

Enforcement Guide

Chapter 13

Insolvency

13.1 Introduction

13.1.1

This chapter explains the *FCA's* policies on how it uses its powers under the *Act* to apply to the court for orders under existing insolvency legislation and exercise its rights under the *Act* to be involved in proceedings under that legislation. The *FCA's* effective use of its powers and rights in insolvency proceedings helps it pursue its *statutory objectives*, including its operational objectives of securing an appropriate degree of protection for *consumers*, protecting and enhancing the integrity of the *UK financial system*, and promoting effective competition in the interests of *consumers* by, amongst other matters, enabling it to apply to court for action to:

- (1) stop *firms* and *unauthorised persons* carrying on insolvent or unlawful business; and
- (2) ensure the orderly realisation and distribution of their assets.



13.2 The FCA's general approach to use of its powers and rights in insolvency proceedings

- 13.2.1** In using its powers to seek *insolvency orders* the *FCA* takes full account of: the principle adopted by the courts that recourse to insolvency regimes is a step to be taken for the benefit of creditors as a whole; and the fact that the court will have regard to the public interest when considering whether to wind up a body on the grounds that it is just and equitable to do so.
- 13.2.2** The *FCA* will consider the facts of each particular case when it decides whether to use its powers and exercise its rights. The *FCA* will also consider the other powers available to it under the *Act* and to *consumers* under the *Act* and other legislation, and the extent to which the use of those other powers meets the needs of *consumers* as a whole and the *FCA's statutory objectives*. The *FCA* may use its powers to seek *insolvency orders* in conjunction with its other powers, including its powers to seek *injunctions*.
- 13.2.3** Decisions about whether to apply to the civil courts for insolvency orders under the *Act* will be made by the executive director of Enforcement or, in his or her absence, the acting executive director of Enforcement.
- 13.2.4** [deleted]

13.3 Petitions for administration orders or compulsory winding up orders: determining whether a company or partnership is unable to pay its debts

- 13.3.1** The *FCA* can petition for an administration order or compulsory winding up order on the grounds that the *company* or *partnership* is unable (or, in the case of administration orders, is likely to become unable) to pay its debts. The *FCA* does not have to be a creditor to petition on these grounds.
- 13.3.2** Under sections 359 (Petitions) and 367 (Winding up Petitions) of the *Act*, a *company* or *partnership* is deemed to be unable to pay its debts if it is in default on an obligation to pay a sum due and payable under an agreement where the making or performance of the agreement constitutes or is part of a *regulated activity* which the *company* or *partnership* is carrying on.
- 13.3.3** The *FCA* would not ordinarily petition for an administration order unless it believes that the *company* or *partnership* is, or is likely to become, insolvent. Similarly, the *FCA* would not ordinarily petition for a compulsory winding up order solely on the ground of inability to pay debts (as provided in the *Act*), unless it believes that the *company* or *partnership* is or is likely to be insolvent.
- 13.3.4** While a default on a single agreement of the type mentioned in **paragraph 13.3.2** is, under the *Act*, a presumption of an inability to pay debts, the *FCA* will consider the circumstances surrounding the default. In particular, the *FCA* will consider whether:
- (1) the default is the subject of continuing discussion between the *company* or *partnership* and the creditor, under the relevant agreement, which is likely to lead to a resolution;
 - (2) the default is an isolated incident;
 - (3) in other respects the *company* or *partnership* is meeting its obligations under agreements of this kind; and
 - (4) the *FCA* has information to indicate that the *company* or *partnership* is able to pay its debts or, alternatively, that in addition to the specific default the *company* or *partnership* is in fact unable to pay its debts.

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.

13.5 Petitions for administration orders or compulsory winding up orders: determining which insolvency order to seek

- 13.5.1** An administration order can be made only in relation to *companies* and *partnerships* and only where the court believes that making such an order will achieve one or more of the four purposes set out in section 8 of the 1986 Act. The *FCA* will apply for an administration order only where it considers that doing so will meet or is likely to meet one or more of these purposes.
- 13.5.2** Where it has the option of applying for either an administration order or a compulsory winding up order, the *FCA* will have regard to the purpose to be achieved by the insolvency procedure.
- 13.5.3** In addition, the *FCA* will consider, where relevant, factors including:
- (1) the extent to which the financial difficulties are, or are likely to be attributable to the management of the *company* or *partnership*, or to external factors, for example, market forces;
 - (2) the extent to which it appears to the *FCA* that the *company* or *partnership* may, through an administrator, be able to trade its way out of its financial difficulties;
 - (3) the extent to which the *company* or *partnership* can lawfully and viably continue to carry on *regulated activities* through an administrator;
 - (4) the extent to which the sale of the business in whole or in part as a going concern is likely to be achievable;
 - (5) the complexity of the business of the *company* or *partnership*;
 - (6) whether recourse to one regime or another is likely to result in delays in redress to *consumers* or an additional cost;
 - (7) whether recourse to one regime or another is likely to result in better redress to *consumers*;
 - (8) the adequacy and reliability of the *company* or *partnership's* accounting or administrative records;

