Thinking ahead
Contingency planning for trustees

Companies which fail are failing more quickly. It was recently reported that companies that enter into administration, a CVA, a debt restructuring or a distress sale within a year of issuing multiple profit warnings are doing so more quickly – on average, just 91 days after a third profit warning - than during the financial crisis. Against this backdrop, the PPF has issued press releases explaining its role during a restructuring or insolvency.

There have been a number of high-profile company restructurings in recent years, and many of those companies sponsor DB pension plans. Of increasing prevalence in the retail sector is the company voluntary arrangement (CVA). This enables a company with serious financial difficulties to reach an agreement to compromise creditors' claims – including those of any DB pension plan – so as to allow the company to be run on.

CVAs

A CVA binds all creditors (subject to exceptions and creditors' rights of challenge) and often results in the PPF assuming responsibility for a DB pension plan. When a CVA proposal and nominee's report is lodged with the court, this triggers a potential section 75 debt. In many cases it also triggers a PPF assessment period meaning that the PPF automatically acquires the trustees' creditor voting rights (whether or not the plan is expected to enter the PPF at the end of the assessment period). The PPF discusses each CVA proposal with TPR, which assesses it from a slightly different viewpoint (consistent with TPR's broader statutory objectives and its arsenal of anti-avoidance powers).

Whilst the PPF usually assumes the trustees' creditor voting rights, the trustees still have a role to play in the CVA. The trustees will be asked to quickly provide information and obtain advice to help the PPF and TPR to scrutinise the CVA proposal, as the formal proposal is often not sufficiently detailed. The trustees will be involved in deciding the basis on which the potential section 75 debt will be calculated and the package of mitigation needed from the company in order that the PPF feels able to vote in favour of the CVA.

A CVA proposal cannot proceed unless at least 75% - by value - of creditors vote in support of it. Often the size of the company's potential section 75 debt, relative to the value of other creditors' claims, is such that the PPF can, if it wishes, use its voting power to prevent a CVA from being approved. According to the PPF, most CVAs are not successful in the medium-long term, and the PPF only votes in support of a CVA proposal if it decides (in line with its published 'restructuring principles') that the pension plan would be adequately protected. The PPF has faced criticism of its perceived 'super creditor' status and some landlords have recently challenged CVAs that lessened a company's property lease obligations but not its other liabilities (such as pension liabilities). It will be interesting to see whether this results in a modified approach being taken to pension plan liabilities.

Practical steps to take now

An employer might appear to be stable and not be presenting any immediate difficulties, but the UK potentially faces a prolonged period of economic uncertainty. What can trustees do to mitigate some of the risks resulting from employer distress?

There are practical steps that trustees should take - ideally when the employer is solvent - to ensure they are well prepared for any future insolvency. These include ensuring they have independent access to the plan's bank account and a contingency plan for running an inhouse pensioner payroll independently of the employer, compiling a full set of the plan's governing documents and identifying all of the plan's statutory employers. These action points, and more, are covered in the PPF's 'Contingency planning for employer insolvency' guide.

Additionally, where an employer has already been identified as vulnerable, the trustees should ask to be kept informed of developments affecting the company - an information-sharing protocol can help to ensure there is no misunderstanding as to the trustees' information requirements. The trustees should undertake regular covenant assessments and consider de-risking the plan's investments. The PPF also recommends that trustees have, or have access to, experience of managing a pension plan where the employer might become insolvent. Experienced independent trustees and advisers can lead on formulating a contingency plan and ensure the trustees respond appropriately to events as they arise. Early preparations should help to ensure a better member experience at what would be an unsettling time.

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