Pension Protection Fund

Media Factsheet

on Restructuring & Insolvency

March 2017

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This document is intended to provide general, factual information to journalists on the PPF's involvement in company insolvencies. It should be looked at in conjunction with the PPF's restructuring principles and approach to insolvency and restructuring, both of which can be found on the PPF's website. It should not be used as a substitute for proper legal advice. For further information, clarification or quotes please contact the PPF Press Office using the contact details in the Media Centre section of our website.

RAAs

Q. What is an RAA?

RAA stands for Regulated Apportionment Arrangement.

Occasionally an employer, with a pension scheme in deficit, faces insolvency and will propose a restructuring package to allow them to continue trading, while the PPF takes on the pension scheme.

Such situations are rare and we do not agree to them lightly. We will only support such proposals if they provide a significantly better return for the pension scheme than it would receive through the normal insolvency process. The PPF's restructuring principles (see below), which are published on the PPF website, must be met for an RAA to happen.

RAAs are normally only possible where a scheme is expected to enter an assessment period i.e. insolvency which triggers the assessment period is inevitable.

Both The Pensions Regulator (TPR) and the PPF have statutory functions as part of the process. Where an RAA is proposed, a draft clearance application should have been submitted to and considered by TPR before the PPF engages in discussions. The PPF must confirm that it does not object to the RAA by issuing a letter of non-objection. If the PPF considers a proposal is worth pursuing, it will ultimately be put to the respective Boards of the PPF and TPR before the PPF can confirm whether we are prepared to proceed or not.

Q. What are the PPF's restructuring principles?

To prevent 'scheme dumping' the PPF has a set of principles which must be met for us to take part in any form of restructuring.

1. Insolvency has to be inevitable – this means that the pension scheme will be entering a PPF assessment period whatever happens.
2. The pension scheme will receive money or assets which are significantly better than it would have otherwise received through the insolvency of an employer.
3. What is offered to the pension scheme in the restructuring is fair compared to what other creditors and shareholders will receive as part of the transaction.
4. The PPF will seek at least 10 per cent equity in the restructured company for the scheme if the future shareholders are not currently involved with the company. We will seek at least 33 per cent if the future shareholders are parties currently involved with the business. This is to make sure that the scheme shares in any value created for the employer by discharging its pension obligations through the restructuring.
5. We need to make sure the pension scheme would not have been better off if TPR had instead used its moral hazard powers and issued a contribution notice or financial support direction.
6. Where the transaction involves a refinancing, the fees charged by the banks are deemed by the PPF to be reasonable.
7. The party seeking the restructuring pays the costs incurred by both the PPF and the trustees in delivering the restructuring. These will include any fees for legal and financial advice and any other costs incurred by the PPF as a result of the transaction, such as TUPE liabilities relating to the staff costs of the pension scheme.

Pre-pack administration

Q. What is a pre-pack administration?

A pre-pack administration is where the sale of a business and assets is negotiated before the appointment of administrators and completes either immediately upon, or shortly following the appointment. This may be for good commercial reasons and be the right approach in certain circumstances.

Q. Why do companies choose a pre-pack?

A pre-pack can be attractive for a number of reasons including:

- allowing the sale of a business without impacting on business continuity;
- allowing the business to protect any assets where in a formal insolvency process followed by a period of trading a significant loss of value may be caused e.g. resulting from the loss of key employees, suppliers and customers;
- by agreeing the deal in advance of a formal insolvency, the business is often sold without negative publicity, enhancing value.

Q. What are the main concerns with a pre-pack?

There are a number of criticisms associated with pre-packs, including a lack of transparency and proper market testing to determine the value of the business. Conduct can often be questioned, particularly whether existing stakeholders have used it to abandon the liabilities and then reacquire the business without repercussions.

Q. What measures are in place to prevent pension 'dumping' in the instance of a pre-pack?

There is the possibility that the process can be used to 'dump' the company's liabilities, including the pension scheme. To an extent, the insolvency profession has recognised and gone some way to address this problem through the Statement of Insolvency Practice 16 (SIP16).

SIP16 requires the insolvency practitioner (IP) to provide information on the transaction and to justify why an immediate sale rather a sale with a proper post-administration marketing period was required. It also requires reporting on consultation with the major creditors which are most likely to include the pension scheme where one exists.

The PPF carefully reviews all insolvency cases as they are notified. The PPF Restructuring & Insolvency team is staffed by experienced insolvency professionals who review each case. If the PPF has concerns, the case will be drawn to the attention of TPR to consider whether it wishes to use its moral hazard powers against those involved. TPR may also initiate investigations based on its own concerns.

