Annex 2 – Draft guidance for insolvency practitioners on how to approach payments and e-money institutions

Chapter 1: Introduction

1. This document provides guidance to insolvency practitioners (IPs) on how to approach payments institutions (PIs) and electronic money institutions (EMIs) authorised or registered under the Payments Services Regulations 2017 (PSRs) or Electronic Money Regulations 2011 (EMRs).

2. If an IP is appointed over a regulated firm, the IP takes control of the firm which continues to have regulatory requirements and responsibilities. We are therefore providing this guidance to help 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.

3. This guidance is not exhaustive, neither is it a substitute for reading and complying with the FCA Handbook and other applicable legislative requirements and guidance.

The FCA's role in firm failures

4. The FCA has a role in every regulated firm failure and the role will vary depending on the individual circumstances of the firm.

5. 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. PIs and EMIs are regulated by the PSRs and the EMRs respectively. The FCA has 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 including 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. PIs and EMIs are required to safeguard funds belonging to customers[51] 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[52]. See paragraph 35 for further details on how relevant funds are defined and our expectations on how these funds should be treated following an insolvency event.

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

[52] Insolvency event is defined in regulation 23(18) of the PSRs and regulation 24 of the EMRs

Chapter 2: Pre-insolvency

Sufficient experience for an appointment over a regulated firm

8. 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. We also expect the IP to know what regulatory requirements and guidance that applies 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 guidance on payment services and electronic money:** the FCA's Approach Document sets out our approach to implementing the PSRs and EMRs. This provides guidance on the requirements of the PSRs and EMRs and the regulatory approach the FCA takes. In respect of safeguarding and prudential risk management, the FCA also recently published additional guidance on safeguarding customers' funds.

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

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

    - **Individual requirements and variation of permission**: the FCA applies these to an individual firm to vary its authorisation or registration and/or restrict the firm's activities[53]. We may ask a firm to voluntarily accept a variation of permission (VVOP) or the imposition of a requirement (VREQ) on is 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.

9. We expect an IP to consider whether they have the capacity to take on an appointment, bearing in mind their existing appointments, and the size and

[53] Regulation 12 of PSRs and Regulations 7 and 8 of the EMRs

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.

Pre-insolvency checks

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. This includes the firm having a wind-down plan. A wind-down plan details the steps that the firm will take in the event of insolvency, any risks associated with the wind-down and mitigating actions for these. An IP may wish to consult the FCA's 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

11. We expect an IP to engage with us at an early stage, both prior to and after appointment of an IP in relation to a regulated firm. The PSRs and EMRs will continue to apply to a firm in an insolvency procedure. Our rules and guidance will also continue to apply to a firm while it remains authorised or registered.

12. We expect an IP to ensure that the firm has notified us of the IP's appointment as soon as possible. We also expect any documents on the IP's appointment and other court documents relating to the firm in insolvency are sent to firm.queries@fca.org.uk.

13. If appropriate, the FCA also has the power to apply to the court to place a PI or an EMI into administration or present a winding-up petition of such firms to the court[54].

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

14. 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 the FCA, PRA and the Bank of England seven days before entering an insolvency procedure[55]. 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 or the PRA and Bank of England have confirmed that they do not intend to apply for bank insolvency under the Banking Act 2009.

Future insolvency changes

15. On 3 December 2020, Her Majesty's Treasury consulted on the following changes to the insolvency framework for PIs and EMIs:

    - a bespoke special administration regime which provides tools to facilitate a speedy return of relevant funds, and
    - applying all insolvency powers under Part 24 of the Financial Services and Markets Act 2000 (FSMA) so that the FCA has rights to participate and protect consumers of such firms in an insolvency process, as it does for other FCA supervised firms.

16. We will keep this guidance under review as these developments progress.

[54] Section 359 and 367 of FSMA

[55] Sections 120A of the Banking Act 2009

Creditors' committees[56]

17. After a firm has been placed into 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. A similar type of committee can be set up in the context of liquidation, which is known as a 'liquidation committee'.

18. The purpose of the creditors' committee is to assist the IP in the discharge of their functions and to approve the IP's remuneration. Creditors will include all stakeholders of the failed firm, including customers, and their interests are significant to the IP in fulfilling their duties. IPs must therefore invite creditors of a regulated firm to form a committee to enable them to provide a 'voice' in the insolvency process. Customers for whom the firm holds relevant funds should be considered when forming a creditors' committee and there should be appropriate representation from across all types of customers for whom the firm is holding relevant funds.

