

## The Foskett Panel

### Guidance for Customers who have been made bankrupt on the implications for awards including the Fixed Sum Award

A flowchart showing the various processes described in this Guidance can be found [here](#).

#### Introduction

1. Some Customers who have opted into the Re-Review have been declared personally bankrupt following the involvement of their business with the IAR.
2. D & C losses are predominantly proprietary in nature and will, therefore, vest in the individual's Trustee in Bankruptcy ("**TiB**") pursuant to s306 and s283 of the Insolvency Act 1986. This means that, unless and until the bankruptcy order is annulled by the relevant court and the "Bankruptcy Liabilities" (explained in paragraph 10 below) discharged, LBG is obliged to pay any compensation awarded by the Panel for such losses to the TiB.
3. This also applies where, before compensation is paid, the Customer has been discharged from bankruptcy and where the TiB has been discharged from office. In this case, the Official Receiver would act as the TiB or may appoint someone else to do so.
4. References in this note to the TiB are to the person who for the time being has capacity to act on behalf of and bind the individual's bankruptcy estate, including, in appropriate circumstances, the Official Receiver.

#### Considerations for bankrupt (or former bankrupt) Customers who are offered and choose to accept a Fixed Sum Award ('FSA')

5. A Customer who has been made bankrupt is eligible to receive a Victim Status Decision ("**VSD**") and to opt for an FSA in the same way as one who has not. The procedure for acceptance and the financial consequences are, however, likely to be different.
6. Bankrupt (or former bankrupt) Customers whom the Panel have concluded to be victims of the IAR Fraud will receive a VSD and will then be offered the option of: (a) accepting the FSA; or (b) continuing in the Re-Review and having their claim for D & C losses assessed.
7. It is important for Customers to understand that if the Panel issue a VSD to a Customer who is or has been bankrupt, their analysis of victim status will not include answering the question of whether the Customer's bankruptcy would or would not probably have occurred in the absence of the IAR Fraud. That assessment can only happen as part of the Panel's assessment of D & C losses in the Re-Review.
8. A Customer who has been made bankrupt who receives a VSD and is offered the FSA option will be obliged to notify the TiB. In order to accept an FSA, the Customer will need to obtain the prior consent of the TiB and the TiB will be required to sign a release agreement with LBG to authorise acceptance.

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9. If a Customer is offered and is permitted to accept an FSA, LBG will pay **the £3 million award to the Customer's TiB and not to the Customer personally**.
10. Under relevant insolvency law, the TiB would then be obliged to use the fixed sum received to meet the liabilities of the bankruptcy estate, being:
  - a. The original creditor claims in the estate which have been proved, plus statutory interest on those debts (calculated as 8% simple interest from the date of the Bankruptcy Order to the date of payment of the claim); and
  - b. The fees and expenses of the TiB  
  
(together, the "**Bankruptcy Liabilities**").
11. Again, under insolvency law, the TiB may then pay any surplus after satisfying the Bankruptcy Liabilities to the Customer. In these circumstances, the Customer may not receive the full FSA or indeed any part of it. The actual amount received by the Customer would be dependent on the amount of the Bankruptcy Liabilities.

*Example: Customer A has Bankruptcy Liabilities of £2 million in their bankruptcy estate. After discharging the Bankruptcy Liabilities, the TiB will pay the £1 million of surplus of the FSA directly to the Customer.*

*Customer B has Bankruptcy Liabilities of £4 million in their bankruptcy estate. After discharging the Bankruptcy Liabilities, there will be a shortfall and the Customer will not receive any of the FSA.*
12. Whether or not the Customer receives all or part of the FSA, the Customer will exit the Re-Review after payment of the FSA to the TiB.
13. If a bankrupt or former bankrupt Customer is offered and accepts the FSA, this will conclude their claim for D & C losses arising from the IAR Fraud, without the delay arising from the assessment of D & C losses in the Re-Review and the need for the Panel to consider whether the bankruptcy would probably have been avoided in the absence of the IAR Fraud.
14. However, the process of re-opening the bankruptcy estate, and for the TiB to finalise the Bankruptcy Liabilities and pay over any surplus to the Customer, may cause a delay to the Customer receiving any part of the FSA (where there is a surplus). Whilst it is impossible for us to predict the time required (it is not within the Panel's control and will vary on each case), we would expect this delay to be measured in months not weeks. Additionally, if the bankruptcy estate is complex (for example, if it involves unresolved litigation), finalising and paying the Bankruptcy Liabilities may take a significant amount of time.

