

URGENT ALERT: Important Changes in Consumer Credit Licensing Affecting Firms Involved in Insolvency

It is important for you to read this article to establish whether your firm requires to take immediate action to obtain an FCA consumer credit licence prior to the regime change on 1 April 2014.

If you are unclear regarding any of the consumer credit terms used in this letter please refer to the Frequently Asked Questions section of our website at <http://icas.org.uk/regulation-ethics/authorisations/consumer-credit-licence/> (you will first need to log in) or the attached article for ease of reference.

The Current Insolvency Exclusion

IPs have an insolvency exclusion which means that any activity within the exclusion is not considered a consumer related regulated activity. The scope of the exclusion is set out in Appendix A to this letter. We were led to understand initially that HM Treasury was minded to interpret the 'reasonable contemplation' exemption widely so as to include some non-statutory debt solutions. Late clarification from HM Treasury in early February 2014 now indicates that this is not the case and that the 'reasonable contemplation' exclusion has a narrower interpretation, which could exclude DAS and other non-statutory debt solutions.

What is covered by the exclusion? Insolvency Appointments

The situation for insolvency appointments is straight forward. Where an IP is appointed as an Insolvency Practitioner, as defined in Section 388 of the Insolvency Act 1986, all debt counselling (e.g. advice), debt adjusting and credit information services pre-appointment is 'in reasonable contemplation of' the appointment and is excluded. Any work post appointment that is:

- Debt adjusting (as set out in article 39D);
- Debt-counselling (as set out in article 39E) e.g. advice;
- Debt-collecting (as set out in article 39F);
- Debt administration (as set out in article 39G).

is also excluded.

It is still expected that insolvency staff involved in any excluded activities do not require their own exclusion because the staff are not conducting the work 'by way of business' and are carrying on the firm's business.

What is not covered by the exclusion?: DAS & non-statutory debt solutions (i.e. work outwith S 388 Insolvency Act 1986)

For any debt work outside the definition of Section 388 the exclusion does not apply. HM Treasury and the FCA have now indicated that they view DAS, and any non-statutory debt solutions, as outwith the exclusion.

Whilst the FCA and HMT have not issued guidance on this, our current understanding is that it is reasonable for an IP (or their staff) to consider initial debt advice/fact finding as 'in reasonable contemplation' of an insolvency appointment but IPs cannot take advantage of the exclusion after the point when a DAS or other non-statutory debt solution, has been identified as the prospective solution for a debtor. At that point, a Consumer Credit Licence, most likely an FCA licence (see further below), will be required to enable the IP to conduct this work, or indeed any other non-statutory debt solution.

What is not covered by the exclusion?: Other consumer credit activities

The exclusion does not include a number of consumer related credit activities which are not seen as being in the usual course of an insolvency appointment, such as:

- entering into a regulated credit agreement as lender (article 60B(1) and 60B(2));
- consumer hire (article 60N (1))
- credit reference agency (article 89B)
- peer to peer lending

The first activity could be covered, if incidental, by the ICAS DPB regime (see the attached article), the other activities are most likely to be mainstream consumer credit activities and would require an FCA licence.

If not all your activities are excluded?

If your firm is conducting any credit regulated activities which do not fall within the insolvency exclusion please consider very carefully whether a Consumer Credit Licence is now required (either a via the DPB regime or via a full FCA licence).

DPB Regime

The DPB consumer credit regime offered by ICAS is only intended to cover firms where certain consumer credit activities are “incidental”. These activities are:

- credit broking; (article 36A);
- debt adjusting; (article 39D(1) and (2));
- debt-counselling; (article 39E(1) and (2));
- providing credit information services (article 89A);
- agreeing to carry on a regulated activity so far as relevant to any of the activities above.

For guidance on these activities, what incidental means, and whether your firm may fall within the ICAS DPB regime, please refer to the consumer credit section of the ICAS website <http://icas.org.uk/regulation-ethics/authorisations/consumer-credit-licence/> or the attached article for ease of reference.

If you are involved in DAS work or other non-statutory debt solutions, in the ordinary course of your business, it is highly unlikely that this meets the incidentalilty test and therefore a FCA licence will be needed.

Some IPs may be able to adapt the firm’s business model so that any non-incidental activities are ring fenced in a separate legal entity which requires FCA authorisation whilst the other activities within the firm fall within the ICAS DPB regime or are excluded altogether.

FCA Regime

If you have identified that your firm requires a full consumer credit licence with the FCA you should apply to the Office of Fair Trading (the OFT) immediately to get a full OFT licence as only OFT licence holders at 1 April 2014 will be transferred across to the FCA under the ‘interim permission’ regime.

The OFT fee for firms is currently £1,466 and £670 for sole practitioners. The current FCA fee for interim permission is £350 for firms and £150 for sole practitioners.

Firms with interim permissions will subsequently be considered for full authorisation by the FCA in due course between 1 October 2014 and 1 April 2016 and there will be phased applications.

If you are already within a firm which holds a standard credit licence from the OFT then you should ensure that the firm has entered into the FCA interim permission regime.

Communication with OFT

ICAS has been in contact with the OFT who has agreed, that due to this late change, that it will fast track any applications from firms needing licences due to the DAS work of their ICAS IPs. The key OFT contact point is Ms Mary Hollely (0207 211 8649 or mary.hollely@oft.gsi.gov.uk) and the application form is an on-line form which can be accessed at <http://www.oft.gov.uk/OFTwork/credit-licensing/apply/>. In addition to the on-line application form, each firm needs to complete a Competence Form, which sets out the firm's competence for the proposed consumer credit activities. Firms are advised to insert Ms Hollely's name on the Competence Form (which is a PDF) to enable the OFT to identify that your firm requires to be fast-tracked.

We are also happy to assist you with getting fast tracked. If you need assistance please contact Lesley Byrne, Director of Regulatory Monitoring on 0131 347 0245 or lbyrne@icas.org.uk.

Appendix A - The Current Insolvency Exclusion

(1) There is excluded from the provisions listed in paragraph (2) any activity carried on by a person acting as an insolvency practitioner.

(2) The provisions are—

(g) article 39D (debt adjusting);

(h) article 39E (debt-counselling);

(i) article 39F (debt-collecting);

(j) article 39G (debt administration);

(3) There is excluded from articles 39D, 39E and 89A [credit information services] any activity carried on by a person acting in reasonable contemplation of that person's appointment as an insolvency practitioner.