



15 September 2011

Our ref: ICAEW Rep 84/11

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By email: dmguidance-consult@oft.gsi.gov.uk

Dear Aaron

Debt management (and credit repair services) guidance

ICAEW is pleased to respond to your request for comments on *Debt management (and credit repair services) guidance*.

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

DEBT MANAGEMENT (AND CREDIT REPAIR SERVICES) GUIDANCE

Memorandum of comment submitted in September 2011 by ICAEW, in response to Office of Fair Trading consultation paper Debt management (and credit repair services) guidance published in June 2011

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Debt management (and credit repair services) guidance* published by Office of Fair Trading on 14 June 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. This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.
5. 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

Support for the initiative

6. We welcome the OFT's review of its guidance on debt management and stated purpose of the guidance as setting out the standards that the OFT expects licensees to adhere to.
7. However, we believe that the guidance fails to recognise the framework that applies to our members as members of a professional body, whether they be accountants in general practice or licensed insolvency practitioners. These individuals are subject to our disciplinary arrangements, code of ethics and practice review via our practice assurance scheme. They are also required to undertake career relevant cpd. The framework which applies to our members is accessible on our website at icaew.com/regulations and we provided extensive information about this in our Fitness and Compliance Plan.
8. Additionally, insolvency practitioners are subject to the requirements of our [Insolvency Licensing Regulations](#) and must comply with the Insolvency Act and Rules and statements of insolvency practice (SIPs). Insolvency practitioners are visited by our specialist insolvency reviewers at regular intervals to test their competence. We believe that there is a major failing in the guidance in that it fails to recognise the framework under which insolvency practitioners operate. There are instances where the guidance is in direct conflict with the standards with which insolvency practitioners must comply. This will make it very difficult for insolvency practitioners to comply with the guidance as the requirements of their profession should obviously take priority - divergence from the law and these standards are matters where regulatory or disciplinary action could be taken against an insolvency practitioner.
9. We note that the lack of an Impact Assessment as a matter of policy. However even guidance can impact the cost and burden of regulatory compliance, and we would expect that to be the

case in this instance as the scope of the guidance is now wider and will affect more businesses.

RESPONSES TO SPECIFIC QUESTIONS

Chapter 1 – Introduction

Q1 Do the Foreword and Introduction (including Annexe A) set out the scope and purpose of the guidance sufficiently clearly?

10. It is not sufficiently clear where the guidance sits in terms of a regulatory hierarchy. Where more specific or rigorous requirements apply, for example to insolvency practitioners, members of professional bodies, other providers within the scope of group licenses or those subject to the requirements of the Charities Commission, it should be clear from the start that these more rigorous requirements apply. This is an issue that arises throughout the guidance which seeks to impose behaviours on our members where a standard already applies via our code of ethics, standards and legislative requirements. Where a standard already exists, we have sought to identify this in our responses to later questions in our response.
11. This is a particularly pertinent as regards insolvency practitioners who in the first instance must comply with the Insolvency Act and Rules and statements of insolvency practice (SIPs) in particular SIP 3 (voluntary arrangements). Divergence from the law and these standards are matters where regulatory or disciplinary action could be taken against an insolvency practitioner and there are occasions where the guidance conflicts with the law and the SIPs. As little reference is made in the guidance to other requirements, it will be difficult for a provider to consider their compliance with this guidance in the context of other legislative requirements.

Q2 Is the definition of who the guidance applies to clear and adequate?

12. The guidance is now much clearer as to its application than the current version where the focus is much more about debt management plan providers. However, the guidance is somewhat unclear as to its application to our accountant members who are covered by our group licence. Specific reference is made to IPs who may be covered by a group licence but not to our other members. We think there needs to be clarification as to the scope of the guidance as regards those of our members, covered by our group licence, who may provide basic debt advice as part of their general accountancy practice. We consider that it would be onerous in the extreme if those accountant members were required to comply with the entirety of the guidance.
13. We would also question whether the guidance is signposted sufficiently for creditors to be aware that there are aspects of the guidance that creditors are expected to follow.

Q3 Have we set out our approach to the assessment of fitness and potential risk sufficiently clearly?

14. The assessment of fitness does not take into account that there may be instances where a statutory requirement is at odds with the guidance, as noted above and in such circumstances we would argue that this would not be evidence of unfitness. We also feel that this aspect of the guidance does not address the approach to fitness as regards those covered by a group licence and the role of the group licence holder in ensuring fitness and competence.

Q4 Are there any substantive aspects with which you disagree?

