special administrator must make allowance for entitlements, by way of a subsequent distribution from the asset pool, of persons who have neither made a relevant funds

claim nor received any payment under a previous distribution of relevant funds. They would also have to make a distribution to late claimants if there are relevant funds available to do so.

- A 'hard' bar date whereby the special administrator can set a final cut-off date for customers to submit claims, with court approval, after which customers can no longer claim on the client estate, any remaining assets can be moved to the general estate and the client estate can be closed completely.

Closure of client estate

84. At the appropriate point, the IP will need to close the client estate. If the firm is in special administration, the ~~PEMIIR's~~PESAR's hard bar date mechanism may be applied before this occurs. We expect an IP to begin planning for the winding-up of the firm, or the next phase of the insolvency, in advance, ensuring they give early thought to dealing with any residual matters, such as treatment of unclaimed relevant funds. Where compulsory liquidation is being considered and there are unresolved issues involving relevant funds, an IP may, for example, need to liaise with the Official Receiver.

~~84.~~85. An IP is required to take reasonable steps under general trust law and their obligations as an IP to notify all customers of the fact that they may have a valid claim for relevant funds, prior to the closure of the client estate. An IP should consider making at least three attempts to contact the customer using two different methods (e.g. an email and a phone call) regarding their opportunity to claim their relevant funds. The IP will also need to determine what to do with any unclaimed relevant funds.

~~85.~~86. We would expect an IP to share any court documents with us in good time prior to closing the client estate.

Hardship policies

~~86.~~87. Until the IP is in a position to distribute the asset pool, funds will not be returned or available to customers. In such situations, the IP should consider hardship cases to help ensure that they are identified and responded to in an appropriate and consistent manner. An IP may be able to provide earlier distributions of their funds to customers who can demonstrate hardship (although this may not always be possible). We therefore expect an IP to identify and devise potential hardship policies and assess whether there is anything that can be done to support these cases, for example, exploring whether it is possible to make an early interim distribution, in a prudent manner. Under the Consumer Duty, firms must design and deliver support to retail customers that meets their needs, including those of customers with characteristics of vulnerability. We expect firms to respond flexibly to the needs of customers with characteristics of vulnerability and they may need to support customers by adapting their usual approach. However, we recognise the ability of the IP to support will depend on the circumstances of the case. IPs should also refer to our guidance on fair treatment of vulnerable customers.

Continuity of supply

~~87.~~88. We expect an IP to consider how they will make sure that the failed firm continues to comply with our regulatory requirements whilst it remains authorised. If the firm loses a supplier, it is still required to comply with our rules.

~~88.~~89. The continuity of service provisions in the Insolvency Act[76] assist an IP by enabling them to limit the terms that essential suppliers can impose as a condition for the continued supply of their service and compel continued supply by restricting the effect of existing insolvency-related terms in an essential supply contract. Continuity of supply also helps to facilitate distribution of relevant funds (e.g. where third party suppliers have been used to maintain customer records and IT systems).

~~89.~~90. Certain continuity of supply provisions are not available for liquidations. An IP must therefore consider on an ongoing basis how they ensure the insolvency is conducted in compliance with our rules. The IP should be aware of which continuity or protection can be relied on in accordance with the law.

Trading while in an insolvency process

~~90.~~91. An IP may decide that it is the best outcome for creditors if the failed firm continues to trade. We expect an IP to be aware that continuing to trade may mean using FCA authorisation and registration, and, if this is the case, that the firm must remain authorised or registered until the firm ceases to be carrying out regulated activities. When FCA authorisation or registration is no longer required, the IP should cancel the firm's authorisation or registration by liaising with us (see below).

~~91.~~92. We would expect ~~firms~~an IP to tell us if they were continuing to cause the firm to trade while in an insolvency process and consider the impact on relevant funds. They should consider how any continued trading impacts on the asset pool and ensure that any relevant funds received post failure are held separately. IPs should be aware of any requirements and make sure that they maintain the firm's organisational arrangements to comply with them. If the firm has retail customers, we expect IPs to conduct the affairs of the firm in a way that is compatible with the Consumer Duty.

Cancellation of authorisation or registration

~~92.~~93. When a firm goes into an insolvency process, the appointed IP should consider whether and when it is appropriate to apply to cancel the firm's authorisation or registration. We expect an IP to consider at an early stage in the insolvency what information we would need to cancel the firm's permissions as this can then be prepared at a relevant time (e.g. when the client estate is closed) rather than at the end of the process. It is only appropriate to apply to cancel the authorisation of the firm if it has stopped carrying out all regulated activities in the future and no longer holding any relevant funds.

~~93.~~94. An IP can request to cancel a firm's authorisation or registration by using our online system Connect.

[76] Sections 233, 233A and 233B of the Insolvency Act 1986

Reporting of unauthorised businesses

~~94.~~95. An IP should report to us if they come across any unauthorised firms or individuals that they believe have carried on or are carrying out FCA regulated activities without the appropriate permissions to do so and any scams relating to financial services~~.~~ ~~For~~ for example, non-FCA authorised firms conducting payment services through online marketplaces. Please note, however, that we are only able to look into scams and unauthorised ~~conduct~~ businesses involving the provision of financial services ~~firms regulated by us~~ or activities that fall within our regulatory perimeter.