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### Considerations for bankrupt (or former bankrupt) Customers who are not offered a FSA or who choose to remain in the Re-Review

15. If a bankrupt (or former bankrupt) Customer is offered, but does not accept, the FSA and remains in the Re-Review, LBG will pay the £250,000 interim payment to the Customer's TiB and not to the Customer. This interim payment is non-refundable. The financial consequences of the interim payment depend on the outcome of the Panel's assessment in the Re-Review, as described below.
16. If a Customer concluded by the Panel to be a victim remains in the Re-Review, the Panel will consider, as part of their work, whether it is probable that the Customer's bankruptcy would have been avoided in the absence of the IAR Fraud. The Panel will give notice of their provisional decision on this point in advance of issuing their 'Minded to' Decision ("MTD"). The Panel will conclude one of the following:
  - a. it is probable that in the absence of the IAR Fraud the individual would have been declared bankrupt in any event; or
  - b. it is probable that in the absence of the IAR Fraud the individual would not have been declared bankrupt.
17. The Panel will consider the Customer's financial position in the absence of the IAR Fraud (the "counterfactual scenario", also called the "Non-Fraudulent Scenario"). This position is then compared with the position in the "actual scenario" which, of course, includes the bankruptcy.
18. The Panel's provisional decision in an MTD on the issue of whether the bankruptcy would or would not probably have been avoided in the absence of the IAR fraud may be challenged either by the Customer or by LBG.
19. Where the Panel conclude in a Final Decision that, in the absence of the IAR Fraud, it is probable that a Customer would have been declared bankrupt in any event, then LBG will pay any award for D & C losses caused by the IAR Fraud directly to the TiB. Under the relevant insolvency provisions, the TiB will be obliged to use these funds to satisfy, in the first instance, the Bankruptcy Liabilities, with any surplus then paid to the Customer (i.e., the treatment would be the same as for an FSA). The net effect is that the Customer would not receive their full award for D & C losses. Save that the amount paid will not be fixed at £3 million but will instead reflect the amount of D & C losses assessed by the Panel in the Final Decision, paragraphs 11 and 14 above will apply equally in this scenario.
20. Where the Panel conclude that, in the absence of the IAR Fraud, a Customer would probably not have been declared bankrupt, they will consider how to compensate the Customer. This is likely to involve two steps: deciding on monetary compensation and taking steps to secure an annulment of the bankruptcy.
21. Restoring the Customer to the financial position they would have been in, but for the IAR Fraud, may be achieved by the Panel making two separate components of its award for D & C Losses:

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- a. compensation for D & C losses suffered personally due to the IAR Fraud (the '**Personal Payment**'); and
  - b. an amount to be paid to the TiB to discharge the Bankruptcy Liabilities (the '**Creditor Payment**').
22. LBG will pay Customers the Personal Payment plus the amount due in tax on this amount. The Customer will be responsible for paying the tax amount directly to HMRC when it is due. Separate guidance from HMRC will be provided about the tax treatment once this has been finalised.
23. The Creditor Payment to the TiB permits either the Customer or LBG to apply to the relevant insolvency court to annul the original bankruptcy order. When the court makes an annulment order, the Personal Payment may be paid directly to the Customer, ensuring that the Customer receives the full amount of any award for D & C losses suffered personally.
24. In practical terms, where the Panel conclude that a Customer would probably not have been made bankrupt but for the IAR Fraud, then a number of steps will need to be taken to ultimately obtain an annulment of the bankruptcy (which is an order in the discretion of the Court). This would involve, amongst other things, entering into a legal agreement between the Customer, LBG and the TiB (the "**Tripartite Agreement**" or "**TPA**"), setting out the various actions and obligations required to obtain the annulment and will provide for the receipt of any interim payments.
25. If the Panel concluded that the Customer's bankruptcy was probably caused by the IAR Fraud, the £250,000 interim payment will be applied to reduce the amount to be paid by LBG to the Customer's TiB to discharge the Bankruptcy Liabilities (the Creditor Payment, as explained in paragraph 21 above). If the Bankruptcy Liabilities exceed £250,000, there will be no set off against the Personal Payment element of the award.