15. No, though as noted above, we would question whether it is appropriate for the guidance as a whole to apply to our members covered by our group licence, who provide debt advice as part of their accountancy practice.

Q5 Do you consider that there are any significant omissions?

16. There is no reference to debt relief orders at paragraph 1.9.

Q6 Do you have any other suggestions for improvement?

17. No.

Chapter 2 – Overarching Principles of Fair Business Practice

Q7 Do you agree with the stated 'Overarching principles of fair business practice'?

18. It is difficult to argue against the overarching principles of transparency and fairness but there are aspects of the descriptions of the appropriate behaviours which already apply to our members via our code of ethics, standards and legislative requirements. As noted above, it should be made clear that equivalent or higher standards may already apply.

19. In particular:

At 2.4b, there is reference to disclosure of registrations etc. But our firms and individual insolvency practitioners are already subject to the legislative disclosure requirements of the Provision of Services Regulations.

20. At 2.5b, there is a reference to advice being in the best interests of the consumer. This does not reflect the role of an insolvency practitioner when acting as nominee and supervisor of a voluntary arrangement. When acting as adviser the insolvency practitioner's role will be to consider the best course of action for the debtor in the light of their particular circumstances; when he becomes nominee his duty will be to the creditors and the court; and when acting as supervisor his responsibilities will be governed by the terms of the arrangement. The roles of nominee and supervisor are statutory concepts and so should take precedence over any guidance.

21. The section on redress does not take into account that those covered by a group licence will not be subject to the jurisdiction of the Financial Ombudsman. We have arrangements via our bye laws which impose upon our members a duty to investigate complaints and our expectation would be that our members covered by our group licence would follow our arrangements. For insolvency practitioners, there is also a guidance papers on complaints handling which applies to all insolvency practitioners.

Q8 Are there any substantive aspects of this chapter with which you disagree?

22. The section on redress is not sufficiently clear about its applicability. The consumer's right to complain to the Financial Ombudsman does not apply to those covered by a group licence.

Q9 Do you consider that there are any significant omissions?

23. Yes, see above. The chapter does not distinguish between those who have a standard licence and those who are covered by a group licence.

Q10 Do you have any other suggestions for improvement?

24. A common issue throughout the guidance is that text that is more suited to the main body of the guidance is relegated to footnote text. An example of this is at paragraph 2.6.

Chapter 3 – Unfair or Improper Business Practices

Lead generation, direct marketing and personal visits

Q11 Are the draft guidelines on lead generation, direct marketing and personal visits sufficiently clear?

25. There should be greater emphasis on the implications for providers of using non-compliant lead generators.

Q12 Are there any substantive aspects of this section with which you disagree?

26. No

Q13 Do you consider that there are any significant omissions?

27. No.

Q14 Do you have any other suggestions for improvement to this section?

28. No.

Advertising

Q15 Are the draft guidelines on advertising sufficiently clear?

29. The footnote text at footnote 32 would be more appropriately situated in the main body of the guidance. This would enhance clarity regarding the scope of the guidance.

30. It should also be made clearer that the guidance regarding advertising applies to lead generators.

31. There is some duplication between the sections on lead generation and advertising.

Q16 Are there any substantive aspects of this section with which you disagree?

32. The description of the majority required to approve an IVA is incorrect – see rule 5.23(2) of the Insolvency Rules.

Q17 Do you consider that there are any significant omissions?

33. There is no reference to the implications for a solution on a third party, such as a joint owner of a property or those who have joint and several liabilities for a debt. These aspects of a debt management solution seem of equal importance to those listed. SIP 3 makes it clear that third parties affected should be encouraged to take their own advice.

Q18 Do you have any other suggestions for improvement to this section?

34. No.

Advice

Q19 Are the draft guidelines on advice sufficiently clear?

35. It is not clear from the guidance how the guidelines on advice interact with SIP 3. For insolvency practitioners, we would expect them to comply with SIP 3 in priority to the guidance. Non-compliance with a SIP is a matter that may be considered by an insolvency practitioner's regulatory body as the basis for disciplinary or regulatory action. SIP 3 deals with advice provision but also the information that will be provided to creditors in the form of the debtor's proposal. There are also legislative requirements as to the content of the proposal which should take priority to the guidance.

Q20 Are there any substantive aspects of this section with which you disagree?

36. Yes, as the section does not take into account the requirements of SIP3. This is a fundamental issue. It is also worth noting that once an IVA is approved creditors are expected to communicate only with the insolvency practitioner (see paragraph 3.17(j)).

Q21 Do you consider that there are there any significant omissions?

