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Insolvency Law Committee response to the Insolvency Service consultation on strengthening the regulatory regime and fee structure for insolvency practitioners

The City of London Law Society ("**CLLS**") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response, in respect of the Insolvency Service consultation on strengthening the regulatory regime and fee structure for insolvency practitioners (the "**Consultation**") has been prepared by the CLLS Insolvency Law Committee.

Whilst the Committee welcomes the opportunity to respond to the Consultation, law firms may not be best placed to provide detailed comments on all of the points raised and we have not therefore responded on all points.

As a general comment, the Committee is of the view that the measures proposed in relation to insolvency practitioner fees are unlikely to improve market confidence or the reputation of the insolvency profession and may in fact discourage insolvency practitioners from taking appointments which may leave creditors in a worse position, for example where work currently undertaken by small practitioners is no longer economic.

Yours sincerely

Hamish Anderson
Chair of CLLS Insolvency Law Committee

31 March 2014

THE CITY OF LONDON LAW SOCIETY
INSOLVENCY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

Hamish Anderson (Norton Rose Fulbright LLP) (Chairman)

C. Balmond (Freshfields Bruckhaus Deringer LLP)
G. Boothman (Ashurst LLP)
T. Bugg (Linklaters LLP)
A. Cohen (Clifford Chance LLP)
B. Klinger (Sidley Austin LLP)
J. Bannister (Hogan Lovells International LLP)
S. Frith (Stephenson Harwood)
S. Gale (Herbert Smith Freehills LLP)
I. Johnson (Slaughter and May)
B. Larkin (Berwin Leighton Paisner LLP)
D. McCahill (Skadden Arps Slate Meagher & Flom (UK) LLP)
Ms J. Marshall (Allen & Overy LLP) (Deputy Chairman)
B. Nurse (Dentons UKMEA LLP)
J.H.D. Roome (Bingham McCutchen LLP)
P. Wiltshire (CMS Cameron McKenna LLP)
M. Woollard (King & Wood Mallesons SJ Berwin)

Working party members for this consultation:

Jennifer Marshall
Byron Nurse
Ian Johnson
Stuart Frith

PART 1. COMMENTS ON SPECIFIC QUESTIONS RAISED IN THE CONSULTATION PAPER - REGULATION OF INSOLVENCY PRACTITIONERS

Question number	Question	Comment
1.	Are the proposed regulatory objectives and the requirements for RPBs to reflect them appropriate for the insolvency regulatory regime?	We welcome the Insolvency Service taking an active role, provided lack of resources does not lead to delays. We welcome generally the regulation of insolvency practitioners being aligned to that of the legal profession.
2.	Do you have any comments on the proposed procedure for revoking the recognition of an RPB?	As identified in the consultation, there will need to be a period of time factored in to pass cases over and this may impact on the overall cost of an insolvency procedure.
3.	Do you have any comments on the proposed scope and procedures for the Secretary of State to issue a direction to an RPB?	
4.	Do you have any comments on the proposed scope and procedures for the Secretary of State to impose a financial penalty on an RPB?	
5.	Do you have any comments on the proposed scope and procedures for the Secretary of State to publicly reprimand an RPB?	
6.	Do you agree with the proposed arrangements for RPBs making representations?	
7.	Do you have any comments on the proposed procedure for the Secretary of State to be able to apply to Court to impose a sanction directly on an IP in exceptional circumstances?	Sanction from the RPB should be sufficient.
8.	Do you have any comments about the proposed procedure for the Secretary of State to require information and the people from whom information may be	

Question number	Question	Comment
	required?	
9.	Do you agree with the proposal to provide a reserve power for the Secretary of State to designate a single insolvency regulator?	This proposal is fine for now as it is subject in any event to further consultation at the time, and best considered in light of developments at that stage. Obviously the revocation powers would need to be amended/removed if there was to be only one regulator.
10.	Do you have any comments on the proposed functions and powers of a single regulator?	

PART 2 - COMMENTS ON SPECIFIC QUESTIONS RAISED IN THE CONSULTATION PAPER - INSOLVENCY PRACTITIONER FEE REGIME

11.	Do you agree with the assessment of the costs associated with fee complaints being reviewed by RPBs?	We welcome the idea of an RPB being a check and balance.
12.	Do you agree that by adding IP fees representing value for money to the regulatory framework, greater compliance monitoring, oversight and complaint handling of fees can be delivered by the regulators?	Yes
13.	Do you believe that publishing information on approving fees, how to appoint an IP, obtain quotes and negotiate fees and comparative fee data by asset size, will assist unsecured creditors to negotiate competitive fee rates?	It is desirable to share information and introduce measures to increase creditor understanding, but this does not follow that this will give creditors greater bargaining power. The use of websites to share information is to be encouraged to save costs.
14.	Do you think that any further exceptions should apply? For example, if one or two unconnected unsecured creditors make up a simple majority by value?	Yes. The imposition of a fixed fee or percentage of realisations fee will not, in our view, serve creditors in many cases.
15.	Do you have any comments on the proposal set out in Annex A to restrict time and rate as a basis of remuneration to cases where there is a creditors committee or where	Creditors' committees cost money and take time which may impact on the success of certain insolvency procedures. See comments above and below: arbitrary measures will lead either to over-

