

PPF Restructuring and Insolvency Team
Guidance note 9
Corporate Insolvency and Governance Act 2020

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1. Background

- 1.1. The Corporate Insolvency and Governance Act 2020 (the Act) came into effect on 26 June 2020. It was supplemented by The Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) Regulations 2020 as amended (the Regulations) which came into operation on 7 July 2020. The Act introduced both a number of time limited measures and permanent measures that found their origin as far back as the 2016 Corporate Insolvency Framework Consultation.
- 1.2. Following initial concerns over the interaction with pension legislation, a number of amendments were made during the passage of the Act but it was recognised that there may still be areas that have to be changed. Accordingly, the Secretary of State has been given the power to make further amending regulations which may in turn require a change to the PPF approach.
- 1.3. As at November 2023, the procedures still have not been widely used but remain a useful restructuring tool. Care has to be taken when applying the provisions of the Act with the requirements of the pension’s legislation.
- 1.4. This guidance is subject to alteration and amendment as cases develop the law and if provisions of the legislation change.

2. Moratorium

2.1. Statutory background

- 2.1.1. The Act amends the Insolvency Act 1986 (IA86) and introduces the concept of a moratorium initiated by the directors of company which among other things suspends payment of most historic debts and prevents action being taken by the creditors to recover sums due. The moratorium is initially for a period of 20 business days but can be extended.

2.1.2. The Act obliges the monitor to notify the PPF of certain matters where the company is an employer of an eligible defined benefit scheme and 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.

2.1.3. A moratorium is not a qualify insolvency event for the purposes of the Pension Act 2004 (PA04) and therefore does not result in the commencement of a PPF assessment period.

2.2. Requirement to notify

2.2.1. Section A8(2)(d) of IA86 requires the moratorium Monitor to notify the PPF that a moratorium has come into effect in relation to an employer of a defined benefit scheme that is eligible for the PPF and the date that it comes to an end. The Monitor must also notify the PPF of any extension to the moratorium.

2.2.2. Insolvency Practitioners should note that failure to provide the necessary notification without reasonable excuse is an offence.

2.3. Method of notification

2.3.1. As an assessment period has not commenced, IPs should **not** use the PPF online reporting system, which is designed solely for making returns in accordance with section 120 of PA04. Notification of the moratorium, preferably using the form in Appendix 1 and available on the PPF website, should be sent to: 2020actnotification@ppf.co.uk

2.3.2. The PPF form includes space to provide any additional information that the IP believes may be of assistance to the PPF in managing the case. This could for example include information on the recovery strategy being adopted, any material facts relating to the case or the likely timeline. Provision of this information is purely voluntary.

2.4. Engagement expected

2.4.1. The pension scheme is likely to be a substantial creditor of the company. As such we expect that the directors and the Monitor will fully engage with the pension scheme trustees, the PPF and The Pensions Regulator (TPR), who are also entitled to receive notice of the moratorium.

2.4.2. The PPF expects to be provided with all the relevant information necessary to permit the proper management of the pension scheme by the trustees including an understanding of the ongoing covenant, existing funding arrangements and the PPF exposure to the PPF deficit and drift. This will be especially important if the directors consider it will be necessary for the moratorium to be extended beyond its initial period.

2.5. Voting & trustee consultation

2.5.1. Regulation 2(2) of the Regulations provides for the PPF to exercise the creditor rights of the trustees of the pension scheme to the exclusion of the trustees in relation to any vote to extend the moratorium. This means that any vote lodged by the scheme trustees would be invalid. The Regulations also require the PPF to consult with the

trustees before exercising the voting rights.

2.5.2. Monitors and directors must factor into their time planning the need for this consultation including, where appropriate, obtaining relevant advice from trustees' covenant advisors. Trustees must ensure that they have the correct level of expertise on their board and have properly qualified professional advisors to address restructuring situations. This should be addressed no later than the potential need for a moratorium becoming apparent. The PPF Trustee and Support Services panel provides experts with a proven background in the issues that will arise who can be engaged by existing trustees to assist them.

2.5.3. The PPF considers that the trustees' vote (exercised by the PPF) on a proposed extension to a moratorium should have the value of the estimated debt that would be due from the employer if section 75 of the Pensions Act 1995 (PA95) applied. This is because should the moratorium fail with a subsequent insolvency, a debt will become due under s75 PA95 and that debt will be claimed in the employer's insolvency.

