

## PPF Restructuring and Insolvency Team

### Guidance Note 1

#### The PPF's legal standing and approach to the governance of insolvency proceedings

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## 1. Background

- 1.1 The interaction between a defined benefit pension scheme, its trustees, the Pension Protection Fund (PPF) and the Insolvency Practitioner (IP) appointed to deal with the scheme employer is important to understand. Decisions may need to be made quickly to preserve value, and resolutions approved by creditors in a timely manner to support those decisions. The PPF places great value and emphasis on timely engagement with the correct parties.
- 1.2 The interaction between insolvency law and pension law can appear complex, but IPs will find that an awareness and understanding of that interaction will help when they are dealing with defined benefit schemes. The PPF Restructuring & Insolvency (R&I) Team is available to assist where possible, and its contact details are provided in this guidance. However, it cannot give legal advice.
- 1.3 The PPF acquires the scheme creditor rights in insolvency situations. Those situations and the general policy approach we adopt when considering decision procedures and other interactions with IPs are set out in more detail in this guidance.
- 1.4 The scheme is frequently the largest creditor of its insolvent employer(s), with the associated voting rights in relation to the insolvency.

## 2. PPF standing as a creditor

- 2.1 If the employer of an eligible defined benefit pension scheme undergoes a qualifying insolvency event<sup>1</sup>, a PPF assessment period will commence. During the assessment period, we shall determine whether we should adopt responsibility for the scheme. This process is set out in more detail in our General guidance on Insolvency and the Assessment Period, and in Guidance note 10 – Potential claims as a result of employer insolvency.

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<sup>1</sup> Section 121(3) Pensions Act 2004 and Regulation 5 Pension Protection Fund (Entry Rules) Regulations 2005.

- 2.2 During the assessment period, the creditor rights in relation to any debt owed to the scheme trustees by the employer are exercised by the PPF in accordance with section 137 Pensions Act 2004.
- 2.3 The PPF exercises these rights to the statutory exclusion of the trustees. Any resolution that an office holder obtains from the pension scheme trustees after the assessment period has started is therefore invalid.
- 2.4 IPs are reminded that all correspondence relating to the insolvency proceedings should be addressed to the PPF's R&I Team (see the contact list at the end of this guidance) from the date of their appointment, or the initial creditor notification if earlier.
- 2.5 There should always be enough time available to agree strategy and matters such as fee proposals, and to obtain valid resolutions, regardless of the decision-making process.
- 2.6 Whilst preparing for insolvency, we expect prospective office holders to identify if the entity they are dealing with is an employer of a defined benefit pension scheme. In those circumstances, it should be assumed that the PPF will have an interest in the impending insolvency, and we should be contacted even before the section 120 notice<sup>2</sup> is submitted. The search function in the online section 120 submission portal on our website can be a useful tool, but a review of the entity's records and enquires of management should also be undertaken.
- 2.7 The legal effect of section 137 Pension Act 2004 will not apply until the qualifying insolvency event. However, early engagement has the benefits of:
  - helping the IP to obtain valid resolution approval at the appropriate juncture;
  - enabling the prospective office holder to discuss and agree strategy with the PPF from the outset, assuming the scheme is a significant creditor; and
  - ensuring that the tasks associated with the PPF assessment period can commence as quickly as possible following the insolvency event. This can shorten the assessment period and reduce uncertainty for scheme members.
- 2.8 We expect IPs to understand and recognise that the PPF will usually have an economic interest in their fees and will be part of the approving body by operation of law. More information about fee approval, both in the periods prior to and following IPs' formal appointment, is provided in Guidance Note 2 – Insolvency Practitioner remuneration.
- 2.9 A members' voluntary liquidation is not a qualifying insolvency event for PPF assessment period purposes.
- 2.10 The Corporate Insolvency and Governance Act 2020 (CIGA) obliges the monitor to notify the PPF of certain matters in relation to a moratorium where the company is an employer of an eligible defined benefit scheme. The Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) Regulations 2020 (the Regulations) provide for the PPF to exercise the rights of the pension scheme trustees in respect of voting on an extension of the moratorium.
- 2.11 The Companies Act 2006 as amended by CIGA imposes obligations to notify the PPF of proposals for a Restructuring Plan where the company is an employer of an eligible

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<sup>2</sup> Section 120 Pensions Act 2004

defined benefit scheme, and the Regulations provide for the PPF to exercise the rights of the pension scheme trustees in respect of voting on the proposals.

- 2.12 More information about the PPF's approach to moratoriums and Restructuring Plans is available in Guidance note 9 – Corporate Insolvency and Governance Act 2020.

