

Enforcement Guide

Chapter 13

Insolvency

13.4 Petitions for administration orders or compulsory winding up orders: determining whether to seek any insolvency order

13.4.1 Where the *FCA* believes that a *company* or *partnership* to which sections 359(1) and 367(1) of the *Act* applies is, or is likely to become, unable to pay its debts, the *FCA* will consider whether it is appropriate to seek an administration order or a compulsory winding up order from the court. The *FCA*'s approach will be in two stages: the first is to consider whether it is appropriate to seek any *insolvency order*; the second is to consider which *insolvency order* will meet, or is likely to meet, the needs of *consumers*.

13.4.2 In determining whether it is appropriate to seek an *insolvency order* on this basis, the *FCA* will consider the facts of each case including, where relevant:

- (1) whether the *company* or *partnership* has taken or is taking steps to deal with its insolvency, including petitioning for its own administration, placing itself in voluntary winding up or proposing to enter into a company voluntary arrangement, and the effectiveness of those steps;
- (2) whether any consumer or other creditor of the *company* or *partnership* has taken steps to seek an *insolvency order* from the court;
- (3) the effect on the *company* or *partnership* and on the creditors of the *company* or *partnership* if an *insolvency order* is made;
- (4) whether the use of other powers, rights or remedies available to the *FCA*, *consumers* and creditors under the *Act* and other legislation will achieve the same or a more advantageous result in terms of the protection of *consumers*, and of market confidence and the restraint and remedy of unlawful activity, for example:
 - (a) in the case of *authorised persons* and *appointed representatives*, the interests of *consumers* may, in certain circumstances, be met by the use of the *FCA*'s intervention powers and by requiring restitution to *consumers*;
 - (b) in the case of unauthorised *companies* and *partnerships*, the *FCA* will consider whether the interests of *consumers* can be achieved by seeking an *injunction* to restrain continuation of the carrying on of the *regulated activity* and/or an order for restitution to *consumers*.

- (5) whether other regulatory authorities or law enforcement agencies propose to take action in respect of the same or a similar issue which would be adequate to address the *FCA's* concerns or whether it would be appropriate for the *FCA* to take its own action;
- (6) the nature and extent of the *company* or *partnership* assets and liabilities, and in particular whether the *company* or *partnership* holds *client* assets and whether its secured and preferred liabilities are likely to exceed available assets;
- (7) whether there is a significant cross border or international element to the business which the *company* or *partnership* is carrying on and the effect on foreign assets or on the continuation of the business abroad of making an *insolvency order*;
- (8) whether an *insolvency order* is likely to achieve a fair and orderly realisation and distribution of assets; and
- (9) whether there is a risk of creditors being preferred and any advantage in securing a moratorium in relation to proceedings against the *company* or *partnership*.

13.4.3

After the *FCA* has determined that it is appropriate to seek an *insolvency order*, and there is no moratorium in place under Schedule A1 to the Insolvency Act 1986 (as amended by the Insolvency Act 2000) (hereafter referred to in this chapter as 'the 1986 Act'), it will consider whether this order should be an administration order or a compulsory winding up order.