Technical Bulletin

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46.1 Meeting with Melanie Johnson, MP, Under-Secretary for Competition, Consumers and Markets

On 27 November President Roger Oldfield led an R3 delegation to meet Melanie Johnson, Minister with responsibility for insolvency matters. Among the issues discussed were the white paper, *Insolvency - A Second Chance*, unregulated advisers, TUPE and the treatment of matrimonial homes in bankruptcies. A note of the meeting is available on the members' section of the R3 web site at www.r3.org.uk

46.2 Statement of Insolvency Practice 8 (England & Wales)

A revised version of Statement of Insolvency Practice 8 (Summoning and Holding Meetings of Creditors Convened Pursuant to Section 98 of the Insolvency Act 1986) (England & Wales) has been issued by the regulatory bodies with an effective date of 1 January 2002. The document can also be viewed on the members' section of the R3 web site (www.r3.org.uk) and hard copies are available from the R3 secretariat upon request.

46.3 Insolvency - A Second Chance

The Association's response to the white paper, *Insolvency - A Second Chance*, is available on the members' section of its web site at: www.r3.org.uk

46.4 Rates in Receivership

In the case of *Boston Borough Council v Rees & Bennett (re Beck Foods Limited)* (20 December 2001, unreported) the Court of Appeal, following the decision in *Ratford v Northavon District Council*, held that administrative receivers who carried on the business of the company on its premises were not in rateable occupation of the premises and consequently were not personally liable for the rates. This remained the case even though they continued to manage the company's business on the premises after it had been placed into liquidation. The cessation of the receivers' agency on liquidation did not affect the power given to them by the debenture to exploit the company's undertaking and assets, and did not give rise to a change of rateable occupation. The company remained the rateable occupier both before and after the liquidation.

46.5 Unfair Dismissal – Increase in Limits

With effect from 1 February 2002 the maximum compensatory award for unfair dismissal is increased from £51,700 to £52,600, and the maximum amount of a week's pay for calculating the basic award for unfair dismissal or for redundancy payments is increased from £240 to £250. The increases apply to claims where the effective date of termination is on or after 1 February 2002. For details see the Employment Rights (Increase of Limits) Order 2002 (SI 2002/10).

46.6 The Financial Services and Markets Act 2000 and Insolvency

The following comments on the new regime introduced by the Financial Services and Markets Act 2000 are intended to give a general overview of the changes which came into effect on 1 December 2001 and which may have insolvency implications. They are not intended to be exhaustive. It must be emphasised that this is a complex and specialist area of the law. For the detailed provisions members should refer to the relevant legislation and guidance material. Advice should be taken where appropriate in individual cases.

46.6.1 Sources

The following legislation and guidance material is referred to in this Bulletin.

Legislation

The Financial Services and Markets Act 2000 (c.8)('FSMA')
The Financial Services and Markets Act 2000 (Insolvency)(Definition of 'Insurer') Order 2001 (SI 2001/2634)
The Financial Services and Markets Act 2000 (Treatment of Assets of Insurers on Winding Up) Regulations 2001 (SI 2001/2968)
The Bankruptcy (Financial Services and Markets Act 2000) (Scotland) Rules 2001 (SI 2001/3591 (S.19))
The Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2001 (SI 2001/3623) ('the Exemption Amendment Order')
The Bankruptcy (Financial Services and Markets Act 2000) Rules 2001 (SI 2001/3634)
The Insurers (Winding Up) Rules 2001 (SI 2001/3635)
The Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (SI 2001/3649) ('The Consequential Amendments and Repeals Order')

Guidance

The principal source of guidance is the Financial Services Authority's Handbook ('the Handbook'), which also contains the rules made by the Authority under Section 138 of the FSMA. The Handbook comprises a series of manuals and sourcebooks, which in turn are divided into chapters. The Handbook is available in hard copy, on CD ROM, or on the Authority's web site at the address given below.

