

Statement

Notes for insolvency practitioners: trustees and statutory notices

September 2015

The Pensions
Regulator

This statement is intended to assist insolvency practitioners ('IPs')¹ to understand the regulator's views on two points of particular relevance to them.

IPs and scheme trustee appointments

This is about the regulator's power to appoint trustees to schemes in some circumstances.

Trustee appointments: employer insolvency

Where an occupational pension scheme's employer has entered insolvency, we can appoint a trustee to the scheme. This is under section 23 of the Pensions Act 1995.

When an IP is appointed in respect of an insolvent employer, it does not always mean that we will appoint a trustee to the scheme. Making this type of trustee appointment is discretionary on our part. Whether we do so will be determined on the scheme's circumstances – for example, because the employer is also the trustee, or because the trustee indicates he is not willing or able to continue to act².

For these appointments, we will choose a candidate from our trustee register: www.tpr.gov.uk/trustee-register.

IPs and trustees of an employer's pension scheme

Before any application the IP may wish to consider:

- ▶ exercising any employer power to appoint a new trustee, or
- ▶ acting as a trustee (on behalf of the insolvent employer where the employer was a trustee)

This could be to the benefit of the IP, the scheme's members and the creditors of the employer as:

- ▶ the IP has greater control of the process generally
- ▶ it could speed up the resolution of any scheme issues which could affect the progress of the employer insolvency process, and
- ▶ it may provide greater certainty about scheme costs

¹ For these purposes, the term 'insolvency practitioner' should be taken to include the Official Receiver.

² Trustees should not assume that: (i) they are discharged of their trusteeship, or (ii) that they have no risk of liability for acts or omissions occurring after they regard their involvement with the scheme as having ended. A current or former trustee should consider obtaining legal advice where there is any doubt about their position.

IP appointing a trustee

When appointing a trustee, an IP should be satisfied that the selected trustee:

- ▶ is able and willing to act
- ▶ is 'independent' to the extent that the selected trustee has no connections with the scheme, the employer or the IP
- ▶ is capable of discharging trustee duties
- ▶ charges professional fees which are reasonable (if indeed it charges fees at all), and if fees are charged we suggest the IP investigates a fixed-fee appointment

Where the scheme is (or is likely to be) subject to a Pension Protection Fund (PPF) assessment period, or may qualify for the Financial Assistance Scheme (FAS), the IP should consider the selected trustee's experience and ability to deal with PPF/FAS issues. IPs may wish to have regard to the regulator's trustee register (www.tpr.gov.uk/trustee-register) and the PPF's views (and its Trustee Advisory Panel, which consists of trustees which the PPF considers to have relevant experience and skills on PPF/FAS matters).

IP acting as trustee

In most circumstances, an IP is capable of performing the employer's trustee function. There may be reasons why this is neither practical nor appropriate, for example:

- ▶ there is a conflict between the trustee and IP functions (such as a dispute about the existence of the employer liability or there is a significant section 75 debt)
- ▶ where the tasks required of the trustee are so extensive or complex that an IP could not devote sufficient time or expertise to them in a trustee role (such as where litigation is required to recover trust assets or to realise a negligence claim)

IPs and statutory obligations to notify

It appears that some IPs are unclear about some of their statutory obligations to make notifications to The Pensions Regulator (among other parties). Specifically, some IPs believe the obligation to notify in section 22 Pensions Act 1995 (which applies for example where an IP begins to act in relation to the scheme's employer) is overridden by the obligation in section 120 Pensions Act 2004 (which applies where there is an insolvency event).

It is true that some events could trigger both obligations. Nonetheless, the obligations in sections 22 and 120 are separate and distinct, and the regulator expects that where these obligations both apply they will both be complied with.

If any IP is unclear about when these obligations apply and what is required to comply with them, we suggest they obtain legal advice.

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