~~95.~~96. An IP may also find that the firm over which they are appointed is being scammed or cloned. An IP should be vigilant to this and other scams and ensure to communicate to customers appropriately and report it to us at firm.queries@fca.org.uk.

Phoenixing

~~96.~~97. 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~~owed by the old firm. Each time this happens, the insolvent company's assets, but not its liabilities, are transferred to a new, similar 'phoenix' company. The insolvent company then ceases to trade and might enter into formal insolvency proceedings (liquidation, administration or administrative receivership) or be dissolved.

~~97.~~98. UK law does not prevent the director of a company that has failed from forming a new company, unless they are personally bankrupt or disqualified from acting in the management of a limited company. However, there is a risk that a company owing significant sums, often in the form of consumer redress awarded by the Ombudsman Service, will be placed into formal insolvency, leaving liabilities owed to the consumer unpaid. Directors, shareholders and senior staff who have engaged in financial misconduct may reappear, connected with a new firm of strikingly similar business. We consider this to be unacceptable practice. Where we find such individuals have deliberately avoided their responsibilities and not complied with previous redress awards made against their firms, we will question the fitness and propriety of these individuals and take necessary steps against them so that they do not cause further harm to consumers.

99. If an IP becomes suspicious of phoenixing in respect of a failed firm, they should report these suspicions to firm.queries@fca.org.uk immediately. 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.

Information requirements and investigations

100. We have various powers to require the provision of information or documents for the purposes of supervising or investigating regulated firms. While we will generally work with an IP to ensure that the scope of such requirements is proportionate, compliance with statutory information requirements is mandatory. Where a firm in an insolvency procedure is under

investigation, we expect the IP to cooperate fully with the investigators and retain firm records.

Sale of customer data

~~98.~~101. An IP may consider selling customers' data as part of a transfer or sale of the business of the failed firm. We expect the IP to consider the following matters in this scenario and, where retail customers are concerned, conduct the affair of the firm in a way that is compatible with the Consumer Duty:

- **Notice to the FCA:** an IP should notify us if they are planning to sell customer data in good time, including sufficient details.
- **Customer outcomes and fair ~~Fair~~ treatment ~~of customers~~**: before transferring customers' personal data, an IP must consider whether this is in the interests of the firm's customers and, for non-retail customers, treat them fairly[77] or, for retail customers, act to deliver good outcomes[78].
- **Selling to a claims management company (CMC):** if an IP proposes to sell the customer data to a CMC, the IP should consider our joint statement with the ICO on dealing with personal data.
- **Obtain legal advice on the application of data protection legislation**: data protection legislation applies to data controllers including IPs. Relevant legislation includes the Data Protection Act 2018, ~~General Data Protection Regulation (EU) 2016/679 (GDPR)~~ the UK General Data Protection Regulation, and Privacy and Electronic Communications ~~Regulations~~ (EC Directive) Regulations 2003, the PSRs and EMRs. An IP should obtain legal advice on their obligations under such legislation to ensure that they handle customer data appropriately.
- **Communication to customers:** An IP must pay due regard to the information needs of their customers and communicate with them in a way which is clear, fair and not misleading. For retail customers, IPs must also consider relevant Consumer Duty requirements for communications to be likely to be understood by customers and to equip them to make decisions that are effective, timely and properly informed. This includes clearly articulate the transaction with a suitable helpline/contact(s) being provided to support and respond to customer queries. The IP should also encourage the buyer to inform customers on the sale and their rights, so that they can manage their rights appropriately.
- **The sale is not facilitating the practice of phoenixing of the failed firm described in paragraph 97.**

~~99.~~102. For further details on our expectations of handling customer data more generally, please see our communication on this.

Liaising with overseas regulators

[77] Principle 6 (Customers' interests)

[78] Principle 12 (Consumer Duty)

~~100.~~103. Where an IP receives or issues correspondence to an overseas regulator in relation to the insolvency process, this information should be shared with us at firm.queries@fca.org.uk. This would help us to keep us abreast of the situation and to inform any discussions that we may have or be required to have with the overseas regulator.

Chapter 5: Restructuring procedures

~~101.~~104. Firms may consider using other procedures to enable them to restructure and continue trading. These can include:

- Scheme of arrangement
- Company voluntary arrangement (CVA)
- Restructuring plan

105. We have issued separate non-Handbook guidance on our general approach to compromises[79] (where a firm uses one of the above procedures, typically to restructure debts). This guidance is aimed at firms authorised or registered by us. This includes PIs and EMIs.

106. This guidance clarifies our general approach to compromises, including the factors we will consider when deciding if and what actions we will take. The guidance will help regulated firms (including those where an IP has been appointed) understand our expectations and ultimately help firms to avoid proposing compromises that are unacceptable to us because they threaten or adversely affect our statutory objectives.

