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Our ref: ICAEW Rep 13/12

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Dear Ms Isanzu

Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up

ICAEW is pleased to respond to your request for comments on *Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

REFORM OF THE PROCESS TO APPLY FOR BANKRUPTCY AND COMPULSORY WINDING UP

Memorandum of comment submitted in January 2012 by ICAEW, in response to The Insolvency Service consultation paper Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up published in November 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up* published by The Insolvency Service on 7 November 2011 a copy of which is available from this link.

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter which obliges us to work in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 136,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

4. ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and ICAEW is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing around 700 practitioners. ICAEW's Insolvency Committee is a technical committee made up of Insolvency Practitioners working within large, medium and small practices. The Committee represents the views of ICAEW licence holders.

MAJOR POINTS

5. As we mentioned in our response to the previous consultation (ICAEW REP 19/10), we welcome initiatives to speed up the process in a debtor's petition because, in our experience, the delay in getting such a matter heard before the court can be at an unacceptable level in certain areas, causing real hardship for a large number of debtors (and causing disparity between different courts). In contrast, a creditor's petition is often heard in a much shorter time.

6. However, we still have a number of reservations over the implications and practicalities of the proposals. In particular, we are concerned about creditor applications in respect of so called 'ostrich debtors', as we fear that there will be insufficient safeguards in an administrative process to deal with debtors for whom bankruptcy is not appropriate but who do not engage with the process. Also, given the decision making process is to be moved from the courts to Adjudicators, they must have sufficient experience (we believe they should be at least an 'experienced licence holder' or equivalent) as otherwise this new administrative procedure will almost certainly result in miscarriages of justice. Therefore, whilst this procedure will reduce the burden on the courts, it will increase the burden on the Insolvency Service, and sufficient budget must therefore be made available to ensure that the applications are assessed by Adjudicators with sufficient experience. Also, the fact that the petitioner is submitting the petition online or by post may mean (s)he may not be aware of the severity of the procedure and its consequences as (s)he would have been had (s)he been required to appear in court to account for their actions, and there is a danger that the procedure could be wrongly perceived as a less serious or onerous option and thus could increase the likelihood of debtors petitioning in error or haste without fully understanding the consequences. We therefore strongly believe that initial interviews by telephone with the OR would **not** be appropriate following this administrative application process, and such interviews should instead always be conducted in person.

7. In ICAEW REP 19/10, we noted that it is proposed that Adjudicators are to be a centralised function, rather than being allocated to any particular court. This flexibility will assist the pool of

Adjudicators in coping with fluctuating demands. However, if there is no mechanism for a court number to be allocated to this administrative determination, we fear this could cause difficulties or complications under the EU Regulations where, if there are creditors and/or assets elsewhere in the EU, the bankruptcy may not be recognised and main proceedings (and therefore control) might pass to another jurisdiction to the detriment of local creditors. We urged the Insolvency Service to ensure that this consideration is addressed, and we would be grateful for confirmation of this. If this remains a concern, we believe this should also be revisited in relation to IVAs.

8. As we explained in ICAEW REP 19/10, we consider it is important that Adjudicators be given the same powers as the Courts to refer debtors under s274 IA86 in cases where debtors proceed with a bankruptcy petition where an IVA is apparently a better course of action for them and/or for creditors. As mentioned above, Adjudicators therefore need to be sufficiently qualified/experienced to be able to exercise this judgement. We also recommend that debtors should be required to state that they have read the IS publication 'In Debt? Dealing with your creditors'.

9. We also note that, in a large number of cases, the information provided in the application will be inaccurate, and we therefore believe it is important that the Adjudicator should be able to seek further information or clarification, again to avoid potential miscarriages of justice (see also Q36 below). This will give rise to potential period of delay, which does not occur under the current system (as the petition is dealt with on a same day basis by the courts), and this is further reason for a court number to be issued (to prevent creditors taking action to recover debts during this period), or consideration needs to be given to introducing a moratorium for this period or some other means of protecting the status quo.