37. Reference should be made to the legislative requirements for IVAs and the standards applied via SIP 3.

Q22 Do you have any other suggestions for improvement to this section?

38. No.

Charging for debt management services

Q23 Are the draft guidelines on charging for debt management services sufficiently clear?

39. No. The guidance does not reflect the fee structure of IVAs and the role of creditors in agreeing those fees via the voting arrangements for the debtor's proposal. Similarly, no reference is made to the fee structure in a DRO or bankruptcy.

Q24 Are there any substantive aspects of this section with which you disagree?

40. See above.

Q25 Do you consider that there any significant omissions?

41. Fee charging in an IVA context should be highlighted. Where the guidance applies to IVAs, its content should be consistent with the Insolvency Act and SIP3.

Q26 Do you have any other suggestions for improvement to this section?

42. No.

Pre-contract information

Q27 Are the draft guidelines on pre-contract information sufficiently clear?

43. Again, it is not clear from the guidance, how the guidelines on pre contract information interact with SIP 3. There is considerable detail contained in SIP 3 about initial contact with the debtor and the steps to be taken.

Q28 Are there any substantive aspects of this section with which you disagree?

44. Yes. 3.33 (p) could be considered to be incorrect as creditors will be bound by an IVA if the proposal is approved, and will be bound by the terms of the arrangement to accept a reduced sum. 3.33 (r) does not reflect the effect of an IVA or in certain cases an interim order which will prevent further legal action by creditors. At 3.33 (s)(iv) the description of the majority required to approve an IVA is incorrect – see rule 5.23(2) of the Insolvency Rules.

Q29 Do you consider that there are any significant omissions?

45. Reference should be made to the legislative requirements for IVAs and the standards applied via SIP 3.

Q30 Do you have any other suggestions for improvement to this section?

46. No.

Contracts

Q31 Are the draft guidelines on contracts sufficiently clear?

47. Again, it is not clear from the guidance, how the guidelines on contracts interact with the Insolvency Act and SIP 3. The 'contract' in an IVA is effectively the debtor's proposal and the terms and conditions of that proposal. The content of the proposal is detailed in the Insolvency Rules and SIP 3.

Q32 Are there any substantive aspects of this section with which you disagree?

48. No, but see above.

Q33 Do you consider that there are any significant omissions?

49. Reference should be made to the nature and content of the proposal in an IVA.

Q34 Do you have any other suggestions for improvement to this section?

50. No.

Handling client's money

Q35 Are the draft guidelines on handling client's money sufficiently clear?

51. This is a section of the guidance where there is significant divergence between the standards under which an IP operates when supervising an IVA and others who provide debt management plans. The guidance should recognise that in an IVA there is an estate and estate accounting requirements apply. Statement of insolvency practice 11 - the handling of funds in formal insolvency appointments, applies in such circumstances. This section should make it clear that the requirements applied to insolvency practitioners take priority over the guidance.
52. Our members in practice must also comply with our clients' money regulations when dealing with clients' money in cases where SIP 11 does not apply.

Q36 Are there any substantive aspects of this section with which you disagree?

53. Yes. The guidance in this chapter is not appropriate for IVA providers. The terms of the proposal will detail when distributions will be made to creditors and also what will happen to funds should the arrangement fail. An IP should comply with terms of the proposal rather than the guidance.

Q37 Do you consider that there are any significant omissions?

54. The guidance will only be helpful to insolvency practitioners if it is given context in reference to the terms of an IVA proposal.

Q38 Do you have any other suggestions for improvement to this section?

55. No.

Debt management services

Q39 Are the draft guidelines on debt management services sufficiently clear?

56. No, this section of the guidance appears to be aimed solely at providers of debt management plans rather than any wider debt management service. This is another area where an

insolvency practitioner should be acting in compliance with SIP 3 and the terms of the proposal. Reference should be made to this framework in the context of the guidance.

Q40 Are there any substantive aspects of the draft guidelines on postcontractual issues with which you disagree?

57. See above.

Q41 Do you consider that there are any significant omissions?

58. See above.

Q42 Do you have any other suggestions for improvement to this section?

59. No.

Credit information services

Q43 Are the draft guidelines on credit information services sufficiently clear?

60. Yes.

Q44 Are there any substantive aspects of this section with which you disagree?

61. No.

Q45 Do you consider that there are any significant omissions?

62. No.

Q46 Do you have any other suggestions for improvement to this section?

63. No.

Creditor's responsibilities

Q47 Are the draft guidelines on creditor's responsibilities sufficiently clear?