46.6.2 The new Authority and Compensation Scheme

The bulk of the provisions of the Financial Services and Markets Act 2000 came into force on 1 December 2001 ('N2'). As from that date the Financial Services Authority ('the Authority') took control of the regulation of all financial business and a new compensation scheme replaced the previous compensation schemes for investment business, banking, building societies and insurance. On N2 the following organisations ceased to carry out their previous functions:

- The Securities and Futures Authority (SFA)
- The Personal Investment Authority (PIA)
- The Investment Management Regulatory Organisation (IMRO)
- The Building Societies Commission
- The Registrar of Friendly Societies
- The Deposit Protection Board
- The Policyholders Protection Board

As from N2, the compensation scheme is controlled by a single body, the Financial Services and Markets Compensation Scheme, operated under the auspices of the Financial Services Authority. The new body is responsible for compensation schemes in relation to:

- deposits - replacing the Deposit Protection Board
- investments - replacing the Investors Compensation Scheme
- insurance - replacing the Policyholders Protection Board and voluntary organisations such as the Friendly Societies Protection Scheme.

The maximum levels of compensation are:

- Deposits - 100% of the first £2,000 and 90% of the next £33,000 (total £31,7000).
- Investments - 100% of the first £30,000 and 90% of the next £20,000 (total £48,000).
- Insurance
  - Compulsory - covered in full
  - Non-compulsory - 100% of the first £2,000 of a claim or policy, and 90% of the remainder of the claim or value of unused premiums.
  - Long-term - 100% of the first £2,000, and 90% of the remainder of the value of the policy.

The contact details are:

Financial Services Authority
25 The North Colonnade
Canary Wharf
London
E14 5HS

Tel: 020 7676 1000
Fax: 020 7676 1099
www.fsa.gov.uk

Financial Services compensation Scheme
7th Floor Lloyds Chambers
Portsoken Street
London E1 8BN

Tel: 020 7892 7300
Fax: 020 7892 7301
www.fscs.org.uk

46.6.3 Insolvency practitioner exemption

The subject of regulated activities, and the exemption of persons acting as insolvency practitioners from the prohibition against carrying on a regulated activity without authorisation, was covered in Technical Bulletin 42.2 (June 2001). The statutory provisions referred to therein also came into effect on 1 December 2001. The exemption has now been extended to persons acting as insolvency practitioners under Article 3 of the Insolvency (Northern Ireland) Order 1989 (Article 6 of the Exemption Amendment Order).

46.6.4 The Authority's powers in connection with insolvency proceedings

(a) Administration and Winding up by the Court.

The Authority has power to petition for an administration or winding-up order in relation to a company, a limited liability partnership or a partnership constituted under English law which:

- is, or has been, an authorised person;
- is, or has been, an appointed representative*; or
- is carrying on, or has carried on, a regulated activity in contravention of the prohibition against doing so. (Sections 359, 367, FSMA)

The provisions of section 367 FSMA which appear to allow the Authority to petition for the winding up of a Scottish partnership appear to be included in error. The Insolvent Partnerships Order 1994 does not extend to Scotland, where partnerhips are dealt with under the sequestration regime. Clarification is being sought on this point.

* An appointed representative is a representative acting on behalf of a principal who is an authorised person and who has accepted responsibility for the representative's activities (section 39, FSMA)

Where a person other than the Authority has presented a petition for an administration or winding-up order in connection with a company or partnership to which the above conditions apply:

- the Authority is entitled to be heard at the hearing of the petition and any other hearing in relation to the company or partnership;
- any notice or other document required to be sent to creditors must be sent to the Authority;
- a person appointed by the Authority is entitled to attend any meeting of creditors or any committee and to make representations on any matter for decision at such a meeting;
- in the case of administrations, the Authority may apply to the court under section 27 of the Insolvency Act 1986 or Article 39 of the Insolvency (Northern Ireland) Order 1989;
- if during the course of the proceedings a compromise or arrangement is proposed between the company and its creditors, the Authority may apply to the court under section 425 of the Companies Act 1985, or Article 418 of the Companies (Northern Ireland) Order 1986. (Sections 362, 371 FSMA)

(b) Voluntary Winding Up

Where a company being wound up voluntarily is an authorised person and is not an insurer conducting long-term business:

- the Authority may apply to the court under section 112 of the Insolvency Act 1986 or Article 98 of the Insolvency (Northern Ireland) Order 1989;
- the Authority is entitled to be heard at any hearing of the court in relation to the winding up;
- any notice or other document required to be sent to creditors must be sent to the Authority;
- a person appointed by the Authority is entitled to attend any meeting of creditors or any committee and to make representations on any matter for decision at such a meeting;
- if during the course of the proceedings a compromise or arrangement is proposed between the company and its creditors, the Authority may apply to the court under section 425 of the Companies Act 1985, or Article 418 of the Companies (Northern Ireland) Order 1986.