10. Also, as we explained in ICAEW REP 19/10, the interaction with existing procedures needs careful consideration. For example, IVAs often take a long period of time to terminate (and the IP report is often then filed with IS a week later) and so perhaps the petitioner should be required to produce a scan/copy of the certificate of termination.

11. We also reiterate our call for repeal of early discharge, which we acknowledge would require primary legislation, but we believe should be brought forward at the earliest opportunity.

RESPONSES TO SPECIFIC PROPOSALS

Part 1. The court's role

Question 1: Should documents relating to a bankruptcy or winding up case remain with the party who created them, and be open to inspection there by persons so entitled? If not, please explain your answer.

12. As inefficient as it might appear to require one person to create a document so that it can be sent to another (the OR) to be filed, it seems even more inefficient to require every person who has created a document in relation to a bankruptcy to retain it and keep it open for inspection for an indeterminate period, and equally inefficient for someone who needs to inspect a document years later to have to make enquires of several different people rather than go to a central point. We therefore do not agree with the IS proposal to make the initiator/creator of documents solely responsible for their retention, as it will inevitably result in there being a series of separate files being retained at different locations and for varying periods of time (with each party being required to retain only partial correspondence ie, that sent to other parties but not whatever has been received). The Adjudicator, the Official receiver and IP Trustee would all have to be approached by an interested party to obtain access to a complete file. In addition an IP Trustee is legally required to retain his file for 6 years after his release (although this is extended to 10 years as recommended by the RPBs). The Adjudicator will presumably only retain his files for 6 years or such longer time as may be deemed reasonable under the Data Protection Act. The Official Receiver, however, is the government official who has an over-arching responsibility for the administration of every bankruptcy and. being the Trustee of last

resort and legally the Trustee of all bankruptcy estates where there is no IP Trustee in office, is in effect office-holder in perpetuity, or at least until an annulment, and should therefore never destroy his files (although it is understood however that on occasions this has been known to happen in the past). It would be logical therefore that, as the OR is required to retain his files anyway, he should be the person required to retain all relevant documents. This would have advantages of saving unnecessary costs of other parties also having to keep files for extended periods together with a simplicity of inspection as there would be only one place to enquire.

Part 2. The Adjudicator

13. Page 17: We note the IS proposes that 'the Adjudicator should sit within The Insolvency Service but be completely separate operationally from Official Receivers'. Separation is also dealt with later at paragraph 74 of the consultation, which notes that the Insolvency orders made by the Adjudicator will be capable of being communicated very efficiently to official receivers because, although the roles of these two persons are completely separate, they will both sit within the Insolvency Service and the IT that each uses should be compatible, enabling swift transfer of information to the appropriate official receiver. We agree that separation is important, otherwise there will be conflicts arising especially out of s282 (1)(a) annulment applications, and we are therefore happy with this approach.

Part 3. Application Fees

14. Page 17: The IS proposes that 'the costs incurred in processing an application will be met in full from fees charged'. We are happy with this approach.

Question 2: Do you think that a debtor should be able to pay instalments within a specified period of time after submission of his/her application, or that there should be no such time constraints but only when full payment has been made would a debtor be able to complete and submit an application form?

15. We agree with the IS proposal on page 18 that an applicant would have to pay in full both the fee for processing the application and the deposit before his/her application form can be considered by the Adjudicator. If there is a facility for the application fee and deposit to be paid in instalments, we believe the debtor should only be able to complete and submit the application once all the instalments have been paid, to ensure that the information the Adjudicator is required to consider is up to date (ie, we would prefer the latter option, rather than permitting the application to be made during the instalment period and requiring payments to be made in full within a specified period – see also Q3 below). It may take some time (eg, several months) for the debtor to pay these fees, and his circumstances will have changed during that period. As explained in the consultation, in any event, the Adjudicator will not be permitted to carry out any work until there has been full payment of the application fee and so there seems little point in the debtor starting to complete the documentation if his circumstances are likely to change before the application is considered by the adjudicator.