- (9) the extent to which the management of the *company or partnership* has co- operated with the *FCA*;
- (10) in the case of an unauthorised *company or partnership* carrying on a *regulated activity* as part of a larger enterprise, the scale and importance of the unauthorised activity in relation to the whole of the *company's or partnership's* business;
- (11) the extent to which the management of the *company or partnership* is likely to cooperate in determining whether one or more of the purposes of an administration order can be met;
- (12) in the case of an unauthorised *company or partnership* carrying on a *regulated activity* as part of a larger enterprise, the extent to which the *company's or partnership's* survival can be anticipated without the continuance of the unauthorised *regulated activity*;
- (13) where an administrative receiver is in place, whether the *debenture* holder is likely to agree to an application for an administration order;
- (14) where an administrative receiver is in place, whether the *FCA* has reason to believe that the *debenture* under which the administrative receiver has been appointed is likely to be released, discharged, avoided or challenged.

13.6 Petitioning for compulsory winding up on just and equitable grounds

13.6.1 The *FCA* has power under section 367(3)(b) of the *Act* to petition the court for the compulsory winding up of a *company* or *partnership*, on the ground that it is just and equitable for the body to be wound up, regardless of whether or not the body is able to pay its debts. In some instances the *FCA* may need to consider whether to petition on this ground alone or in addition to the ground of insolvency.

13.6.2 When deciding whether to petition on this ground the *FCA* will consider all relevant facts including:

- (1) whether the needs of *consumers* and the public interest require the *company* or *partnership* to cease to operate;
- (2) the need to protect *consumers'* claims and *client* assets;
- (3) whether the needs of *consumers* and the public interest can be met by using the *FCA's* other powers;
- (4) in the case of an *authorised person*, where the *FCA* considers that the *authorisation* should be withdrawn or where it has been withdrawn, the extent to which there is other business that the *person* can carry on without *authorisation*;
- (5) in the case of an unauthorised *company* or *partnership* carrying on a *regulated activity* as part of a larger enterprise, the scale and importance of the *unauthorised regulated activity* and the extent to which the enterprise is likely to survive the restraint and remedying of that activity by the use of other powers available to the *FCA* having regard to any continuing risk to *consumers*;
- (6) whether there is reason to believe that an *injunction* to restrain the carrying on of an *unauthorised regulated activity* would be ineffective;
- (7) whether the *company* or *partnership* appears to be or to have been involved in *financial crime* or appears to be or to have been used as a vehicle for *financial crime*.

13.6.3 Where appropriate the *FCA* will also take the following factors into account:

- (1) the complexity of the *company* or *partnership* (as this may have a bearing on the effectiveness of winding up or any alternative action);

- (2) whether there is a significant cross border or international element to the business being carried on by the *company* or *partnership* and the impact on the business in other jurisdictions;
- (3) the adequacy and reliability of the *company* or *partnership's* accounting or administrative records;
- (4) the extent to which the *company* or *partnership's* management has co-operated with the *FCA*.

13.7 Petitioning for compulsory winding up of a company already in voluntary winding up

13.7.1 Section 365(6) of the *Act* makes it clear that the *FCA* may petition for the compulsory winding up of a *company* even if it is already in voluntary winding up. This power is already available to creditors and contributories of *companies* in voluntary winding up. For example, the court can be asked to direct the liquidator to investigate a transaction which the *company* undertook before the winding up. In some circumstances, this power may be used in respect of partnerships (section 367 of the *Act*).

13.7.2 Given the powers available to creditors (or contributories), the *FCA* anticipates that there will only be a limited number of cases where it will exercise the right under section 365(6) to petition for the compulsory winding up of a company already in voluntary winding up. The *FCA* will only be able to exercise this right where one or both of the grounds on which it can seek compulsory winding up are met.