The voluntary winding up of the company does not bar the right of the Authority to have it wound up by the court. (Section 365, FSMA)

(c) Receivership

Where a receiver has been appointed in relation to a company which:

- is, or has been, an authorised person;
- is, or has been, an appointed representative; or
- is carrying on, or has carried on, a regulated activity in contravention of the prohibition against doing so,

then

- the Authority is entitled to be heard on any application to the court made by the receiver or (in Scotland) the holder of the floating charge;
- the Authority is entitled to make an application under sections 41 or 69 of the Insolvency Act 1986, or Article 51 of the Insolvency (Northern Ireland) Order 1989 (enforcement of duty to make returns);
- any report made under sections 48 or 67 of the Insolvency Act 1986 or Article 58 of the Insolvency (Northern Ireland) Order 1989 must be sent to the Authority;
- a person appointed by the Authority is entitled to attend any meeting of creditors or any committee and to make representations on any matter for decision at such a meeting. (Section 363 FSMA)

Note that these provisions are not confined to administrative receiverships.

(d) Bankruptcy

The Authority has power to present a petition for a bankruptcy order, or in Scotland an award of sequestration, against an individual who:

- is, or has been an authorised person; or
- is carrying on, or has carried on, a regulated activity in contravention of the prohibition against doing so.

Such a petition may only be presented on the grounds that the individual is unable to pay a debt contracted in connection with a regulated activity. (Section 372 FSMA). The detailed rules regarding demands made by the Authority to establish inability to pay such a debt are contained in the Bankruptcy (Financial Services and Markets Act 2000) Rules 2001 and the Bankruptcy (Financial Services and Markets Act 2000) (Scotland) Rules 2001.

The wording of subsection 372(1)(b) FSMA appears to exclude the possibility of the Authority petitioning for the sequestration of a Scottish partnership. This would appear to be a mistake in the legislation for which clarification is being sought.

Where a person other than the Authority presents a petition for a bankruptcy order or an award of sequestration against an individual or other entity whose estate may be sequestrated:

- the Authority is entitled to be heard at the hearing of the petition and any other hearing in relation to the individual or entity;
- a copy of any report prepared under section 274 of the Insolvency Act 1986 or Article 248 of the Insolvency (Northern Ireland) Order 1989 must be sent to the Authority. (Section 374 FSMA).

(e) Voluntary Arrangements and Trust Deeds

Where a voluntary arrangement has been approved in relation to a company or partnership which is an authorised person, the Authority has power to make an application to the court or to be heard at any hearing in relation to an application by any other person. (Section 356 FSMA)

The Authority is entitled to be heard on any application for an interim order by an individual who is an authorised person. Although there is no statutory requirement for the Authority to be given notice of the hearing, it is clearly sensible practice to ensure that notice is given to the Authority in such cases.

Where an interim order is made:

- a person appointed by the Authority is entitled to attend the meeting summoned to consider the proposal;
- notice of the result of the meeting must be given to the Authority by the chairman of the meeting;
- the Authority may apply to the court under section 262 or 263 of the Insolvency Act 1986, or Article 236 or 237 of the Insolvency (Northern Ireland) Order 1989;
- if another person makes an application under those provisions, the Authority is entitled to be heard at the hearing. (Section 357 FSMA)

Where a trust deed has been granted by or on behalf of a debtor who is an authorised person:

- the trustee must send to the Authority a copy of the trust deed and any other document or information sent to creditors under paragraph 5 (1)(c) of Schedule 5 to the Bankruptcy (Scotland) Act 1985;
- the Authority has the same right to petition for sequestration as a qualified creditor under paragraph 7 of Schedule 5;
- the Authority must be given the same notice as the creditors of any meeting of creditors held in relation to the trust deed;
- a person appointed by the Authority is entitled to attend and participate in any such meeting.