### **3. Creditors' and liquidation committees**

- 3.1 Creditors sometimes want to form a creditors' or liquidation committee. While a committee can perform a useful purpose in some circumstances, the PPF considers that they should only be convened where it is clear that they can add significant value to the insolvency process and assist the IP in maximising realisations.
- 3.2 In the majority of cases where there is a defined benefit pension scheme debt, it will be at such a level that most of the economic benefit from the insolvency will flow to the scheme or the PPF. In these circumstances, the specialist PPF R&I Team will closely monitor and, where appropriate, challenge IPs on their actions and costs.
- 3.3 The PPF is well placed to influence the conduct of the insolvency through direct contact with the IP. This facilitates more effective control, as more confidential information can be shared than might be the case with a committee, and the PPF is usually in a position to apply a greater level of scrutiny and understanding through its industry-experienced professionals.
- 3.4 It also mitigates some of the costs of a formal committee.
- 3.5 These measures have the objective of maximising the potential return to the scheme and, as a result, to creditors as a whole. The value of this approach for creditors has been demonstrated in the past by cases such as BHS.
- 3.6 The result is that where the PPF has a majority unsecured interest, it will not usually propose or support a resolution to form a committee.
- 3.7 If the office holder considers that a committee will be beneficial, supporting information demonstrating the need should be provided to the PPF in advance of any decision procedure proposing a committee.
- 3.8 In circumstances where the PPF agrees with the office holder that a committee is necessary or beneficial, it will normally want to be represented. Office holders should contact the PPF's R&I Team to obtain details of the appropriate representative.
- 3.9 The PPF does not consider it appropriate to propose forming a committee for the sole purpose of approving office holders' remuneration, except in the case of Scottish insolvencies where a committee will mitigate the need (and cost) to go to court for fee approval. It is accepted, however, that IPs are often required by statute to propose a committee, regardless of the expected benefits or drawbacks.

## 4. PPF as a disenfranchised creditor

- 4.1 Any situation where resolutions are obtained (including approval of the basis of remuneration) or actions taken without the PPF having an opportunity to consider and vote will, where appropriate, be investigated by the R&I Team. Office holders should contact the team in the event that they identify any situation where resolutions have been obtained without the PPF's previous involvement.
- 4.2 Particular care needs to be taken in CVL cases where passing a resolution to wind-up at a meeting of members will trigger the start of an assessment period and the ability to exercise the scheme trustees' creditor rights will pass to the PPF in respect of the subsequent decisions.
- 4.3 The PPF will exercise its statutory rights to protect its interests and those of the schemes it protects.
- 4.4 The PPF submits complaints and reports to the relevant authorising bodies as deemed necessary when it considers that it has been disenfranchised by the actions of insolvency office holders.
- 4.5 Office holders should not rely on resolutions approved by the pension scheme trustees when it is apparent that the right or interest is (or will be) held or exercised by the PPF. We regard any prior agreement between the office holder and the scheme trustees as invalid. Office holders should contact the R&I Team if they are in any doubt about the circumstances applicable to a case.

## 5. Insolvency Practitioners' proposals and resolutions

- 5.1 In any circumstance where the scheme's eligibility for entry into the PPF is uncertain, it is in the best interests of the office holder that any resolutions are approved jointly by the PPF and scheme trustees. This ensures that the vote is valid irrespective of the scheme's eligibility.
- 5.2 The PPF will instigate this approach if it is required, but IPs can help by ensuring that the PPF's R&I Team is aware of any impending voting deadline as early as possible, particularly in the case of a CVL, where a section 120 notice cannot be submitted ahead of the insolvency event.
- 5.3 The PPF has a standard approach to certain proposals and to resolutions proposed in various types of insolvency situations.
- 5.4 Remuneration – the approach is explained in our Guidance Note 2 – Insolvency Practitioner remuneration.
- 5.5 The formation of committees – see section 3 above.
- 5.6 Voluntary Arrangements – the approach is explained in our Guidance Note 5 – Company Voluntary Arrangements. The qualifying insolvency event relating to Company Voluntary Arrangements, Individual Voluntary Arrangements and Partnership Voluntary

Arrangements is usually the submission of the nominee's report to court and is never the decision procedure convened to consider and approve proposals.

- 5.7 Discharge of administrators' liability – a discharge effective at the end of the administration is often sought in administrators' proposals. The PPF's position is that it cannot conclude whether this is appropriate at such an early stage. This decision can only be made when the administrators' work has largely been concluded, and a resolution should be sought at that time. Accordingly, we will vote against any such resolution unless it is intended to bring the administration to an end immediately following the approval of the proposals.

## Contact details

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Please note this leaflet seeks to assist stakeholders and insolvency professionals on our approach to restructuring and insolvency cases. It is an accompaniment to existing publications from the PPF published on our website, not a substitute. We encourage restructuring & insolvency practitioners and trustees to seek appropriate, specific case guidance.

See [www.ppf.co.uk](http://www.ppf.co.uk) for further information.