

This guidance is tailored specifically for official receivers. It is discretionary and not designed for use by third parties. This version was the most up to date guidance available to official receivers as at 11 March 2020

57. Pensions

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Frequently asked questions – Pensions in bankruptcy

These FAQs are to assist official receivers in understanding the subject and should be read in conjunction with the more detailed guidance given in the main body of the chapter.

I thought that pensions were excluded from the bankruptcy estate?

All approved pensions in cases made on a petition presented on or after 29 May 2000 are excluded from the bankrupt's estate. This includes not only the pension fund itself, but any related rights such as the right to receive a death benefit or the right to bring a legal claim in respect of the pension.

What is an approved pension?

In essence an approved pension is one that has been approved by HMRC as being tax compliant.

How will I know if a pension has been approved by HMRC?

We take the position that a pension with a recognised national provider or a recognised national employer will be tax approved.

Is there any way that the benefits of an excluded pension can be realised?

Not directly but if the pension is comes into payment during the period of bankruptcy or during the period of an existing IPA/IPO, the official receiver, as trustee, should seek to enter into an IPA for any surplus pension income. The official receiver cannot, however, 'force' the bankrupt to take their pension for the purposes of an IPO/IPA.

What if the pension is unapproved?

Apart from in relation to foreign pensions, unapproved pensions are very rare, but if you do encounter a pension that is unapproved, it will vest in the official receiver as trustee of the bankrupt's estate as any other type of asset.

What should I do with an unapproved pension?

You should notify the pension provider and bankrupt of the official receiver's interest in the pension. Unless the bankrupt wants to enter into a qualifying agreement, the pension would then be passed to the LTADT to monitor and realise as appropriate.

What is a 'qualifying agreement'?

A qualifying agreement is an agreement between the bankrupt and their trustee in bankruptcy that the pension will be excluded from the estate. Depending on the value of the pension fund and the pension provision available for the bankrupt and their dependents, the trustee should look for some payment to be made into the estate in return for entering into the qualifying agreement.

Is there a time limit to enter into a qualifying agreement?

A qualifying agreement must be entered into within nine weeks of the vesting of the bankrupt's estate in the trustee or the date that the pension ceased to be an approved pension. This time limit is not able to be extended.

What if the trustee does not wish to enter into a qualifying agreement?

The bankrupt can apply to court for an order that their pension is excluded from the bankruptcy estate. They have 13 weeks from the date that the pension vested in the

trustee to apply for such an order. The bankrupt can apply for such an order before, after or instead of attempting to enter into a qualifying agreement with the trustee.

I have a bankrupt with a pension that is administered in another EU country. What do I do about this?

A pension administered in another EU country is unlikely to have sought, or received, HMRC approval and is therefore considered to be unapproved and forms part of the bankruptcy estate.

Unapproved pensions are assets of the bankruptcy estate, so would I send it to LTADT for them to realise in due course?

No. The Insolvency Service is concerned to ensure that EU citizens that have exercised their right to free movement within the EU are not disadvantaged by the operation of UK law and we would not seek to realise the pension.

Why don't we realise the pension?

We would take the position that a person that has a pension that is tax-approved in its own EU country should be treated the same as a pension approved in the UK. Since the law operates to vest the pension in the official receiver as trustee, we have to find some other way of dealing with the pension.

How would I know if the pension has been approved in another EU country?

If the pension is with an internationally recognised pension provider or employer, it can be assumed that the pension is approved. Otherwise, there is some guidance in the chapter.

How do we deal with an 'approved' EU pension?

We would deal with an 'approved' EU pension by entering into a qualifying agreement with the bankrupt.

Qualifying agreements. I know about those – so, we ask the bankrupt for a payment in return for agreeing that their pension is excluded from the estate?

A qualifying agreement is an agreement between a trustee and the bankrupt to exclude the pension from the estate and we would normally seek a payment in return for entering into the agreement. However, to seek a payment in these circumstances would be treating the EU pension-holder differently from how we would treat a bankrupt with a UK approved pension (which is unconditionally excluded from the estate).

If the pension is able to be brought into payment within three years of the making of the order, you should, in return for entering into the qualifying agreement, seek an agreement that in the event the pension is brought into payment, the bankrupt will enter into an IPA for any surplus pension funds. However you should not seek an agreement that the bankrupt will bring the pension into payment. This is the same way as we would treat a UK approved pension – in that we would seek an IPA/IPO in relation to pension income.

And if the pension is not coming into payment within three years?

Then the qualifying agreement would be unconditional.

Does the time limit for entering into the qualifying agreement still apply to these ‘EU pension’ qualifying agreements?

Yes. The qualifying agreement must be entered into within nine weeks of the pension vesting in the official receiver as trustee.