107. We have rights to make representations at court and creditor meetings for all restructuring procedures. When a firm is considering proposing a compromise, in line with Principle 11 and relevant rules in SUP, PSRs and EMRs, the firm should notify us immediately and provide relevant information at an early stage to enable our assessment of the compromise. We consider proceeding with preparation for a compromise, without notifying us to be a significant breach of Principle 11.

~~102.~~108. If an IP is advising a firm on their options or take forward a scheme of arrangement, CVA or restructuring plan in respect of a regulated firm, or which impacts on a regulated firm, the firm should notify us of their plans in good time.

~~103.~~109. ~~We have rights to make representations at court and creditor meetings for all restructuring procedures. We therefore expect appropriate notice.~~ We also expect the firm or an IP (in their capacity as supervisor of a CVA) to send reports on a regular basis regarding the progress of these procedures to us so that we can review as appropriate. Reports should be sent to firm.queries@fca.org.uk.

[79] FCA's approach to compromises for regulated firms FG22/4, July 2022

~~104.~~110. If a firm is likely to be placed into administration or liquidation while subject to one of these procedures, the firm is required to promptly notify us[80].

Chapter 6: Checklist

~~105.~~111. The checklist below summarises the key steps from the guidance that an IP will need to consider when appointed over a regulated firm.

	Key step	**Tick**
1.	Understand the firm's business model and how FCA requirements apply to the firm before appointment.	
2.	Engage with the FCA as early as possible, including sharing court documentation and consent requests, and throughout the insolvency process as appropriate.	
3.	Communicate appropriately with customers, taking into account, where relevant, the requirements of the Consumer Duty.	
4.	Treat relevant funds in accordance with the PSRs, EMRs and FCA guidance.	
5.	Ensure costs are properly recorded and communicated to customers and creditors in an appropriate manner.	
6.	Do not facilitate phoenixing and notify the FCA promptly of any phoenixing concerns.	
7.	Cancel the firm's authorisation or registration when the firm is no longer conducting regulated activities and relevant funds have been returned or transferred.	

[80] Principle 11 (Relations with regulators)

Appendix: Template letter for section 362A FSMA consent requests

Financial Conduct Authority
12 Endeavour Square
London
E20 1JN
For the attention of [ ]

[date]

STRICTLY PRIVATE & CONFIDENTIAL

Dear ~~Sirs~~FCA,

[ ] ('the Company')

[I/ We] refer to the proposal that the directors of the Company are currently considering to place the Company into administration under paragraph [ ] of Schedule B1 of the Insolvency Act 1986.

[I/ We] have been advising the directors of the possible administration and understand that if they seek to place the Company into administration, they will ask me [and [ ]] to accept the appointment as [joint] administrators.

In connection with such a proposed appointment, [I confirm on behalf of myself and [ ]] [We confirm] that -

1. [I am a/ We are] licensed under the Insolvency Act 1986 as insolvency practitioner[s];

2. [I am / We are] satisfied that [I/ we] have the required professional qualification and experience to accept the appointment. [I/We] have experience and expertise of taking appointments as administrators, and indeed provisional liquidators, of companies, [including companies regulated by the Financial Conduct Authority]. [Given that the Company is authorised by the Financial Conduct Authority for the carrying on of regulated activities, [I/ we] confirm that persons with the relevant financial services experience will provide the necessary assistance]; and

3. [[I/ We] believe the company can be rescued as a going concern.] [I am/ We are] [satisfied that it is reasonably likely that administration will achieve a better result for the Company's creditors as a whole than would be likely if the Company were wound-up.] (if the purpose of the administration is the realisation of the company's assets) [[I/ We] believe that the distribution of the Company's assets to those entitled is not likely to be slower than would be the case if the Company were to be placed into liquidation.]

If you have any questions on the above, please do not hesitate to contact [me/ us].

Annex 3 – Abbreviations used in this paper

AR	Appointed representative
CASS	Client Assets Sourcebook
CBA	Cost benefit analysis
CIS	Collective investment scheme
CMC	Claims management company
CMP	Client money pool
CVA	Company voluntary arrangement
COMP	Compensation Sourcebook
DISP	Disputes Resolution Complaints Sourcebook
EMI	Electronic money institutions
EMR	Electronic Money Regulations 2011
FCA	Financial Conduct Authority
FSCS	Financial Services Compensation Scheme
FSMA	Financial Services and Markets Act 2000
~~**GDPR**~~	~~General Data Protection Regulation~~
IBSAR	Investment Bank Special Administration Regime
ICO	Information Commissioner's Office
IP	Insolvency practitioner
KYC	Know Your Client
LRRA	Legislative and Regulatory Reform Act 2006

MVL	Members' voluntary liquidation
OIREQ	Own-initiative imposition of requirement
OIVOP	Own-initiative variation of permission
~~**PEMIIR**~~	~~Payment and Electronic Money Institution Insolvency Regulations 2021~~
PESAR	Payments and E-Money Special Administration Regime
PI	Payment institutions
PPE	Primary pooling event
PRA	Prudential Regulation Authority
PRIN	Principles for Businesses
PSP	Payment service provider
PSR	Payment Services Regulations 2017
SIPP	Self-invested personal pension
SUP	Supervision Manual
VREQ	Voluntarily requirement
VVOP	Voluntary variation of permission