Question 3: If you favour a limit on the period of time during which instalments could be paid, what do you think should be the maximum period? Less than 3 months? 3 months? Or more than 3 months?

16. N/A. We do not support this 'time limit' option, because the debtor's circumstances may change in a relatively short period of time. What is important is that the application shows the debtor's circumstances as at the date of submission, not when he first started to pay instalments. See also our answer to Q2 above.

Question 4: Should instalment payments be non refundable?

17. Where the application fee and deposit are paid by instalments, we agree that any instalment payments made should first be applied towards paying the application fee, and then towards the deposit. Where the debtor does not proceed with the application, we believe the application fee should be non-refundable (and can be used to fund any associated administrative costs).

However, we consider that the deposit should be refundable and therefore, to the extent that instalment payments have been made in excess of the application fee and thus towards the deposit, these should be repaid in full. We therefore agree with the IS proposal on page 19 that 'any instalment payments made should first be applied towards paying the application fee', but we propose a variation on their proposal that 'any charges associated with administering a refund are made against, and to the extent of, the application fee paid'.

Question 5: If not, how should the administrative costs of handling the refund be recouped?

18. See Q4 above.

19. Page 20: In order to keep administrative costs as low as possible for all applicants, the IS proposes that the Adjudicator should not keep hold of any money which has been paid by way of instalments towards the cost of an application if it is clear that the prospective applicant no longer intends to proceed with his/her application. The IS therefore proposes that *'if full payment has not been made in respect of an application and there has been no activity on that account in respect of any further payments within a period of say, 6 months, a refund should be given* '. In our view, it is reasonable to have a time limit and six months seems about right. The repayment should be after deduction of the application fee, to discourage frivolous or casual applications. An applicant will have had six months to withdraw his application if he wants his deposit back. We are therefore happy with this approach, provided the time limit and consequences are made sufficiently clear to the debtor.

Question 6: Should there be any additional requirements for registration in order to deter abuse? If yes, please outline what you think those requirements should be.

20. Given the relatively low level of bankruptcy fees/deposit, we do not believe that there is much likelihood of the bankruptcy application process being a source of wholesale money-laundering, especially if the application fee is to be non-refundable. However, we do believe that bankruptcy proceedings should be subject to the normal identification process, ie, provision of passport and utility bill to prove identity and address, to prevent malicious applications and/or identity theft problems. We are aware of many instances in bankruptcy where aliases or variations of names have been used, and of at least one instance where the bankrupt pretended to be someone else with a similar name, and therefore we find it astonishing that the Courts do not already demand this.

We recognise that a requirement to provide these documents with the application to the Adjudicator could cause most bankrupts to make hard copy registrations/applications (albeit at the Post Office and scanned under a 'check and send' arrangement), as they are unlikely to have the ability to scan copies of these documents in order to apply electronically, which could thwart the IS wish to encourage electronic applications. Any such requirement could also make the process too expensive if, ultimately, the fee for each type of application is set at a level that enables all of the costs of processing those applications to be recovered. We would instead suggest that, following an application to the Adjudicator, the OR could be required to verify the debtor's ID in the first interview (which, as we mention above, we believe should always be in person following an application to the Adjudicator).

21. Page 20: The IS proposes that there should not be a facility for third party applicants to make payments by instalments (for either bankruptcy or company winding). We are happy with this approach.

22. Page 21: The IS proposes that all debtors should have a choice about whether to make their application electronically or on paper and, in either case, they would pay the same application fee. Whilst we consider that giving electronic applications a discount would encourage their use, we recognise there is a 'public interest' in making the bankruptcy process accessible, and that potential bankrupts should not be disadvantaged if they are not online, and therefore we are happy with this proposal.

