

Enforcement Guide

Chapter 13

Insolvency

13.9 The FCA's use of its power to petition for a bankruptcy order or a sequestration award in relation to an individual (section 372 of the Act)

13.9.1 The *FCA* recognises that the bankruptcy of an individual or the sequestration of an individual's estate are significant measures which may have significant personal and professional implications for the individual involved. In considering whether to present a petition the *FCA*'s principal considerations will be its *statutory objectives* including the protection of *consumers*.

13.9.2 The *FCA* is also mindful that whilst the winding up of an unauthorised *company* or *partnership* should bring an end to any unlawful activity, this is not necessarily the effect of bankruptcy or sequestration. The *FCA* may, in certain cases, consider the use of powers to petition for bankruptcy or sequestration in conjunction with the use of other powers to seek *injunctions* and other relief from the court. In particular, where the individual controls assets belonging to consumers and holds, or appears to hold, those assets on trust for consumers, those assets will not vest in the insolvency practitioner appointed in the bankruptcy or sequestration. The *FCA* will in those circumstances consider whether separate action is necessary to protect the assets and interests of *consumers*.

13.9.3 If an individual appears to be unable to pay a *regulated activity debt*, or to have no reasonable prospect of doing so, then section 372 of the *Act* permits the *FCA* to petition for the individual's bankruptcy, or in Scotland, for the sequestration of the individual's estate. The *FCA* will petition for bankruptcy or sequestration only if it believes that the individual is, in fact, insolvent. In determining this, as a general rule, the *FCA* will serve a demand requiring the individual to establish, to the *FCA*'s satisfaction, that there is a reasonable prospect that he will be able to pay the *regulated activity debt*.

13.9.4 The *FCA* will consider the response of the individual to that demand on its own facts and in the light of information, if any, available to the *FCA*. Exceptionally, the *FCA* may not first proceed to serve a demand if:

- (1) the individual is already in default of a *regulated activity debt* which has fallen due and payable; and
- (2) the *FCA* is satisfied, either because the individual has confirmed it or on the information already available to the *FCA*, that the individual is

insolvent and has no reasonable prospect of paying another *regulated activity debt* when it falls due.

13.9.5

If the *FCA* believes that the individual is insolvent, the factors it will consider when it decides whether to seek a bankruptcy order or sequestration award include:

- (1) whether others have taken steps to deal with the individual's insolvency, including a proposal by the individual of a voluntary arrangement, a petition by the individual for his own bankruptcy or sequestration, or a petition by a third party for the individual's bankruptcy or the sequestration of the individual's estate;
- (2) whether the *FCA* can adequately deal with the individual using other powers available to it under the *Act*, without the need to seek a bankruptcy order or sequestration award;
- (3) the extent of the individual's insolvency or apparent insolvency;
- (4) the number of *consumers* affected and the extent of their claims against the individual;
- (5) whether the individual has control over assets belonging to *consumers*;
- (6) the individual's conduct in his dealings with the *FCA*, including the extent of his cooperation with the *FCA*;
- (7) whether the individual appears to be, or to have been, involved in *financial crime*;
- (8) the adequacy of the individual's accounts and administration records;
- (9) in the case of an *unauthorised individual* who is carrying on or who has carried on a *regulated activity*, the nature, scale and importance of that activity and the individual's conduct in carrying on that activity;
- (10) whether there would be an advantage in securing a moratorium in respect of proceedings against the individual; and
- (11) whether there are any special personal or professional implications for that individual if a bankruptcy order or sequestration award is made.