British Property Federation response to:

The Insolvency Service consultation on 'Strengthening the regulatory regime and fee structure for insolvency practitioners'

March 2014

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1. The British Property Federation (BPF) is pleased to respond to the review being undertaken by the Insolvency Service into the fee structure and regulatory regime for insolvency practitioners.

2. The British Property Federation is the voice of property in the UK, representing companies, owning, managing and investing in property. This includes a broad range of businesses comprising commercial and residential property owners, housing associations and financial institutions including pension funds, corporate property owners as well as a number of regional landlord associations. A list of our largest members can be found at the following link: http://www.bpf.org.uk/en/members/our_members.php

3. The consultation poses a number of questions with regards to IP regulation and the structure of fees. We have therefore decided to take a thematic view of the proposals outlined in the consultation. We will firstly address the proposals around strengthening the regulatory framework of the insolvency practitioner industry and thereafter will move on to comment on the fees system. We would be delighted to provide any further information or clarification on any aspect of our response on request. In the first instance, please contact Stephanie Pollitt, Senior Policy Officer, Tel: 0207 802 0104 or Email:spollitt@bpf.org.uk

Part 1 – Regulation of Insolvency Practitioners

4. The difficult business environment has been particularly challenging for both occupiers and landlords and there has never been a more pertinent time to address the regulatory system governing Insolvency Practitioners (IPs).

5. Our members have remained concerned that the current system of IP regulation does not provide sufficient transparency or consistency for unsecured creditors and we very much welcome the reform objectives as set out in paragraph 43 to the document. Having previously responded to the review of corporate insolvency conducted by the Office of Fair Trading, we were left disappointed by time taken to make any further progress.

Regulatory objectives for RPBs

6. We wholeheartedly agree that the insolvency profession should act with integrity, fairness and transparency and whilst we would hope that this is done as a matter of course, we appreciate that this is not always the case. As noted, the complaints mechanism has been a particular sticking point for unsecured creditors, primarily based around how to complain and who to and a lack of confidence that if they were able to put forward a complaint, whether this would be upheld and dealt with accordingly.

7. We were therefore pleased to see the emergence of a complaints portal which we believe will go some way in trying to deal with the issue of who to complain to. Further work, however, must be undertaken to ensure that where a complaint is lodged, that it is dealt with transparently and fairly to help give unsecured creditors the confidence that their voices are being heard.

8. We also agree that existing RPBs must give every regard to the regulatory objectives as set out and ensure that they are at the centre of their work. Furthermore, we agree that for an RPB to be recognised as such is contingent on them incorporating the regulatory objectives within their framework of rules and practices.

Secretary of State as oversight regulator

9. One of the failures of the current regulatory system for creditors is the lack of tools for the Insolvency Service to monitor and sanction RPBs to a sufficient degree. The result is a lack of confidence in the regulatory system for creditors. To address this we support the proposal to appoint the Secretary of State as oversight regulator with a range of powers to proportionately sanction RPBs for misconduct.

10. We welcome the proposals to introduce a range of proportionate sanctions which the Insolvency Service (IS) may impose on behalf of the Secretary of State. Where sanctions are imposed, these should be done in a fair and consistent way and be attributed on a case by case basis.

11. We agree that the revocation of recognition should remain the most powerful sanction available to address any serious misconduct by an RPB and that the process by which this will be done should be clearly outlined in legislation. This would ensure that RPBs are fully aware of their duties and the consequences that could be incurred if they do not meet these duties. It will also help increase creditors confidence by confirming that there are real penalties for non-compliance.

12. We are also pleased to see that notices of the Secretary of State's decision will be published and which will specify the reasons for this decision and when that revocation will be effective from. We feel that this will help set the example that to other RPBs that non-compliance will not be tolerated. We agree that such notices should be published by the Insolvency Service and information be held centrally there.

13. We agree that financial penalties should form part of the package of sanctions available to the Secretary of State. We strongly agree that fines should be of a sufficient size to deter future transgressions and that each fine should be set commensurate to the breach that has occurred. We do not, however, agree that a period of 3 months be given for payment to be

made. We feel that this is too long and given that the RPB will have had prior notice of the intended action, the fine should not come as a surprise to them. Government's own good practice denotes that commercial debts must be paid within 60 days and we feel that this should be applied here.

Reserve power to replace RPBs with a single insolvency regulator

14. We believe the current structure of seven RPB's for IPs, or eight including the Insolvency Service, is too great a number and is not conducive to increasing transparency in the system. We are aware that not only did the 2011 consultation on IP regulation show strong support for a single regulator, but in her review, Professor Kempson also felt that this was strong argument for a reducing the number of RPBs and introducing a single regulator. Through her research she noted that there was 'considerable variation in the compliance monitoring'[1] undertaken by RPBs and that 'ultimately there is a case for a single regulator[2].