*Example: Customer C has Bankruptcy Liabilities of £350,000 in their bankruptcy estate. After receipt of the £250,000 interim payment by the TiB the remaining Bankruptcy Liabilities will be £100,000. If the Customer is later awarded D & C losses of £1 million by the Panel, LBG will pay a Creditor Payment of £100,000 to discharge the remaining Bankruptcy Liabilities plus LBG will pay the £1 million Personal Payment directly to the Customer.*

26. If the Bankruptcy Liabilities do not exceed £250,000, the Customer will be entitled to the surplus from the TiB. Any surplus will be set off against the Personal Payment.

*Example: Customer D has Bankruptcy Liabilities of £150,000 in their bankruptcy estate. After receipt of the £250,000 interim payment by the TiB the Bankruptcy Liabilities will be fully discharged and the Customer will receive the surplus of £100,000 from the TiB. If the Customer later receives an award for D & C losses of £1 million from the Panel, LBG will have no Creditor Payment to pay and will pay a Personal Payment of*

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*£900,000 (being £1 million less the £100,000 surplus) directly to the Customer.*

*Example: If Customer E receives a surplus of £100,000 from the TiB and later receives an award for D & C losses of £60,000 from the Panel, LBG will have no Creditor Payment to pay and no Personal Payment to pay. The Customer will not have to repay the excess of £40,000 they have received, because the interim payment of £250,000 is non-refundable.*

27. If the Panel conclude the bankruptcy would probably have been avoided but for the IAR Fraud and make a provisional award for D & C losses, there might also be a separate interim payment of 40% of the Personal Payment awarded in the MTD (less any surplus from the first £250,000 received), providing that the conditions for obtaining such an interim payment are met. In the case of bankrupt (or former bankrupt) Customers, the conditions for obtaining an interim payment are the same as for other Customers with an additional condition that LBG does not challenge the Panel's decision on whether or not a Customer would have avoided bankruptcy, but for the IAR Fraud. This interim payment would be set-off against the Personal Payment awarded in the Panel's Final Decision. If the Personal Payment as finally awarded were lower than this interim payment the Customer would have to pay back the shortfall to LBG.
28. If not provided for in the Tripartite Agreement, there may be drawn up a separate Interim Payment Agreement (again, between the Customer, LBG and the TiB) to enable the Customer to receive the further interim payment directly from LBG.
29. Where the Panel conclude that the Customer would probably have been declared bankrupt in any event irrespective of the impact of the IAR Fraud (see paragraph 19 above), then there would be no process to seek to annul the bankruptcy and any interim payment would be paid by LBG directly to the TiB.
30. Customers can apply to Peter Hurst at [costs@foskettpanel.com](mailto:costs@foskettpanel.com) to request funding from LBG for their reasonable legal fees to advise on the Tripartite Agreement and any legal advice necessary in connection with above processes where the Panel have concluded the bankruptcy was probably caused by the IAR Fraud.

### Considerations for Customers whom the Panel conclude in the Re-Review are not victims of the IAR Fraud

31. Where the Panel conclude in respect of any Customer who has opted in to the Re-Review that they were not a victim of the IAR Fraud, then the question of whether their bankruptcy could have been avoided in the absence of the IAR Fraud will not arise.