Q. What is the PPF's involvement in a pre-pack?

When presented with administrators' proposals following a pre-pack, the PPF will:

- Consider the extent to which the trustees/PPF have been consulted prior to the administrators' appointment;
- Assess whether the consultation has been effective and the views of the trustees/PPF have been properly taken into account, including consideration of the costs of the process;

- Resolve to appoint an alternative IP to act as CVA (Company Voluntary Arrangement) supervisor or liquidator of the company (in the short term if necessary) as the exit route where there has been no or ineffective consultation and there remain concerns over the process, providing the opportunity to examine the conduct of the directors & administrators;
- Consider the need for a compulsory winding up order to be made in situations where the company will be dissolved immediately after administration, to allow scrutiny by a liquidator.

Q. When does the PPF first hear about a pre-pack?

The PPF has published guidance on its approach to pre-packs. From this IPs should be clear that the PPF expects to be consulted as early as possible when a pre-pack is being considered by an employer. The PPF needs to understand at an early stage why a pre-pack is appropriate and what steps are being taken to ensure that maximum value is being obtained.

If the guidance is not followed, then the PPF will become aware of the situation when it receives the s120 notification.

Q. Can pre-packs be challenged and by whom?

It is very difficult to challenge a pre-pack before it occurs simply because sufficient information is unlikely to be available and legal standing to challenge may not exist (the PPF only assumes the scheme creditor rights on the insolvency appointment and the pre-pack is likely to take place minutes after the appointment).

It is possible to challenge what an administrator has done after the event although this will only result in a compensation claim against the IP. This is likely to be brought by a subsequently appointed liquidator of the estate. If it is clear that actions have been taken with the intention of causing detriment to the pension scheme, then moral hazard action may be taken by TPR.

CVAs

Q. What is a CVA?

A Company Voluntary Arrangement is a legally binding agreement, generally where a company proposes to pay back a compromised amount to its creditors over a set time period, allowing the company to continue trading. It must be agreed to by creditors owed 75% of the debt. In some cases the pension scheme may be the biggest creditor, so the PPF may be critical in approving the CVA. If the CVA does not go ahead the company may enter some other form of insolvency.

Q. In what circumstances would the PPF veto a CVA?

The PPF will consider the extent to which the CVA proposal affects the pension scheme. If only one group of creditors, such as landlords, are affected we will consider whether the company will be viable after the CVA is implemented in deciding how to vote.

If the CVA directly affects the pension scheme, the PPF applies its restructuring principles (as in the case of RAAs above). We will only support such proposals if they provide a significantly better return for the pension scheme than it would receive through the normal insolvency process.

What happens next?

Q. What happens after the PPF takes over creditor rights?

When a company enters administration the IP submits a Section 120 notice to the PPF to inform us about the Pension Scheme. Once the scheme has been validated it enters the PPF assessment period. The PPF acquires the rights the trustees had as creditor to the employer in relation to any debt due to the pension scheme.

In practice, this means the PPF is responsible for:

- Submitting the proof of debt for the amount due under Section 75 of the Pensions Act 1995 to the IP;
- negotiations with the company/IP, including discussions involving compromise arrangements; and
- representing the pension scheme at creditors' meetings and on any creditors' committee if constituted.

The PPF will lodge a claim with the IP for the full value of the Section 75 debt. In practice the employer will have sufficient assets to pay the full value, so the PPF and other creditors will subsequently receive a dividend for every pound of debt claimed (e.g. 20p in the pound). This amount is calculated by reference to the net realisation that have been made and the total value of creditors' claims. The PPF has a responsibility to seek to recover maximum value on behalf of the pension scheme members. In addition to making a claim for the Section 75 debt, in some circumstances this may entail working with the IP and TPR to look into how the scheme was funded before the company went into insolvency, to make sure the scheme was not wrongly deprived of assets. The PPF has no investigatory or enforcement powers but works closely with TPR.

Glossary

S75 or Section 75 debt – The deficit of a pension scheme (assets minus liabilities) on a 'full buyout' basis – i.e. the amount needed to secure a buyout for scheme members to receive their full benefits.

S89 or Section 89 report – Published by TPR where it has exercised, or considered exercising, its powers in relation to a scheme.

S143 or Section 143 valuation – Used to determine whether a scheme should enter the PPF following an insolvency event – i.e. whether or not the scheme has sufficient assets to pay members benefits above PPF compensation levels and exit the PPF assessment period.

S145 or Section 145 notice – Issued when a scheme completes assessment and formally enters the Pension Protection Fund. It represents binding approval of the S143 valuation.

S179 or Section 179 valuation – Used to calculate scheme underfunding to determine the risk-based pension protection levy that a scheme should pay.

S120 or Section 120 Notice – The procedure by which within 14 days of becoming aware of a defined befit pension scheme, an IP formally notifies the PPF, TPR & trustees that a company has entered insolvency. The PPF then has 28 days to check the scheme's eligibility. If the scheme is eligible we will validate the S120 and the scheme formally enters the PPF assessment period. The date of the insolvency event is the date of the start of the assessment period.

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