What about pensions held outside the EU?

These should be treated as any other unapproved pension.

I have a pension in a case that was made on a petition presented before 29 May 2000. What should I do?

A pension in a case made on a petition presented prior to 29 May 2000 would vest in the official receiver as trustee (or trustee ex-officio). Naturally, the majority of pensions of this type will already be with an LTADT but, if not, you should ensure that the pension details (to include how the pension has come to light) are included on the case file, obtaining (from the court file if necessary) and scanning to the file all relevant documents and then send it to the LTADT.

What do the LTADT do with these pensions?

The LTADT will engage a contractor who will realise the pension for the benefit of the bankrupt's creditors.

Are there any exceptions to the general rule that a pre-May 2000 pension will be realised?

Yes. In cases made under the Bankruptcy Act 1914 (essentially, this will be cases made before 29 December 1986), The Insolvency Service has taken a policy decision not to realise vesting pension benefits. There can be problems obtaining a court order to facilitate the realisation and there are often no records of the creditors in these old cases, meaning that it can be impossible to make a distribution.

I am dealing with a bankrupt who has been granted pension rights under a divorce settlement. Would those rights vest?

Pension rights can pass to a former spouse in divorce proceedings under what are known as earmarking or sharing arrangements. Assuming that the bankruptcy order was made on a petition presented on or after 29 May 2000, the rights passed to the bankrupt would be excluded from the estate as with any other form of pension rights. If the order was made on a petition presented before 29 May 2000, the pension rights should be dealt with as a vesting asset, following the guidance above.

Frequently asked questions – Pensions operated by an insolvent as an employer

These FAQs are to assist official receivers in understanding the subject and should be read in conjunction with the more detailed guidance given in the main body of the chapter.

What do you mean, a ‘pension operated by an insolvent’?

This is a pension operated by a company in liquidation or a bankrupt, as an employer, for the benefit of the employees. You are far more likely to encounter such a pension in a company case.

OK. So what do I have to do?

The difficulty, when an insolvency order is made against an employer, is that it will no longer be able to operate the pension scheme and, particular, it will be unable to continue to make contributions to the scheme.

Although not directly the responsibility of the official receiver, the rules surrounding how such a pension are dealt with are designed to ensure that, so far as is possible, the benefits promised to members under the pension are paid. There are certain tasks for the official receiver in this regard, which are covered later.

What do I need to know about occupational pension schemes?

For the purposes of fulfilling the official receiver’s obligations, you do not need to know too much about occupational pension schemes. Suffice to say that there are two types of occupational pension schemes.

The first is a ‘defined contribution’ scheme where the contributions to the pension scheme accumulate into a fund which is invested and then used to pay the pension benefits. In this type of scheme, the benefits payable will relate directly to the value of the accumulated funds.

The second type of scheme is called a ‘defined benefit’ scheme. As a civil servant you will be familiar with this type of scheme as it is the type that you are a member of. This is a scheme where the benefits are promised at the outset and generally relate to the time that the person has been a member and the amount of salary they

have earned whilst a member or when they retire, rather than being connected to the monies paid into the scheme.

In both types of scheme, contributions are generally made by both employer and employee.

What about stakeholder pensions?

Stakeholder pensions are effectively personal pension schemes accessed via the employer and managed by a financial services company. In that sense they are not pension schemes operated by the insolvent employer and the official receiver need not be concerned with these schemes as they will continue to operate outside of the insolvency.

What role does the official receiver have in this?

The official receiver's prime duty is to inform interested parties of the making of the insolvency order.

Who are these interested parties?

They are the Pension Protection Fund, the Pensions Regulator and the pension trustee(s).

What do these organisations do?

The Pension Protection Fund has the duty to provide a minimum level of benefits to members of defined benefit schemes. Where the assets of the scheme are insufficient to pay the benefits that the members were promised, the Pension Protection Fund can make up some of the shortfall.

And the Pensions Regulator?

The Pensions Regulator has the job of ensuring that persons responsible for providing access to and managing work based pension schemes fulfil their obligations. They have the power to seek an order that a person responsible for a pension fund having insufficient assets to pay benefits (leaving the Pension Protection Fund to 'pick up the tab') makes a financial contribution to the assets of the scheme. The Regulator can also appoint an independent trustee.

Trustee? What does the trustee do?

The trustee's role is to ensure that the pension scheme is managed according to the trust deed and rules. A pension scheme may have a number of trustees and they may be a combination of members of the scheme, the employer, specialists or a financial services company. At least one third of the trustees must be nominated by the members of the scheme.

How are these interested parties notified of the making of the order?

Notification is by way of the submission of a notice called a 'section 120' notice. It is called this after the section of the Pensions Act 2004 that requires it be sent. The form can be submitted in paper form, or on-line.