Question 7: Do you think it would be useful for the Post Office Ltd (or another business that provides a similar service) to offer a "check and send" service?

23. Yes.

Question 8: Do you think that there should be a fully electronic process for third parties who submit applications for individuals' bankruptcy or for companies to be wound up? If you think not, can you explain why not?

24. We support an electronic process for third party applications, but we do **not** support the proposal that third parties should be permitted **only** to apply electronically rather than in hard copy (as is suggested on page 21), as we believe that, at least for the first several (eg, three to five) years, third parties should be able to submit a paper application. In our view, this question is misleading as many people will answer in the affirmative as they support an electronic process, not realising they are agreeing that hard copy applications would not be permitted.

Question 9: Do you think that there should be differential pricing according to whether an application is submitted by a third party in paper form or electronically? Please explain your answer.

25. Whilst we would support a pricing differential between electronic and paper applications made by third parties, given the administration costs will be higher for hard copy applications, we believe there should be consistency with applications made by bankrupts and, if these are not to have any price differential, then we do not think there should be one in respect of creditor applications.

26. Page 22: The IS proposes that 'Debtors will be able to pay [the fees] in cash at a post office or at an approved agent such as Payzone, or by debit card or pre-paid card, but not by credit card or Paypal'. We are happy with this approach.

Question 10: Do you think that third parties should only be able to pay application fees electronically? If not, can you say why not and suggest alternative or additional means of payment?

27. We do not agree that payment of the application fee and deposit by third parties should be required to be made electronically, especially given we believe third parties should be permitted to make hard copy applications (see Q9 above). For instance, third parties should be able to make such payments by cheque, or in cash at a post office or at an approved agent such as Payzone.

Part 4. Pre – application process

Question 11: Do you think that there is scope for a pre-action process to encourage greater settlement of debt claims before a creditor resorts to bankruptcy or compulsory liquidation?

28. There is a significant difference between a disputed debt and a disagreement over the timing or method of payments of undisputed debts. Therefore, there are two entirely distinct types of resolutions that need to be considered for a pre-action protocol:
a) those where the debt is disputed, and
b) those where the debt is established but there are arguments about payment.
A pre-action protocol for type (b) could possibly be able to run concurrently with bankruptcy proceedings, but type (a) must be resolved before any bankruptcy action could be taken.

29. If there is a disputed debt then it should not be the basis for a bankruptcy/winding up petition. Further, in our view, it has long been established in law that it is an abuse to use a statutory demand or bankruptcy/winding up petition as a means of debt collection. Indeed there is a clear process whereby a debtor can apply to have a Statutory Demand set aside where there is a dispute. (We note that it is not clear to us why a company cannot do the same but instead has to get an injunction, and we think this is an area which could usefully be looked at.) The

logical process should be firstly to have a pre-action protocol including some form of ADR in respect of the debt, and if (but only if) a liability has been established, only then should any form of enforcement such as bankruptcy/winding up commence. It is entirely illogical for someone to be able to commence bankruptcy/winding up proceedings against another person/company before he has established a liability.

30. The consultation paper appears to be confused as to what is proposed as a pre-action protocol, other than as being a means of trying to resolve disputes. By suggesting that the pre-action protocol could follow an unsatisfied execution, the Insolvency Service are implying that it is merely the latter, ie, a process to resolve a disagreement over the timing or method of payments of undisputed debts Similarly, apart from an unsatisfied execution, the consultation provides that the pre-action notice would be combined with service of a statutory demand. So unless the Insolvency Service mean that they think it OK to start bankruptcy proceedings in respect of a disputed debt, they can only be referring to time to pay arrangements.
However on pages 25-26, the consultation refers to encouraging ADR to resolve disputes, and they are referring to a pre-action protocol as including evidence gathering and being an alternative to 'Solving Disputes in the County Courts'. This means that they intend pre-action protocol to mean a way of establishing liability rather than enforcing collection.
The fact that the consultation confuses the matter still further at the bottom of page 25 by bringing in examples of possession claims based on mortgage arrears (which can have no relevance to bankruptcy applications) add further confusion.

