Checklist — Securities Firm Bankruptcy

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Pursuant to s. 254 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), all of the provisions of the BIA apply to securities firm bankruptcies, with such modifications as the circumstances may require. However, to the extent of any conflicts as between the provisions of Part XII of the BIA, which governs securities firm bankruptcies, and the other provisions of the BIA, s. 255 of the BIA provides that the provisions of Part XII shall prevail.

This checklist should be read in conjunction with the flowchart: Key Steps in a Bankruptcy Proceeding (with Timelines and Procedural Requirements). In addition to the provisions of the BIA which affect bankruptcies generally, the following pertinent steps to securities firm bankruptcies are addressed in Part XII of the BIA:

1. Determine whether the insolvent person is a "securities firm" within the meaning of Part XII of the BIA (BIA s. 253).
2. Determine whether to bankrupt the securities firm by:
    - Voluntary assignment of the securities firm into bankruptcy (BIA s. 49) (see practice note: What is a Voluntary Assignment in Bankruptcy?); or
    - Successful application for bankruptcy order (BIA s. 43) (see practice note: What is an Involuntary Bankruptcy Application?).
3. If an application for a bankruptcy order is sought, the application may be brought by any of the following persons, provided that the requirements of s. 256(1) the BIA are satisfied:
    - any creditor who may file an application in accordance with ss. 43 to 45 of the BIA (BIA s. 256(1));
    - a securities commission established under a provincial enactment (BIA s. 256(1)(a));
    - a securities exchange recognized by a provincial securities commission (BIA s. 256(1)(b)); or
    - a "customer compensation body" (as defined by s. 253 of the BIA) (BIA s. 256(1)(c)).
4. The person making the application for a bankruptcy order against the securities firm must:
    - obtain the consent of the proposed trustee to act as the trustee (see precedent: Consent of Trustee to Act in Bankruptcy);
    - file the application in the judicial district of the locality of the securities firm (*Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (the "General Rules"), r. 69);
    - serve notice of the filed application upon the securities firm, the proposed trustee and the Office of the Superintendent of Bankruptcy at the applicable Division Office (General Rules r. 70); and
    - if the person making the application for a bankruptcy order is a securities exchange or customer compensation body, serve notice of the filed application upon the securities commission, if any, having jurisdiction in the locality of the securities firm where the application was filed (BIA s. 256(3)).
5. Following the bankruptcy of the securities firm, the trustee is required to administer the estate in accordance with the BIA, and Part XII in particular, and take additional steps in a securities firm bankruptcy including:
    - consult with the customer compensation body on the administration of the estate where the accounts of the customers of the security firm are protected by such customer compensation body (BIA s. 264);

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- issue a statement of customer accounts to customers together with notice of bankruptcy and first meeting of creditors (see precedent: Notice of Bankruptcy and First Meeting of Creditors (Section 102(1)) as required by s. 102 of the BIA (BIA s. 257);
- determine whether there are any "deferred customers" (as defined by s. 253 of the BIA) whose misconduct caused or materially contributed to the insolvency of the securities firm and apply to the court for a determination of same (BIA s. 258);
- determine which securities in customers' securities accounts are customer name securities, if any (BIA s. 260);
- advise customers with securities determined to be customer name securities of such determination (BIA s. 260);
- deliver customer name securities to the customer who owns them, provided that debts owing by such customer to the securities firm have been discharged in full, either by payment made by the customer or from the trustee's sale of sufficient customer name securities, sold on notice to the customer who owns them (BIA ss. 263(2) and (3));
- sell such customer name securities as may be required to discharge the indebtedness of customers owning customer name securities;
- establish a customer pool fund and a general fund from the securities and cash which vest in the trustee (BIA s. 261(2));
- distribute the estate of the securities firm, subject to the rights of secured creditors, in accordance with ss. 262 and 265 of the BIA, including:
  - adhere to priority scheme of payment set forth in s. 262(3) of the BIA;
  - determine whether there is any property which a person has deposited with the firm pursuant to an eligible financial contract to assure performance of that person's obligations, and if that property is part of the customer pool fund, distribute to that person as though he were a customer of the firm (BIA s. 262(1.1));
  - determine whether it would be more favourable to sell any of the securities in the customer pool fund rather than distribute the securities themselves and, if so, to sell such securities and distribute the proceeds to the customers who own those securities (BIA s. 262(2)); and
  - evaluate any late claims and make appropriate distribution to customers having proven late claims in accordance with s. 265 of the BIA; and
- issue a statement indicating the distribution of property in the customer pool fund among customers with proven claims and the disposal of customer name securities or such other report relating to that distribution or disposal as the court may direct (BIA s. 266).

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