15. We note that the IS clearly sees the merits of a single regulator but that the preferred option would be to work RPBs to strengthen the current regime through the introduction of regulatory objectives and sanctions. Work done since the OFT report in 2010, the IP consultation in 2011, the single complaints portal and various changes to Statement of Insolvency Practices (SIPs) have only really served to tinker with the existing regulations and the proposals being put forward in this consultation are no different. The introduction of a single regulator would bring a significant change to the IP regime and it is frustrating that such a change which has consistently received strong support is yet again to be put on the back burner.

16. We acknowledge that powers will be put in place for the SoS to appoint a single regulator in place of the existing RPBs if the current proposals do not improve public confidence in the current system. However, as mentioned above, support has already been there for a single regulator and therefore we must ask ourselves, what other show of support must be attained before this proposal is finally enacted?

Part 2 – Insolvency Practitioner Fee Regime

17. Any new insolvency event generates particular issues and difficulties. With the current volume of already empty units, members are finding their time focussed on, amongst other matters, minimising void periods, seeking new occupiers, pushing IP's for rental payments and getting them to comply with lease provisions. All this aside, rightly or wrongly, the level of IP remuneration is not given the attention that is needed to enforce a change.

18. However, there is a clear strength of feeling amongst members that where fees are charged for work done, it is often difficult to quantify the value of this cost. In particular with restructures through pre-pack there is rarely any hope of a dividend to unsecured creditors anyway, with the charge holders hoovering up any realisations long before us ordinary creditors get a look in. Aside from the most straightforward of cases such as small company

[1] Review of Insolvency Practitioner Fees Report to the Insolvency Service, Elaine Kempton, July 2013

[2] Review of Insolvency Practitioner Fees Report to the Insolvency Service, Elaine Kempton, July 2013

voluntary liquidations, the level of confidence relating to whether fees are commensurate with working undertaken is low.

19. We therefore very much welcome the proposals being put forward in this consultation and see them as an important step forward in making the whole fee regime far more transparent for creditors. As rightly noted Professor Kempson pointed out that it is particularly the smaller and less experienced unsecured creditors that bear the brunt of the current fee structure, resulting in higher costs and lower realisations.

Enhanced monitoring by regulators – providing value for money

20. We agree that an objective should be set to ensure that fees charged by an IP represent value for money and which is reflective of the nature and complexity of the work being undertaken. Whilst we acknowledge that this monitoring will be done by the respective RPB, we would ideally favour the creation of an independent body to oversee this work creating a greater degree of objectivity. However, on the basis that RPBs will face relevant sanctions and penalties should they not fulfil this objective at the required level, this is still a good starting point.

Increasing creditor engagement

21. As previously stated, it is often the smaller and less experienced unsecured creditors who do not have access to the relevant legal knowledge and are therefore at a disadvantage when trying to negotiate fees or question the work being done. We certainly commend the efforts to increase the level of information available to unsecured creditors which include updating SIP9 and having internet based information on how to appoint an IP and negotiate on fees.

22. What will be key will be ensuring that this information is readily available and accessible to unsecured creditors which also means ensuring that it is communicated as widely as possible.

23. Whilst we appreciate that drawing up a comparative data study on fees charged by asset size and sector would be labour intensive and costly, we do feel that it would benefit both unsecured creditors in allowing them to make more informed choices as well as RPBs in helping with their oversight role.

Simplification of the fee structure

24. Giving creditors greater control over how fees are charged marks an important step in revolutionising the fee structure and we very much welcome the proposals being put forward. We agree with the exceptions that have been outlined particularly in respect of where a creditors committee has been established and where they are satisfied that they are able to oversee office-holder's remuneration.

25. We believe that a system of fixed fees which are presented to creditors at the earliest opportunity and which are based around deliverable outcomes or remuneration taken as a percentage of realisations would help ensure a more transparent process and alleviate the need for disputes further down the line.

26. We appreciate that a system of fixed fees in particular will be a contentious one for the IP community as they will argue that their work and therefore the costs, can never be predictable. However, we feel that the proposals to allow IPs to request a review of the fees where there is a material and substantial change is a fair solution and should provide all parties with greater confidence that those fees most accurately reflect the work that is being undertaken. We also believe that fixed fees will incentivise the IP to achieve the best possible outcome and eliminate waste.

27. The proposed fee scale contained in the consultation seems sensible and practical, however we have difficulty in understanding how an IP can justify the additional charges shown for distributing to creditors what is effectively their own money.

28. We strongly agree that time and rate should only be allowed in specific circumstances and only when supported by unsecured creditors and where they have been able to agree the basis for how this will be set. We are concerned that fees set on this basis will be greatly inflated to cover the costs of the IP. Charging on a time and rate basis is too difficult to quantify and we would only condone its use when it has been sanctioned by the majority support of unsecured creditors.