64. We would question how creditors are to be informed of their obligations under this guidance, which is aimed at providers of debt management (and other) services. It would also be interesting to see how this guidance interacts with the Lending Code and whether there are any conflicting requirements.

Q48 Are there any substantive aspects of this section with which you disagree?

65. This section of the guidance does not reflect the binding nature of an IVA and the impact of IVA approval on creditors, for example accepting payments and the treatment of interest.

Q49 Do you consider that there are any significant omissions?

66. See above.

Q50 Do you have any other suggestions for improvement to this section?

67. No.

Q51 Do you have any comments about the structure and format of this guidance document?

68. We have noted throughout that the guidance document does not reflect the obligations placed on insolvency practitioners under the law and statements of insolvency practice. We feel that

to be relevant to the insolvency profession, the guidance must be given context within the regulatory framework particularly where there is apparent conflict between the guidance and the law.

Complaints handling

Q52 Are the draft guidelines on complaints handling sufficiently clear?

- 69.** The guidance itself is clear but it is not made clear that certain aspects of this section will not apply to those covered by a group licence. Additionally, the guidance does not make it clear that for an insolvency practitioner, a debtor or other party may also make a complaint to their licensing body.
- 70.** For insolvency practitioners, there is an insolvency guidance paper on complaints handling which offers guidance to all insolvency practitioners irrespective of their licensing body. ICAEW members have a duty to investigate complaints under our bye laws.
- 71.** There may also be instances in formal insolvency procedures where the appropriate route to make a challenge may be via the court. This is not highlighted in the guidance.

Q53 Are there any substantive aspects of this section with which you disagree?

- 72.** No, but see above.

Q54 Do you consider that there are any significant omissions?

- 73.** Yes, see above.

Q55 Do you have any other suggestions for improvement to this section?

- 74.** No.

Chapter 4 – Regulatory Compliance and Enforcement

Q56 Are these draft guidelines on regulatory compliance and enforcement (including Annexe B) sufficiently clear?

- 75.** No. Compliance is considered first in terms of OFT guidance and then in terms of compliance with the law. We strongly believe compliance with relevant laws should have priority. We would also have expected there to be a reference to the Insolvency Act in the main body of the guidance given its relevance to IVAs, bankruptcy and DROs.

Q57 Does the section 'Licence holders' responsibilities for third parties' clearly convey our expectations?

- 76.** We feel this aspect of the guidance should be given greater priority as it may impact on a licensee's fitness.

Q58 Are there any substantive aspects with which you disagree?

- 77.** No.

Q59 Do you consider that there are any significant omissions?

- 78.** No reference is made to the authorising bodies for insolvency practitioners in footnote 91. We find this surprising as only an insolvency practitioner may act as a nominee and/or supervisor of an IVA, and an insolvency practitioner must be authorised to so act. This is different from membership of a professional body or a trade association as it is a statutory requirement. We were also surprised that no reference is made to the qualifications required to become an insolvency practitioner in footnote 98.

79. Neither is any reference made to the professional bodies of which those covered by a group licence will be members. If this guidance is to be wider in focus than simply commercial providers of debt management plans, it should be recognised that those to whom the guidance applies could be accountants, solicitors, insolvency practitioners or third sector debt advisors.

Q60 Do you have any other suggestions for improvement?

80. No.

Q61 Do you have any other comments about the Annexes (A-D) contained in the guidance document?

81. We feel that the text contained in annex A should be included in the main body of the guidance. If further clarification is required, this would suggest that chapter 1 of the guidance is not sufficiently detailed as regards scope. It is still unclear from annex A how this guidance applies to our accountant members who may provide debt advice as part of their provision of accountancy services to their clients. We also think that the paragraphs on insolvency practitioners should give greater emphasis to the role of the recognised professional bodies (including listing their names) as the majority of insolvency practitioners are licensed by an RPB rather than being authorised by the Insolvency Service or DETINI. Similarly it should make clear that the Accountant in Bankruptcy has no role in licensing insolvency practitioners.

82. As noted previously we feel greater emphasis should be given to the implications of using lead providers, so as with annex A, we feel annex B should be included in the main body of the guidance.

83. We think that relevant insolvency legislation and standards (SIPs and code of ethics) should be included in detail in annex C rather than being listed in annex D. Insolvency legislation is obviously of paramount importance to insolvency practitioners.

Q62 Do you have any other comments about this guidance document?

84. No.

Q63 Do you consider that a shortened (executive summary) version of the guidance might be useful? If so, which aspects of this document do you consider might be included/omitted?

85. No. It would be more helpful if those aspects of the guidance which applied to certain business types was signposted throughout the guidance as has been done in annex A.

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