2.6. Termination of PPF's exercise of creditor rights

2.6.1. The PPF will cease to exercise the trustees' creditor rights on the date the moratorium ends. The rights will remain with the PPF if there is an immediate insolvency event or a compromise or arrangement (within the meaning of section 901A of the Companies Act 2006 (CA06) is proposed. If neither occurs, the rights will revert back to the trustees.

2.7. PPF considerations on moratoriums

2.7.1. The PPF is supportive of genuine attempts to restructure viable businesses to enable them to continue and meet their commitments to defined benefit pension schemes. However, the legislation is specific that the Monitor must issue a statement that "it is likely that a moratorium for the company **would** result in the rescue of **the company as a going concern**" (emphasis added).

2.7.2. In our view, this is a very high bar, meaning that the corporate entity will survive at the end of the moratorium period and any subsequent procedure. If the Monitor does not check or fails to consider on an ongoing basis that the company meets the criteria of the moratorium, the PPF may choose to present a challenge to the court.

2.7.3. The PPF will:

- Be mindful of the objectives of the pension scheme and consult with the trustees on its approach.
- Consider the position of the PPF, the effect of the moratorium on a potential claim by the pension scheme on the PPF's balance sheet and the subsequent effect on PPF levy payers.
- Consider the activities and strategy pursued by the directors in respect of restructuring the company and its effect on different classes of stakeholders.
- Require that any directors' proposals for restructuring the company are in line with published PPF guidance (available on the PPF website).
- Only support proposals that do not set an adverse precedent in respect of

PPF policy on restructuring and insolvency.

2.8. Considerations on extensions

2.8.1. In addition to the considerations above, the PPF will consider voting in favour of an extension to the moratorium where:

- There is a clearly explained strategy to achieve a going concern rescue of the company.
- It is clear that there is a strong likelihood that the strategy will be successful, e.g., appropriate finance is available/being arranged, there is sufficient stakeholder support.
- Stakeholders are being treated appropriately and equitably.
- There is full and frank disclosure of information.

3. Restructuring Plans

3.1. Statutory background

3.1.1. The Act amends CA06 and introduces the concept of a compromise or arrangement between a company and its creditors and/or members, the purpose of which is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties the company is facing. The proposals to achieve this will be set out in a "Restructuring Plan" (RP)

3.1.2. CA06 imposes obligations to notify the PPF of the proposals where the company is an employer of an eligible 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.

3.1.3. The proposal of a RP is not a qualify insolvency event for the purposes of PA04 and therefore does not commence a PPF assessment period.

3.2. Requirement to notify

3.2.1. Section 9011 (2) of CA06 requires the company to notify the PPF of the RP proposals in relation to an employer of a defined benefit scheme that is eligible for the PPF. Directors should note that failure to provide the necessary notification is an offence. As a minimum, the notification must be provided at the same time as other creditors receive it. If the scheme is a creditor that will be affected by the proposals, the PPF considers it to be best practice to engage early with it and the scheme trustees.

3.3. Method of notification

3.3.1. As an assessment period has not commenced, the company should **not** use the PPF online reporting system which is designed solely for making returns in accordance with s120 of PA04. Information and notices should be sent to:

2020actnotification@ppf.co.uk

3.4. Engagement expected

3.4.1. The pension scheme is likely to be a substantial creditor of the company. As such, we expect that the directors and their advisors will fully engage with the pension scheme trustees, the PPF and TPR, who are also entitled to receive notice of the RP proposals.

3.4.2. We expect to be provided with all the relevant information necessary to permit the proper management of the pension scheme by the trustees including an understanding of the ongoing covenant, existing funding arrangements and the PPF exposure to the PPF deficit and drift.

3.4.3. Any RP proposals should adhere to our published PPF principles as set out in our guidance entitled "Guidance on the PPF's approach to Employer Restructuring" and we will apply the same considerations when assessing the viability of the ongoing company as we do with CVAs. These are set out in section 3 of Guidance Note 5 – Company voluntary arrangements. All PPF guidance is available on our website.

3.5. Voting & trustee consultation

3.5.1. Regulations 3(2) and (3) of the Regulations provide for the PPF to exercise certain rights under part 26A CA06 as though the PPF were a creditor, and for the PPF to exercise those rights in addition to the pension scheme trustees.

3.5.2. However, regulation 3(4) specifically provides for the PPF to exercise, to the exclusion of the trustees, the creditor rights of the pension scheme trustees in respect of voting in meetings summoned under section 901C (1) CA06. This means that any vote lodged by the scheme trustees would be invalid.