13.7.3 Factors which the *FCA* will consider when it decides whether to use this power (in addition to the factors identified in ■ paragraphs 13.5.1 to ■ 13.6.3 in relation to the *FCA*'s decisions to seek compulsory winding up) include:

- (1) whether the *FCA*'s concerns can properly and effectively be met by seeking a specific direction under section 365(2) of the *Act*;
- (2) whether the affairs of the *company* require independent investigation of the kind which follows a compulsory winding up order and whether there are or are likely to be funds available for that investigation;
- (3) the composition of the creditors of the company including the ratio of *consumer* and non-*consumer* creditors and the nature of their claims;
- (4) the extent to which there are creditors who are or are likely to be connected to the *company* or its directors and management;
- (5) the extent to which the directors and management are cooperating with the liquidator in voluntary winding up;
- (6) the need to protect and distribute *consumers'* claims and *assets*;

- (7) whether a petition by the *FCA* for compulsory winding up is likely to have the support of the majority or a large proportion of the creditors; and
- (8) the extent of any resulting delay and additional costs in seeking a compulsory winding up order.

13.7.4

[deleted]

13.8 Power to apply to court for a provisional liquidator

13.8.1

Where a petition has been presented for the winding up of a body, the court may appoint a provisional liquidator in the interim period pending the hearing of the petition. An appointment may be sought and made to:

- (1) permit the continuation of the business for the protection of *consumers*; or
- (2) secure, protect, or realise assets or property in the possession or under the control of the *company* or *partnership* (in particular where there is a risk that the assets will be dissipated) for the benefit of creditors or *consumers*.

13.8.2

In cases where it decides to petition for the compulsory winding up of a body under section 367 of the *Act*, the *FCA* will also consider whether it should seek the appointment of a provisional liquidator. The *FCA* will have regard, in particular, to the extent to which there may be a need to protect *consumers'* claims and *consumers'* funds or other assets. Where the *FCA* decides to petition for the compulsory winding up of a *company* or *partnership* on the just and equitable ground and where the *company* or *partnership* is solvent but may become insolvent, the *FCA* will also consider whether the appointment of a provisional liquidator would serve to maintain the solvency of the *company* or *partnership*.

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.

13.10 Applications in relation to voluntary arrangements: the FCA's policy

13.10.1 In general terms, the approval of a voluntary arrangement (in relation to *companies, partnerships and individuals*) requires more than 75% of the creditors to whom notice of a meeting has been sent and who are present in person or by proxy. The arrangement must also not be opposed by more than 50% of creditors given notice of the meeting and who have notified their claim, but excluding secured creditors and creditors who are, in the case of companies or partnerships, connected persons and, in the case of individuals, associates. The *FCA* will therefore not normally challenge an arrangement approved by a majority of creditors.

13.10.2 Exceptionally, the *FCA* will consider making such a challenge using its powers in sections 356 and 357 of the *Act* after considering, in particular, the following matters:

- (1) The composition of the creditors of the company including the ratio of *consumer* to non-*consumer* creditors or the nature of their claims;
- (2) whether the *FCA* has concerns, or is aware of concerns of creditors, about the regularity of the meeting or the identification of connected or associated creditors and the extent to which creditors with those concerns could themselves make an application to court;
- (3) whether the *company, partnership* or individual has control of consumer assets which might be affected by the voluntary arrangement;
- (4) the complexity of the arrangement;
- (5) the nature and complexity of the *regulated activity*;
- (6) the *company's, partnership's* or individual's previous dealings with the *FCA*, including the extent of its cooperation with the *FCA* and its compliance history;
- (7) whether the *FCA* is aware of any matters which would materially affect the rights and expectations of creditors under the voluntary arrangement as approved; and
- (8) the extent to which the debtor has made full and accurate disclosure of assets and liabilities in the proposal to creditors.

13.10.3

Similarly, the *FCA* will not normally use its powers under section 358 of the *Act* to petition for sequestration of a debtor's estate following the grant of a trust deed, if the trust deed has been, or appears likely to be, acceded to by a majority of creditors.:

13.10.4

In considering whether to exercise its powers under Schedule A1 to the 1986 *Act* to make a challenge in relation to acts, omissions or decisions of a nominee during a moratorium, the *FCA* will have regard to the following matters in particular:

- (1) whether the *FCA* is aware of matters indicating that the proposed voluntary arrangement does not have a reasonable prospect of being approved and implemented or that the company is likely to have insufficient funds available to it to carry on its business during the moratorium;
- (2) whether consumer assets held by the company are or may be placed at risk; and
- (3) in the case of an unauthorised *company* whether that *company* is able to carry on its business lawfully during the moratorium without undertaking any *regulated activity* in contravention of the *general prohibition*.

13.11 Applications for orders against debt avoidance: the FCA's policy

13.11.1 When it decides whether to make an application for an order against debt avoidance pursuant to section 375 of the *Act*, the *FCA* will consider all relevant factors, including the following:

- (1) the extent to which the relevant transactions involved dealings in *consumers'* funds;
- (2) whether it would be appropriate to petition for a winding up order, bankruptcy order, or sequestration award, in relation to the debtor and the extent to which the transaction could properly be dealt with in that winding up, bankruptcy or sequestration;
- (3) the number of *consumers* or other creditors likely to be affected and their ability to make an application of this nature; and
- (4) the size of the transaction.