31. Page 27: The IS proposes that '*the pre-action process should operate alongside the existing pre-petition requirements (such as those relating to the statutory or written demand) but, rather than focusing on warning the debtor of the consequences of not paying, the pre-action process would set out in clear and plain English what steps the debtor can now take – such as the benefits of entering into discussions with the claimant and/or seeking debt advice – in order to resolve the situation. This is referred to as the pre-action notice*' and page 29 contains an indication of the sorts of information it should contain. Please see our comments in paragraphs 28 to 30 above in relation to these proposals.

32. Page 27 and 28: The IS proposes that 'the pre-action process and procedure for serving any statutory demand should run concurrently' to avoid extending the proceedings over a longer period of time. Please see our comments in paragraphs 28 to 30 above in relation to these proposals.

Question 12: Is 21 days an adequate time period within which debtors can respond to a pre-action notice? If not, please suggest a more suitable period and explain your reasoning.

33. Yes, 21 days is adequate. However, please see our comments at Q11 above, ie, that pre-action protocol on dispute resolution should be dealt with first, and not be linked to bankruptcy/winding up proceedings.

Question 13: Can you suggest any additional matters that you think ought to be included in the pre-action process? Is there anything listed that should not be included? Please give reasons for your answer.

34. See our answers above.

Question 14: Do you think that the pre-action process should be mandatory or discretionary?

35. As with Q11 above, the consultation appears to be confusing/combining dispute resolution and debt enforcement. We would support a pre-action protocol for dispute resolution and another for debt enforcement, but these should be separate processes.

Question 15: Do you think that there should be sanctions for a creditor who indicates it has complied with the pre-action process when it has not? Do you think those sanctions should be civil (such as costs or more onerous requirements for filing future applications) or criminal or do you think there should be the option of both?

36. Whatever pre-action protocol is adopted there should be sanctions for any party who lies, misleads or commits perjury. It should be the equivalent of contempt of court (ie they should be more onerous than those in respect of DROs under sections 2510 to 251T of Insolvency Act 1986).

Part 5. Third party (such as creditor) applications for bankruptcy

Other requirements before submitting a bankruptcy application to the Adjudicator

Question 16: Do you think that these questions would be helpful to applicants in deciding whether they are entitled to make an application on the grounds of a debtor's COMI?

37. Yes, we think it would be helpful if the application form is accompanied by clear guidance on COMI, to help applicants decide whether they are entitled to make an application in respect of the debtor.

Question 17: Can you suggest any other matters that the guidance could usefully cover to further help applicants?

38. We believe it would also be helpful for debtor applications to contain clear COMI guidance.

Question 18: How likely is it that a third party such as a creditor will know, or be able to find out with reasonable accuracy, a debtor's email address and/or mobile telephone number?

39. We note the proposal for a new requirement on third party applicants to provide details of a debtor's email address(es) and mobile telephone number(s) where known. We believe it could be very difficult or even impossible in some instances for the creditor to find this information.

Question 19: Is it reasonable to require a creditor to re-serve a statutory demand if more than 4 months have elapsed between service of the demand and making the application?

40. Yes, we would support a new legal requirement that a statutory demand cannot form the basis of an application to the Adjudicator for bankruptcy if there has been a delay of more than 4 months between service of the demand and submission of the application.

41. Page 34: The IS proposes that '*the application process will require a third party applicant to confirm the truth of the application's contents*' and that *'any creditor (or other third party applicant) who has reason to believe that there is a serious possibility that either a debtor's assets may be at risk or that the debtor is about to abscond should still be able to make an application to the court for the appointment of an interim receiver.*' We are happy with this approach.

Ensuring that the debtor knows about the bankruptcy application and its consequences

Question 20: Who do you think should be responsible for sending a copy of the bankruptcy application to the debtor and eliciting his/her response?

