29 June 2010

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Insolvency Service Consultation / Call for Evidence on Improving the transparency of, and Confidence in, pre-packaged sales in administrations (March 2010)

Dear Mr Chapman,

We welcome the opportunity on behalf of the Association for Financial Markets in Europe (AFME) to comment on the Insolvency Service Consultation on Improving the transparency of, and Confidence in, pre-packaged sales in (the "Consultation Paper").

AFME was formed last year upon the merger of LIBA (the London Investment Banking Association) and the European operations of SIFMA (the Securities Industry and Financial Markets Association). The former European High Yield Association (EHYA) was integrated into AFME and now operates under the name AFME / EHYA and runs AFME's division of leveraged finance. AFME represents a European and global participants in the wholesale financial markets, and its members comprise all pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants.[1] For more information please visit the AFME website, www.AFME.eu.

We support the Insolvency Service's objectives in increasing the transparency and confidence in pre-pack sales. We believe that voluntary compliance with the disclosure requirements of Statement of Insolvency Practice (SIP) 16 is already current market practice for transactions at the larger end of the market, in which our members engage. Therefore, we would support Option 2 under the Consultation Paper to give statutory force to the SIP 16 disclosure requirements and providing penalties for noncompliance for the reasons spelled out below. [2]

[1]AFME participates in a global alliance with SIFMA in the US, and the Asian Securities Industry and Financial Markets Association through the GFMA (Global Financial Markets Association), and provides members with an effective and influential voice through which to communicate the industry standpoint on issues affecting the international, European, and UK capital markets.

[2] The disclosure requirements of SIP 16 are set forth in the attached annex.

1. Our bank member firms lend to companies and underwrite the issuance of debt securities to finance, among other things, working capital, acquisitions or a leveraged buyout, or to refinance existing debt.

2. Our members focus on the larger end of the market, ie, transactions ranging from £200 million to in excess of £1.5 billion in total debt. Lenders may find themselves in the senior or the junior layers of a company's debt, and sometimes in both.

3. Our members generally use pre-packs in conjunction with schemes of arrangement as a rescue tool to restructure a company's debt load to a more manageable size in order to ensure the company's survival.

4. Pre-packs are regarded as a useful tool because they are fast and simple to put in place. This is critical in restructuring a distressed company to arrest value erosion and loss of market confidence.

5. Where value breaks above the junior debt, the threat of a pre-pack, particularly when accompanied with the offer of an equity interest to junior creditors (who would otherwise receive nothing in a pre-pack), can be just as useful to secure creditor support for a consensual (and speedier) deal.

6. This is particularly the preferred route where the parties perceive there to be relationship value in maintaining harmony amongst the company and different classes of creditors.

7. But for a pre-pack to be effective, including as a tool to secure a consensual restructuring, the procedure must be credible and legitimate, and the parties accountable. As in all restructurings, transparency plays an essential role.

8. In the larger end of the market where our firms are most active, their experience is that the sophistication of the investors, the number of professional advisors involved, and the reputational value at stake tends to increase the scrutiny of the transaction.

9. This heightened scrutiny acts as a check and balance on administrators' statutory duty to achieve the best price for the company. Compliance with the disclosure requirements of SIP 16 acts as a record of the steps taken to meet that statutory duty.

10. The record creation fostered by SIP 16 is particularly important insofar as while there is judicial authority for an administrator to sell assets without prior creditor or court approval, administrators are still subject to potential challenges to their conduct under paragraph 74, or claims for misfeasance under paragraph 75, of Schedule B1 to the Insolvency Act 1986.

11. Maintaining the modernity and fairness of the UK's insolvency laws is particularly important in the current economic environment in order to encourage the providers of debt, be they banks or non-banks, or be they senior or junior creditors, to continue to lend.

12. Restructuring transactions constantly evolve with each successive economic cycle. Transparency allows regulators to monitor the impact of insolvency laws in order to ensure that they are suitable for evolving structures.

13. For these reasons, we think it is a good idea to give statutory force to SIP 16 (including penalties for noncompliance) so that pre-packs are a transparent and credible tool in restructuring distressed companies.

If you have any questions, please do not hesitate to contact me on 0207 743 9334.

Yours sincerely

Gilbey Strub

Managing Director

AFME / European High Yield Association

ANNEX A

The following information should be disclosed to creditors in all cases where there is a pre-packaged sale, as far as the administrator is aware after making appropriate enquiries:

- The source of the administrator's initial introduction
- The extent of the administrator's involvement prior to appointment
- Any marketing activities conducted by the company and/or the administrator
- Any valuations obtained of the business or the underlying assets
- The alternative courses of action that were considered by the administrator, with an explanation of possible financial outcomes
- Why it was not appropriate to trade the business, and offer it for sale as a going concern, during the administration
- Details of requests made to potential funders to fund working capital requirements
- Whether efforts were made to consult with major creditors
- The date of the transaction
- Details of the assets involved and the nature of the transaction
- The consideration for the transaction, terms of payment, and any condition of the contract that could materially affect the consideration
- If the sale is part of a wider transaction, a description of the other aspects of the transaction
- The identity of the purchaser
- Any connection between the purchaser and the directors, shareholders or secured creditors of the company
- The names of any directors, or former directors, of the company who are involved in the management or ownership of the purchaser, or of any other entity into which any of the assets are transferred
- Whether any directors had given guarantees for amounts due from the company to a prior financier, and whether that financier is financing the new business
- Any options, buy-back arrangements or similar conditions attached to the contract of sale