The FCA's arrangements for notification of petitions and other documents

13.11.2 ■ Paragraphs 13.12.2 to ■ 13.13.1 contain information for insolvency practitioners and others about sending copies of petitions, notices and other documents to the *FCA*, and about making reports to the *FCA*. Insolvency practitioners and others have duties to give that information and those documents to the *FCA* under various sections in Part XXIV of the *Act* (Insolvency). ■ Paragraphs 13.12.2 identifies the relevant sections of the *Act* that explain some of the duties.

13.12 Insolvency regime and relevant sections of the Act

13.12.1

Insolvency regime	Relevant sections of the Act
Administration	Sections 361 and 362(3)
Compulsory winding up	Sections 369, 370, and 371(3)
Voluntary liquidation	Section 365(4)
Receivership	Sections 363(4) and 364
Bankruptcy and sequestration	Sections 373 and 374(3)
Company moratoria Individual voluntary arrangements	Paragraph 44 of schedule A1 to the 1986 Act Section 357(3) - relates to notices of the result of the creditors' meetings.
Trust deeds for creditors	Section 358(2)(a) and (b) - relates to copies of trust deeds and copies of certain other documents of information sent to creditors. Section 358(4) - relates to notices of any meeting of creditors held in relation to the trust deed.

13.12.2

Unless paragraph ■ paragraph 13.13.1 applies, the information and documents identified in ■ 13.12.2 should be sent to the Financial Conduct Authority, 12 Endeavour Square, London, E20 1JN marked 'Insolvency Information'. If the *person* who is subject to the insolvency regime ('the insolvent person') is an *authorised person*, the information and documents should, in the first instance, be addressed to the insolvent person's supervisory contact at the FCA (if known).

13.12.3

If the insolvent person is an *authorised person* and the sender of the information or documents knows that the insolvent person's supervisory contact operates from Edinburgh, information or documents should, in the first instance, be sent to the Financial Conduct Authority, Quayside House, 127 Fountainbridge, Edinburgh EH3 8DJ.

13.13 Rights on petitions by third parties and involvement in creditors meetings: the FCA 's policy

- 13.13.1** The *FCA* will exercise its rights under sections 362, 371 and 374 of the *Act* to be heard on a third party's petition or in subsequent hearings only where it believes it has information that it considers relevant to the court's consideration of the petition or application. These circumstances may include:
- (1) where the *FCA* has relevant information which it believes may not otherwise be drawn to the court's attention; especially where the *FCA* has been asked to attend for a particular purpose (for example to explain the operation of its *rules*);
 - (2) where the *FCA* believes that the *insolvency order* being sought by a third party is inappropriate to meet the needs of *consumers* and the public interest; and
 - (3) where the *FCA* believes that the making of an *insolvency order* will affect the *FCA*'s exercise of its other powers under the *Act*, and wishes to make the court aware of this.
- 13.13.2** The making of an *insolvency order* operates to stay any proceedings already in place against the company, partnership or individual, and prevents proceedings being commenced while the *insolvency order* is in place. Proceedings can continue or be commenced against those *persons* only with the court's permission. This may impact on the effectiveness of the *FCA*'s use of its powers to seek *injunctions* and restitution orders from the court. The *FCA* will draw the court's attention to this potential effect where the *FCA* believes it is a relevant consideration, but it is a matter for the court to determine its relevance in a particular case.
- 13.13.3** The *FCA* is given power to receive the same information as creditors are entitled to receive in the winding up, administration, receivership or voluntary arrangement of an *authorised person*, of *appointed representatives* and of *persons* who have carried out a *regulated activity* while *unauthorised*. The *FCA* is also entitled to attend and make representation at any creditors' meeting or (where relevant) creditors' committee meeting taking place in those regimes. When it decides whether to exercise its power to attend and make representations at meetings the factors which the *FCA* will take into account include:

- (1) the extent of claims by *consumers* upon the body or individual;
- (2) the extent to which *consumer* assets are held by the body or individual;
- (3) the extent to which the *FCA* is aware of concerns of *consumers* (or other creditors or contributories) about the way in which the insolvency regime is proceeding;
- (4) whether the circumstances which gave rise to the insolvency regime might have general implications for others carrying on regulated business;
- (5) whether the creditors include *shareholders*, directors, or other *persons* who have a connection with the management or ownership of the body or are associated with the individual;
- (6) the complexity or specialisation of the business of the body or individual; and
- (7) where there is a significant cross border or international element to the business which the *company*, *partnership* or individual is carrying out.

