

Chapter 13

Insolvency

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

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