These provisions do not affect any rights which the Authority may have as a creditor. (Section 358 FSMA)

46.6.5 Insolvency practitioners' duties to report to the Authority

Where a receiver or a liquidator in a voluntary winding up has been appointed to a company, or an administrator, a liquidator in a winding up by the Court, or a trustee in bankruptcy has been appointed in proceedings founded on a petition presented by a person other than the Authority, and it appears to the office holder that the company, partnership or individual to which he has been appointed is carrying on, or has carried, a regulated activity in contravention of the prohibition against doing so, then he must report the matter to the Authority without delay (sections 361, 364, 370, 373 FSMA).

46.6.6 Provisions against debt avoidance

The Authority may apply to the court for an order under section 423 of the Insolvency Act 1986, or Article 367 of the Insolvency (Northern Ireland) Order 1989, where a transaction is entered into at an undervalue and:

- at the time the transaction was entered into the debtor was carrying on a regulated activity (whether or not in contravention of the prohibition against doing so), and
- a victim of the transaction is, or was, a party to an agreement with the debtor which formed part of a regulated activity carried on by the debtor. (Section 375 FSMA).

46.6.7 The Authority's policy in relation to its powers

The Authority's policy in relation to the exercise of its powers to participate in insolvency proceedings and apply for orders against debt avoidance are set out in:

Handbook/Enforcement/ENF10: Insolvency Proceedings and orders against debt avoidance.

46.6.8 Insurance companies

Special provisions relating to the winding up of insurance companies are contained in sections 366, 369 and 376-379 FSMA, the Insurers (Winding Up) Rules 2001, the Financial Services and Markets Act 2000 (Treatment of Assets of Insurers on Winding Up) Regulations 2001 and the Financial Services and Markets Act 2000 (Insolvency)(Definition of 'Insurer') Order 2001. The Insurance Companies Act 1982 is repealed (Article 3, the Consequential Amendments and Repeals Order).

46.6.9 Client money

The treatment of client money on the failure of an authorised firm, or third party with whom an authorised firm holds client money, is now governed by the Client Money Distribution Rules made by the Authority and set out in:

Handbook/Conduct of Business/COB9: Client Assets/Section 9.5: Client Money Distribution.

These replace the client money regulations made by the Securities and Investments Board which were the subject of SPI Technical Release 3 ('Client Money in Authorised Investment Businesses').

46.6.10 Rights of the Compensation Scheme in relation to insolvency

The compensation scheme may make any payment to a claimant conditional on the claimant assigning the whole or part of his rights to the scheme on such terms as the scheme thinks fit. Any sum payable in relation to the rights so assigned will be payable to the scheme and not to the claimant. For details of how the assignment of rights works see:

Handbook/Compensation/Comp 7: Assignment of Rights

If a person other than the scheme manager presents a petition for an administration, winding-up or bankruptcy order or an award of sequestration in relation to a company or entity which is an authorised person or an appointed representative, the scheme manager has the same rights to participate in the proceedings as the Authority does, or would do, in equivalent circumstances (section 215 FSMA).

46.6.11 Other consequential amendments and repeals

A number of consequential amendments are made to insolvency legislation by the Consequential Amendments and Repeals Order. These are mainly to bring definitions and statutory references into line with the changes made by the FSMA.

Note also:

The further meaning of inability to pay debts for the purposes of an administration order where the company is a deposit taker (Articles 303,400, 468).

The substitution of:

- a representative of the Financial Services Authority who exercises the right to be a member of the committee, and
- a representative of the scheme manager who exercises the right to be a member of the committee

for a representative of the Deposit Protection Board as an additional creditor member of the liquidation committee. (Articles 378, 379).

The following Articles of the Order contain amendments to insolvency related legislation:

224-225	Bankruptcy (Scotland) Act 1985
303-307	Insolvency Act 1986
360	Scotland Act 1998
377-381	Insolvency Rules 1986
398	Banks (Administration Proceedings) Order 1989
400-403	Insolvency (Northern Ireland) Order 1989
414	Banks (Administration Proceedings) Order (Northern Ireland) 1991
415	Financial Markets and Insolvency Regulations 1991
467 - 470	Insolvent Partnerships Order 1994
471	Insolvency Regulations 1994
513	Financial Markets and Insolvency (Money Market) Regulations 1995 (revoked)

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