42. We note that the consultation proposes that the Adjudicator will send a copy of the application to the address at which the Adjudicator reasonably believes that the debtor resides, and will attempt to ensure that the debtor responds (rather than requiring the creditor (or other third party) petitioner to serve the debtor with the application. However, in our view, it may be more straightforward, logical and cost effective for the applicant to be responsible for making the debtor aware of the application and then report to the adjudicator, given the debtor and creditor will have already had contact in the past and it would reduce costs for the Adjudicator. The applicant could be required to produce some form of evidence supporting a statement of the debtor's address. If the Adjudicator were not satisfied with the evidence, he could require

further evidence from the applicant, or even reject the application in extreme cases. If the applicant cannot produce evidence of the debtor's address then the application would have to go to the Court for some sort of order for substituted service to minimise the chance of a miscarriage of justice. We acknowledge there is a risk that, where you have an 'ostrich debtor', he may well continue to ignore communications from the creditor, but might take more notice of correspondence from the adjudicator. We would therefore suggest a combination may be the best approach, whereby the applicant begins the process but if he reports to the adjudicator that he cannot elicit a response or acknowledgement from the debtor then the Adjudicator should try before referring it to the Court for an order for substituted service.

The debtor's response to the application

43. We note the proposals that the Adjudicator will ask the debtor:

- whether he/she consents to or opposes the proceedings,
- to confirm that the contact details supplied by the applicant are correct (or alternatively, to supply corrections), and
- to indicate the manner in which he/she would prefer to receive further communication from the Adjudicator.

See our comments at Q20 above in respect of these proposals.

Question 21: Do you think that a prompt by text message (which would only be sent if a debtor consents to the use of his/her mobile telephone number in this way) would be an effective mechanism to help alert the debtor to the imminent arrival of further information by post and/or email? Please explain your answer.

44. Sending a text message alert could be desirable as it would prompt a debtor to check his/her mailbox for more information, but texting should not be relied upon as sole means of communication because the debtor's mobile may have been cut off since he consented to that form of communication.

Question 22: Do you agree that the only dialogue between the debtor and the Adjudicator should be to confirm correct contact details, and to establish whether the criteria for making a bankruptcy order are met. e.g. whether the application process has been complied with by the creditor; whether there is a debt that exceeds the bankruptcy level; and whether the jurisdiction criteria are satisfied. If not, can you suggest what other dialogue might need to take place and why?

45. We support the proposal that the debtor will be asked to complete a pre-printed statement to indicate **either** that he/she has had an opportunity to take advice, understands the consequences of bankruptcy, and consents to bankruptcy or does not otherwise oppose the bankruptcy application; **or alternatively** that he/she opposes the application. However, we would like to point out that this requirement for a statement that the debtor has had an opportunity to take advice, and understands the consequences of signing a document, appears to be inconsistent with recent OFT publications, in which such practice was criticised (see paragraph 3.36a on page 56 of the OFT consultation on Debt Management (and Credit Repair Services) Guidance, which sought to ban such activity as being 'unfair or improper business practice' (available at: http://www.oft.gov.uk/OFTwork/consultations/current/debt-management-guidance/).

46. In addition to such statement, in our view, the debtor should be permitted to provide any additional narrative or make any statement that he wishes to the Adjudicator (as he can presently to a District Judge/Registrar), who can exercise their judgement as to whether it is relevant. Giving the debtor this right might prevent a potential miscarriage of justice. In this regard, we reiterate our view that Adjudicators should have at least 'experienced licence holder' or equivalent qualification/experience, to be able to exercise such judgement. For instance, the debtor might wish to ask for more time to pay, if his financial circumstances are due to change in the near future.

The Adjudicator's response to an application

Question 23: Is there any other way in which a dispute might be resolved before the court becomes involved? Or do you think that it is appropriate that a judicial decision is given at this stage in the proceedings?

