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## **FIRST SUPERVISORY NOTICE**

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**To: Berry Birch & Noble Financial Services Ltd**

**Of: Eaton House, 1 Eaton Road, Coventry, CV1 2FJ**

**Date: 1 April 2004**

**TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") has taken the following action**

### **ACTION**

1. The FSA, exercising its own-initiative power under section 45 of the Financial Services and Markets Act 2000 (the "Act"), has varied the permission granted to Berry Birch & Noble Financial Services Ltd ("BBNFS") under Part IV of the Act by the inclusion of the requirement that BBNFS must not take any action which may result in distributions of any of its assets to any companies in the same group as BBNFS.

### **EFFECTIVE DATE**

2. The variation specified in paragraph 1 takes immediate effect.

### **REASONS FOR THE DECISION**

#### **Summary**

3. BBNFS is a subsidiary in the Berkeley Berry Birch Group ("BBBG"). BBNFS has been loss-making for some time and has been unable to meet its capital adequacy requirements. BBNFS had been kept as a going concern through support from other BBBG companies. BBBG has decided to withdraw its continuing support and put BBNFS into liquidation.

4. Prior to putting BBNFS into liquidation, BBNFS effected the transfer of its on-going business and some associated assets and liabilities ("the transfer") to Berry Birch & Noble Financial Planning Ltd ("BBNFP"). BBNFP is another subsidiary of BBBG. The remaining liabilities of BBNFS, which include claims from customers in respect of its regulated activities, are significantly greater than its remaining assets.
5. The FSA has concerns that the transfer to BBNFP may not have been carried out at full value, that provisions made by BBNFS may not be adequate to meet all the claims for compensation expected and that certain creditors may have been unfairly given priority by being included in the transfer. If any of these concerns are correct, then among other things consumers will be likely to be disadvantaged to the extent that their claims against BBNFS for compensation will not be met in full.
6. The FSA therefore considers that it is necessary to take immediate steps to ensure that monies are not paid from BBNFS to BBBG companies until FSA has had a full and sufficient opportunity to enquire into, and if necessary take action in respect of, the circumstances of the transfer to BBNFP.

### **Relevant Statutory Provisions**

7. By section 45 of the Act, the FSA may, among other things:
  - (1) vary an authorised person's permission, where it appears to the FSA that:
    - (a) such person is failing, or is likely to fail, to satisfy the threshold conditions; or
    - (b) it is desirable to exercise the power in section 45 to protect the interests of consumers.
  - (2) vary such a permission by imposing a requirement to refrain from taking specified action.
8. Section 53(3) of the Act allows such a variation to take effect immediately if the FSA reasonably considers that it is necessary for the variation to do so.

## **Facts and matters relied on**

9. The FSA has relied on the following facts and matters in making its decision:
- (1) according to BBNFS, the goodwill, tangible fixed assets, prepayments, accrued income, accruals and indemnity commission provisions held by BBNFS were, with effect from 20 February 2004, transferred to BBNFP for a consideration of £880,000 (made up of the assumption by BBNFP of a £460,000 deferred consideration creditor and the payment of £420,000 cash);
  - (2) BBNFS is currently in Creditors Voluntary Liquidation;
  - (3) BBBG companies remain BBNFS's largest creditors in the amount of approximately £5m. There are also significant outstanding claims from consumers arising from the manner in which BBNFS has carried regulated activities;
  - (4) BBNFS has supplied the FSA with a description of how it valued the transfer;
  - (5) the FSA believes that the consideration paid by BBNFP for the transfer may have been less than full value, due in part to apparent inconsistencies in the treatment of goodwill and a low valuation given to the trail/renewal stream and that the provisions made for outstanding and future claims may be inadequate.

## **Conclusions**

10. The facts and matters described above lead the FSA, having regard to its regulatory objectives, to the following conclusions:
- (1) consumers would be disadvantaged if the transfer was carried out at less than full value or if provisions for outstanding and future claims were inadequate;
  - (2) the degree of uncertainty about the valuation of the transfer and the adequacy of the provisions is such that further enquiries should be carried out;
  - (3) unless restrained, the Liquidator of BBNFS could distribute BBNFS's remaining assets to its creditors, including BBBG companies;
  - (4) the FSA therefore wishes to ensure that monies are not distributed to BBBG companies until investigations are complete, so that the monies are available for consumers if the investigations suggest that this is appropriate.

## **DECISION MAKER**

11. The decision which gave rise to the obligation to give this First Supervisory Notice was made by the Regulatory Decisions Committee on behalf of the FSA.

## **IMPORTANT**

12. This First Supervisory Notice is given to you in accordance with section 53(4) of the Act. The following statutory rights are important.

### **The Tribunal**

13. You may refer this matter to the Financial Services and Markets Tribunal ("the Tribunal"). Under section 133 of the Act, you have 28 days from the date this First Supervisory Notice was given to refer the matter to the Tribunal or such other period as specified in the Tribunal Rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this notice. The Tribunal's address is: 15-19 Bedford Avenue, London WC1B 3AS (telephone 020 7612 9700). The detailed procedures for making a reference to the Tribunal are contained in section 133 of the Act and the Tribunal Rules.
14. You should note that the Tribunal Rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the notice to the FSA. Any copy notice should be sent to Douglas Tucker at the FSA, 11<sup>th</sup> Floor, 25 The North Colonnade, Canary Wharf, London E14 5HS.
15. You have the right to make written and oral representations to the FSA (whether or not you refer this matter to the Tribunal). If you wish to make written representations you must do so within 28 days of receiving this First Supervisory Notice or such longer period as may be permitted by the FSA. Written representations should be made to the Regulatory Decisions Committee and sent to Jackie Noonan, Regulatory Decisions Committee Secretariat, at the above address. If you wish to make oral representations, you should inform Jackie Noonan not less than 5 business days before the expiry of the 28 day period.

### **Confidentiality and publicity**

16. You should note that this First Supervisory Notice may contain confidential information and should not be disclosed to a third party (except for the purpose of obtaining advice on its contents). You should also note that section 391 of the Act requires the FSA when the First Supervisory Notice takes effect, to publish such information about the matter as it considers appropriate.

### **FSA contacts**

17. If you have any questions regarding the procedures of the Regulatory Decisions Committee, you should contact either Jackie Noonan (direct line: 020 7066 3196/fax: 020 7066 3197) or Brian Whitbread, Head of the Regulatory Decisions Committee Secretariat (direct line: 020 7066 3202/fax: 020 7066 3203).
18. For more information concerning this matter generally, you should contact Douglas Tucker in the FSA's Investment Firms Department (direct line: 020 7066 1560/fax: 020 7066 1561).

Christopher FitzGerald  
Chairman, Regulatory Decisions Committee