Insolvency costs

19. We 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 relevant funds. We also expect that the IP is efficient in their work and take steps with the aim of reducing costs that would be borne by customers and creditors wherever possible.

20. 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.

21. We expect an IP to properly consider expenses that may be incurred (i.e. legal expenses). 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 in relation to work directly attributable to the distribution of relevant funds.

22. 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.

23. Given the role of the creditors' committee in this process, it is important that it appropriately represents the customer base of the firm. IPs should consider how

[56] References in this guidance to creditors' committee refers to any creditors' committee or liquidation committee established by an IP under Part 17 of the Insolvency (England and Wales) Rules 2016 unless otherwise stated.

they ensure appropriate representation across all types of stakeholders of the failed firm on the committee throughout the insolvency process.

Chapter 3: Entering insolvency

Interaction with the FCA

24. If a firm is considering entering or has entered into an insolvency procedure, we would expect an IP to provide regular updates to the FCA for a period agreed with us. Items that an IP should update us on include:

- 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 Financial Ombudsman Service[57]
- 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
- adverse press or other commentary
- any intelligence or information arising from the insolvency or investigations into directors' conduct that could give rise to harm
- 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

25. 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.

26. 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 in flight payments and whether e-money cards will continue to work.

27. In addition, the following practical issues should be considered factors:

[57] FSCS is not currently available for customers of PIs and EMIs.

- **Use language that is clearly understood by the audience of the communication**[58], 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.

- **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)[59] given FSCS is not currently available for customers of PIs and EMIs.

- **Share draft versions of key customer communications with the FCA (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). This would also help to ensure that customer communications are consistent with any FCA press releases upon an IP's appointment.

28. 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, communicated to the FCA 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.

Interaction with the Financial Ombudsman Service

29. The Financial 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 Financial Ombudsman Service is set out in DISP rules of the Handbook.

30. We would expect an IP to engage with the Financial 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.

[58] This is in accordance with the firm's obligations under Principle 7 (communication with clients).

[59] Paragraph 1.26 of Coronavirus and safeguarding customers' funds: additional guidance for payment and e-money firms.

Agents and distributors

31. 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[60]. These entities are required to be registered with the FCA. 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 the FCA. We expect an IP to be mindful of any agent and distributor arrangements as part of the insolvency process.

Chapter 4: Post insolvency

Claims process

32. 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 the idea of handling the claims process via web portal.

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

- how statements to customers are issued
- 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
- the process if customers choose to abandon small claims, and
- information/data to be collected regarding engagement with the claims process.

34. 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.

[60] See regulation 2 of the PSRs and regulation 2 of the EMRs

Treatment of customers' funds

35. 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[61]. 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, and
    - sums received from a payment transaction on behalf of a payment service user.

36. The safeguarding requirements[62] apply to all authorised PIs, authorised EMIs and small EMIs. 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.

37. If a PI or an EMI that is holding relevant funds enters an insolvency procedure, an IP will need to ensure that such funds continue to be treated in line with the PSRs and EMRs (as applicable).

How are relevant funds safeguarded?

38. 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:

    - **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[63].
    - **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[64].

39. As set out in a recent court judgment[65], PIs that safeguard using the segregation method hold safeguarded funds on trust. We also consider that this is true for EMIs.

Steps to take immediately after appointment

Take control of relevant funds

40. 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.

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[61] Regulation 20(1) of EMRs

[62] 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.

[63] Regulation 21 of the EMRs 2011 and paragraph 10.31 of the FCA's Payment Services and Electronic Money – Our Approach

[64] As defined in Regulation 24 of the EMRs 2011 and Regulation 23 of the PSRs 2017.

[65] Supercapital (in administration) [2020] EWHC 1685 (Ch)

Furthermore, the IP should cooperate with any payment systems to facilitate settlement or completion of inflight payments.

41. On the occurrence of an insolvency event[66], an 'asset pool' is formed of the relevant funds that have been segregated, funds or assets held in a safeguarding account[67] 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 should also take reasonable measures to include all identifiable relevant funds in any other account held by the firm (e.g. unsegregated funds).

42. 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 is necessary to distribute the funds to customers.

43. 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

44. 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).

45. As stated earlier, 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.

46. 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 accordingly separate pools following insolvency.