47. Again the consultation appears to be confusing dispute resolution with debt enforcement. If there is a disputed debt then it should not be the basis for a bankruptcy/winding up petition (see also Q11 above).

Questions 24: Do you agree with the way we suggest that applications to which there is neither consent nor opposition should be handled? If not, can you explain why not and suggest an alternative solution?

48. Yes, we support the proposals that there should be no further delay where debtors fail to respond to an application for bankruptcy, and agree with the imposition of sanctions to deter and/or penalise any creditor who wrongly swears a declaration confirming satisfactory service of the statutory demand and/or wrongly indicates compliance with the pre-action process, to reduce the risk that the debtor is unaware of the proceedings.

Question 25: What period of time would it be appropriate to allow the debtor to communicate his/her response to the Adjudicator? 14 days? Less? Or more?

49. We believe this should be more than 14 days, and would suggest 21 days. We think it would be unreasonable for this time limit to be set at 14 days, because a surprising number of debtors will take a fortnight's holiday and (whilst one may not approve), it would be unreasonable to penalise debtors from being away from home for two weeks.

Withdrawing a bankruptcy application

Question 26: Do you think a third party applicant should be able to request to withdraw its application at any time up to the point at which it is determined?

50. Yes, we agree that creditors should only be able to withdraw an application before it has been determined, and that note that the application fee would not be refunded.

Appeal against the decision of the Adjudicator

51. We note the proposal on page 41 that, where a third party applicant or a debtor is dissatisfied with the decision of the Adjudicator, they will have the right to ask the Adjudicator to review his/her decision. This review will be free of charge and based on information that is already in the Adjudicator's possession and will comprise a check to see if there is any relevant information that the Adjudicator didn't take into account in reaching his/her decision. Any appeal to the court would only be permitted once this review has taken place. We are happy with this approach, provided the Adjudicator's review process is sufficiently quick such that it does not give rise to delays.

Question 27: Should any appeal against the decision of the Adjudicator be made in the first instance to the county court, or is there a benefit in retaining the existing provision that allows an appeal to be made in the first instance, in certain circumstances, to the High Court?

52. Following the review mentioned at paragraph 51 above (which must be carried out before an appeal can be made to the courts), we consider that any subsequent appeal against the decision of the Adjudicator, by either a debtor or third party applicant should always be made in the first instance to the nearest county court to where the debtor resides that has bankruptcy jurisdiction (and not to the High Court).

53. We note the proposal on page 42 that the court should be able to direct the Adjudicator either to make a bankruptcy order in circumstances where the Adjudicator has not done so but where the court determines that bankruptcy is the right outcome, or to annul a bankruptcy order where the court considers this appropriate. We are happy with this approach.

Part 6. Application for compulsory winding up of a company

Territorial scope of the proposed changes

Question 28: How important is it for the reforms proposed in this document that there is a Liquidator of Last Resort for Scotland?

54. We consider it **is** important that there is a Liquidator of Last Resort for Scotland.

Question 29: If you think that it is important that there is a Liquidator of Last Resort, which organisation do you think should provide that office and how should it be funded?

55. We have no comment, and are content to defer to ICAS in respect of this question.

Circumstances in which an application can be made to the Adjudicator for the compulsory winding up of a company

Question 30: Do you think that the Adjudicator's role should be limited to determining applications for winding up on the grounds that the company is unable to pay its debts or where the company has passed a valid special resolution that it be wound up? If not, would you please explain your reasoning.

56. We support the proposals on pages 43-44 that, in circumstances where it is asserted that the company is unable to pay its debts, or where the company has passed a valid special resolution that it be wound up, an application for winding up will be made to the Adjudicator, **except** where the petition for winding up is presented by the Secretary of State on public interest grounds, following an investigation into the company or a report of its activities (these petitions will continue to be determined by the courts, so that the Secretary of State could thus never be both the petitioner and, through the office of Adjudicator, the order maker).