3.5.3. The Regulations also require the PPF to consult with the trustees before exercising the voting rights but for this to be meaningful, trustees may require additional time to understand what is being asked. Accordingly, directors must factor into their time planning the need for this consultation including, where appropriate, the ability for the trustees to obtain relevant advice from their professional advisers.

3.5.4. Trustees must ensure that they have the correct level of expertise on their board and have properly qualified professional advisors to address restructuring situations. This should be addressed no later than the need for the potential restructuring becoming apparent. The PPF Trustee and Support Services panel provides experts with a proven background in the issues that will arise who can be engaged by existing trustees to assist them.

3.5.5. The PPF considers that the trustees' vote (exercised by the PPF) on a RP should have the value of the estimated debt that would be due from the employer if s75 PA95 applied. The PPF will submit a claim for the purposes of valuing of the scheme vote at the estimated PA95 s75 level. The reason for this is twofold. Firstly, should the RP fail with a subsequent insolvency, a debt will become due under s75 PA95 and that debt will be claimed in the employer's insolvency. Secondly, the judgment in *Re gategroup Guarantee Ltd [2021] EWHC 304 (Ch)* confirms that restructuring plans are "insolvency proceedings".

3.6. Interaction with pensions legislation

3.6.1. Directors should be mindful of earlier pension legislation as well as the 2020 legislation. In particular, they should ensure that their RP proposals would not compromise the pension scheme's eligibility for PPF protection.

3.6.2. TPR has wide ranging powers to protect both scheme members and the PPF. We work with and encourage TPR to use these powers to the fullest extent possible to provide the protection envisaged by statute.

3.7. PPF considerations on RPs

3.7.1. The PPF will consider the following factors when deciding its approach to voting on any RP proposal:

- Whether the proposal complies with the published PPF restructuring guidance as mentioned above.
- Whether the proposals are being used as a tool to adjust pension scheme liabilities or payments of deficit repair contributions under a recovery plan. RPs must not be used to attempt to abandon pension schemes.
- Whether there is anything in the RP that would disadvantage pension scheme members such as potentially compromising the pension scheme's eligibility for PPF protection.
- Whether there is anything contained in the RP that would adversely affect or bind future negotiations.
- Whether the RP ensures that the scheme is no worse off in the future than today e.g., by guaranteeing the current insolvency outcome.
- The extent to which PPF drift (as explained in Guidance Note 6 - How PPF Drift arises and should be addressed) is fully covered by the proposed RP.
- Whether the RP presents an adverse precedent risk to the PPF.

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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 for further information.

Appendix 1 - PPF Notification Form – commencement, extension or end of a Moratorium

Section A8 (2) (c) & (d) Moratorium Notification

This notice should be submitted in accordance with section A8 (2) (c) & (d) of the Insolvency Act 1986 (as amended) ("the Act"). This notice may be used by an insolvency practitioner to inform the PPF that a sponsoring employer of an occupational pension scheme has commenced, extended or ended a Moratorium as defined by Sections A2 to A5 of the Act.

Please use black ink and CAPITAL LETTERS throughout. * means delete as appropriate.

Name of Insolvency Practitioner	
Insolvency Practitioner number (If applicable)	
Firm Name (where applicable)	
Address of Insolvency Practitioner	
Telephone	
Email	
Contact name	
I hereby give notice as required under the Act that the following employer:	
Employer name	
Address of employer	
Telephone	
Email	
has obtained / extended / ended* a Moratorium as set out in the Act	
Date of commencement / extension / end* of the Moratorium	
The Moratorium extension has been granted by the creditors / Court *	

The afore mentioned employer is the sponsoring employer of the following occupational pension scheme(s)	
Name of pension scheme(s)	
Pension Scheme registration number(s)	
Name of Trustees or Managers of the scheme(s)	
Firm name (where applicable)	
Address	
Telephone	
Email	
Scheme address (if different to the trustee)	
The relevant documentary evidence is attached.	
Voluntary disclosure of other relevant information (e.g. anticipated exit route)	

The information provided above is correct to the best of my knowledge and belief and complies with the notification requirements set out in the Act.

Signed _____

Dated _____

Please send this form to:

The Pension Protection Fund
Restructuring & Insolvency Team
Renaissance
12 Dingwall Road
Croydon CR0 2NA

Email: 2020actnotification@ppf.co.uk