Determine entitlements

47. After forming the asset pool, the 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

48. An IP will need to consider:

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

[66] As defined in the PSRs and EMRs

[67] 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.

- what currency the IP should return relevant funds in the asset pool in.

49. As part of the above considerations, we expect an IP to have regard to any relevant insolvency rules, contractual terms and the currency of the customer's claim.

Treatment of shortfalls

50. 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.

51. 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, 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. As explained above, distribution costs should be recorded and charged appropriately following authority from the creditors' committee or court as appropriate.

52. 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.

53. Customers should be considered contingent creditors in respect of any shortfall. 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.

Relevant funds received by the firm after insolvency

54. 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. These amounts do not form part of the asset pool. An IP should consider setting up procedures to monitor and allocate receipts post insolvency and return these promptly to customers. An IP should also cooperate with the relevant payment systems to facilitate appropriate treatment of inflight transactions.

Distributions of the asset pool

55. The IP is required to pay claims of customers from the asset pool in priority to all other creditors[68]. 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)
    - verifying a customer's bank details before returning relevant funds
    - costs of returning relevant funds to each customer, and
    - if the customer cannot be contacted or disclaims their entitlement.

[68] 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.

Closure of client estate

56. At the appropriate point, the IP will need to close the client estate. 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.

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

Hardship policies

58. 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. It may be that the IP is 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 potential hardship policies and assess whether there is anything that can be done to support these cases. However, we recognise the ability of the IP to support will depend on the circumstances of the case.

Continuity of supply

59. 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. The continuity of service provisions in the Insolvency Act[69] 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).

60. The continuity of supply provisions is 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.

Trading while in an insolvency process

61. 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 the FCA (see below).

62. We would expect firms to tell us if they were continuing to trade while in an insolvency process and consider the impact on relevant funds. They should

[69] Sections 233 and 233A of the Insolvency Act 1986

consider how any continued trading impacts on the asset pool, and ensure that any relevant funds received post insolvency 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.

Cancellation of authorisation or registration

63. When a firm goes into an insolvency process, the appointed IP should consider whether and when it is appropriate to cancel the firm's authorisation or registration. We expect an IP to consider at an early stage in the insolvency what information the FCA 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.

64. An IP can request to cancel a firm's authorisation or registration[70] by using our online system Connect.

Reporting of unauthorised businesses

65. An IP should report to us if they come across any unauthorised firms or individuals that they believe 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 involving financial services regulated by the FCA.

66. 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

67. 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 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.

68. The FCA will stop any practices that cause harm to consumers. There is a risk that directors, shareholders and senior staff wind up companies owing significant sums, often in the form of consumer redress awarded by the Financial Ombudsman Service, or who have engaged in financial misconduct, only to reappear connected with a new firm of strikingly similar business. The FCA considers this to be unacceptable practice.

69. 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.

[70] Regulations 10 and 14 of the PSRs and regulations 10 and 15 of the EMRs

Sale of customer data

70. 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:

- **Notice to the FCA:** An IP should notify the FCA if they are planning to sell customer data in good time, including sufficient details.
- **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 treat them fairly[71].
- **Selling to a claims management company (CMC):** if an IP proposes to sell the customer data to a CMC, the IP should consider the FCA and Information Commissioner's Office (ICO) joint statement 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) and Privacy and Electronic Communications Regulations (EC Directive) 2003. An IP should obtain legal advice on their obligations under such legislation to ensure that they handle customer data appropriately.
- **Communication to customers:** As outlined in paragraph 25 above, 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. 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 phoenixing of the failed firm (see paragraph 67).**

71. For further details on the FCA's expectations of handling customer data more generally, please see our communication on this.

Liaising with overseas regulators

72. 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 us abreast of the situation and to inform any discussions that the FCA may have or be required to have with the overseas regulator.

Chapter 5: Restructuring procedures

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

- Scheme of arrangement

[71] Principle 6 (Customers' interests)

- Company voluntary arrangement (CVA)
- Restructuring plan

74. 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.

75. The FCA have rights to make representations at court and creditor meetings for all restructuring procedures. We therefore expect appropriate notice so we can attend if we choose to do so. We also expect the firm or an IP (in their capacity as supervisor of a scheme of arrangement, restructuring plan or 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.

76. 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 the FCA[72] .

Chapter 6: Checklist

77. 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 and throughout the insolvency process as appropriate.	
3.	Communicate appropriately with customers.	
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.	

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