57. We note the proposal that petitions for the winding up of a company in 'other prescribed circumstances' would also continue to be presented to the court, as now, as they require judgement and the Insolvency Service therefore consider they should not be dealt with under the new administrative adjudication procedure. However, we would query this assertion, on the basis that we believe the Adjudicator should have sufficient experience and therefore should be able to exercise such judgement.

58. We also suggest that applications following a failed 'company voluntary arrangement' (which is usually done on a just and equitable petition) could be dealt with by the Adjudicator if unopposed (but perhaps by the Court if opposed)

Question 31: Are you able to suggest the proportion of petitions that are currently presented to the courts on grounds <u>other than</u> the company's inability to pay its debts; the company having passed a valid special resolution that it be wound up; and that winding up is just and equitable?

59. No comment.

Ensuring that the company knows about the winding up application

Question 32: Who do you think should be responsible for communicating notice of the winding up application to the company and eliciting its response to the proceedings?

60. As we mention at Q20 above, in our view, the applicant could be made responsible provided there are appropriate safeguards.

Question 33: Who should send notice to specified interested parties?

61. We note that the consultation states that it would be more efficient for the Adjudicator to do this. However, we do not agree with this assertion and, in our view, the applicant should be made responsible, provided there are appropriate safeguards.

Question 34: When should notice be sent to these interested parties?

62. As soon as practicable.

Advertising the winding up application

Question 35: Do you think that a winding up application should be advertised under these new proposals? If yes, please provide reasons for your answer.

63. We note the consultation states that, currently, applicant creditors hold off advertising a petition to see if the company will file for Administration. However, a company cannot file for Administration if a petition has been filed. Indeed, advertising the winding-up application helps to prevent this happening.

64. If there is to be no Gazetting of the application then how will the debtor company's bank know to freeze the bank account?

The Adjudicator's response

Question 36: Can you foresee any circumstances in which it would be appropriate for the Adjudicator to seek further information from the applicant? If yes, please provide details and suggest how frequently this might occur.

65. We think it is not possible for the application form to be sufficiently accurate and comprehensive, ie, designed in a way that elicits from the applicant all the relevant facts that the Adjudicator will need in order to reach his/her decision (eg, the company's COMI and the circumstances for winding up). We therefore do not accept the proposal that the Adjudicator would not be permitted to request further information from the applicant.

Question 37: What period of time should be sufficient for a company to communicate to the Adjudicator its opposition? 14 days? More? Or less?

66. We consider that 14 days seems reasonable (as opposed to bankruptcy applications, where we consider 14 days would be unreasonable).

Withdrawing a compulsory winding up application

Question 38: Do you think that a creditor should be able to request to withdraw its application at any time up to the point at which it is determined?

67. Yes, we agree that creditors should only be able to withdraw an application before it has been determined, and that note that the application fee would not be refunded.

Appeal against a decision of the Adjudicator

Question 39: Should any appeal against the decision of the Adjudicator be made in the first instance to the county court, or is there a benefit in retaining the existing provision that allows an appeal to be made in the first instance, in certain circumstances, to the High Court?

68. We agree that such an appeal should only be permitted once a review has been carried out by the Adjudicator (provided the Adjudicator's review process is sufficiently quick such that it does not give rise to delays), and we would be happy for these appeals to be restricted to the county court in the first instance, with a right to appeal to the High Court and upwards.

Impact Assessment:

Question 40IA: Is the proposed pre-action process likely to result in any additional costs for creditor petitioners or debtors? If so, how much and why?

69. We think this is likely to slightly increase these costs. A rough estimate would be an increase of around £25 per petition.

Question 41IA: If you are a creditor, how often do you need to engage solicitors and/or barristers when petitioning for bankruptcy and company winding up? How much does this cost?

70. We represent insolvency practitioners rather than creditors. However, in our experience, legal advice is usually sought and typically costs £1000-£1500, although these costs can be significantly higher in more complex cases.

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