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	secured creditors will not be paid in full?	estimating or under-performing.
16.	What impact do you think the proposed changes to the fee structure will have on IP fees and returns to unsecured creditors?	Fixed fees will be larger on big cases to take account of unknown variables or may not be undertaken by larger firms, which could impact on quality/lack of relevant expertise and be unnecessarily inflexible. It could also see a marked rise in pre-packs instead of trading insolvencies because the costs of pre-packs may be perceived to be easier to estimate/fix at the outset. IPs may be forced to make decisions based on cost/time not return for creditors. New proposed rule 17.14(6) which gives the ability to fix different percentages for different types of work, so for example some tasks may be outsourced.
17.	Do you agree that the proposed changes to basis for remuneration should not apply to company voluntary arrangements, members' voluntary liquidation or individual voluntary arrangements?	Yes CVAs and IVAs seem to lend themselves (perhaps even better) to fixed fee arrangements. Members' voluntary liquidation makes sense in theory (because of solvency) but when a members voluntary liquidation converts into a creditors voluntary liquidation, we assume the new Rules will apply to that part of the process.
18.	Where the basis is set as a percentage of realisations, do you favour setting a prescribed scale for the amount available to be taken as fees, as the default position with the option of seeking approval from creditors for a variation of that amount?	We do not agree with the sliding percentage scale which decreases based on the size of assets/realisations. This could act as a disincentive to take on larger/more complicated cases and make more realisations. In general it could lead to fees disproportionate to the work done (particularly in smaller cases).
19.	Is the current statutory scale commercially viable? If not what might a commercial scale, appropriate for the majority of cases, look like and how do you suggest such a scale should be set?	
20.	Do you think there are further circumstances in which time and rate should be able to be charged?	Yes. Fixed or percentage fees lend themselves to routine matters (e.g. realising assets) but not other circumstances E.g. the fees involved in a) defending vexatious litigation/claims (in particular in English appointments over foreign companies) b) defending ROT claims. We are concerned that court sanction to proceed on many matters not currently requiring

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		sanction will be necessary just to get fees agreed.

Impact Assessment questions:

21.	Do you agree with this estimation for familiarisation costs for the changes to the fee structure?	
22.	As a secured creditor, how much time/cost do you anticipate these changes will require in order to familiarise yourself with the new fee structure?	
23.	To what extent do you expect the new fee structure to reduce the current level of overpayment?	Not in larger cases.
24.	Do you agree with the assessment that the requirement to seek approval of creditors for the percentage of assets against which remuneration will be taken, will not add any additional costs?	
25.	Do you agree with these assumptions? Do you have any data to support how the changes to the fee structure will impact on the fees currently charged?	
26.	Do you agree or disagree in adding a weight in the relative costs and benefits to IPs and unsecured creditors? If you agree, what would the weight be?	
27.	Do consultees believe these measures will improve the market confidence?	No
28.	Do consultees believe these measures will improve the reputation of the insolvency profession?	No

COMMENTS ON DRAFT RULE 17

New rule	Comment
17.13	(b) should be amended to state "liquidators in **a** creditors' voluntary winding up or **a** winding up by the court" to keep consistency with the rest of the rules and avoid a cumbersome plural (c) should be amended similarly "liquidators in a members' voluntary winding up"
17.14(1)	Amend ending to "receive remuneration for **their** services as **an** office holder"
17.14(7)	There are a lot of variables to consider in arriving at the basis for fixing remuneration. Setting them out is helpful.
17.15(5)	Particularly in larger cases it is going to be difficult to fix remuneration for an administration and a subsequent liquidation at the outset.
17.15(8)	We do not understand the rationale for the time limit imposed on making an application to court to fix remuneration.
17.15(10-12)	It is useful to have a fall back position should remuneration not be agreed.
17.16(2)	Third line there should be a "the" added before the word basis.
17.17	Whilst it is important for an office holder to have ultimate recourse to the court if it is not happy with the basis of remuneration, this could prove a considerable drain on court time. The cost should be an expense as per 17.17(8) but this will obviously impact on returns to creditors generally.
17.21(7)	We believe this should read "upon application to the creditors' committee or the creditors".