The Official Receiver, as liquidator or trustee, has also to issue a 'section 122' notice to advise the interested parties whether or not the insolvent business is to be rescued. If the business is to be rescued, the pension scheme can continue. Of course, it is extremely unlikely that any business being dealt with by the official receiver, as liquidator or trustee, will be rescued.

When should these notices be issued?

The section 120 notice should be issued within 14 days of the making of the insolvency order or the official receiver becoming aware of the existence of the pension scheme.

The section 122 must be issued as soon as practical after the decision has been taken whether or not the business is to be continued. For most official receiver cases this is likely to be no later than the time that the report to creditors is issued.

What is the effect of the section 120 notice being issued?

The issuing of the section 120 notice starts a process whereby the Pension Protection Fund will decide whether the pension scheme will be taken into an assessment process, during which they will decide if the scheme has any shortfall that needs covering. If so, they will assume control of the scheme from the trustees, but the assessment process takes around two years so is unlikely to be completed within the period that the official receiver is dealing with the insolvency.

It is likely that any defined benefit scheme operated by the insolvent will be taken into the assessment process.

And what is the effect of the scheme being taken into the assessment process?

The Pension Protection Fund will assume creditor rights in respect of the pension scheme – for employer contributions to the scheme, for example (and should therefore be added to the list of creditors). Otherwise the trustees will continue to manage the scheme, following the trust deed and rules.

What if the company in liquidation is the sole trustee?

The trustees have the duty to manage the pension scheme. It is possible that the company was a trustee of the scheme, and might even have been the only trustee. If the company is the sole trustee, the duties of the company as trustee would fall to the official receiver as liquidator to discharge, which can be administratively burdensome. If there are other trustees, the discharge of the trustee functions can be left to the other trustees.

Fortunately, this situation is unlikely to occur as the Pensions Regulator will generally appoint an independent trustee if the insolvent company is the only trustee.

What if the Pensions Regulator does not appoint an independent trustee?

It is likely that the Regulator will be able to be encouraged to make such an appointment as there can be a conflict between the liquidator's duty to manage the scheme to the benefit of the members and their duty to realise the company assets (which can include any scheme surplus) to the benefit of the creditors. In the extremely unlikely event that they do not, the official receiver should seek the early winding-up of the pension scheme

How is the winding-up of the pension scheme arranged?

It should be possible to effect the winding-up of the scheme simply by requesting this in writing to the financial services company with whom the scheme was arranged.

If the scheme is in the Pension Protection Fund assessment process the official receiver should seek their authorisation for the scheme to be wound-up before starting the process. Of course, winding-up by the official receiver will not be necessary if the scheme has been taken into the control of the Pension Protection Fund.

Are there trustee duties that the official receiver may need to carry out before the scheme is wound-up?

There are some other duties that the official receiver may need to carry out. These are explained in the Technical Manual but, generally, they may be categorised as duties to issue documentation to the scheme members. For the most part, it should be possible for the financial services company through whom the pension scheme is operated to carry out these duties.

Are there any other actions for the official receiver to carry out?

The official receiver has a duty to co-operate with the trustees of the pension scheme, the Pensions Regulator and the Pension Protection Fund and to supply information, as requested, to enable those parties to carry out their various functions.

The official receiver also has a duty to report, to the Pensions Regulator, any concerns they have regarding the operation of the pension scheme.

Finally, the official receiver may need to defer the dissolution of the company if the winding-up of the pension scheme has not been completed.

Introduction

57.1 General

This chapter provides advice on dealing with pensions from two different perspectives:

- where the official receiver is dealing with the affairs of a bankrupt who has an interest in a pension, and

- where the official receiver is dealing with the insolvency of an employer that operated a pension scheme for the benefit of its employees

57.2 Pensions and bankruptcy

In any case where the bankruptcy order was made on a petition presented on or after 29 May 2000, all approved pensions arrangements will not form part of the bankrupt's estate.

Pensions in all earlier cases will, for the most part, form part of the bankruptcy estate.

Overview of pension matters

57.3 Types of pensions

There are a number of different types of pensions; the following are the ones that the official receiver is most likely to encounter:

- occupational pension schemes
- personal pension plans
- retirement annuity contracts
- stakeholder pensions
- self invested personal pension plans (SIPPs)
- state pension
- Second State Pension (S2P)

57.4 Occupational pension scheme

An occupational pension scheme is one set up by an employer for the benefit of its employees and provides members with retirement and death benefits. Contributions to the scheme are generally deducted at source, and may be supplemented by the employer. The scheme may operate on the basis of defined benefits (where the benefits are paid as a proportion of the final or average salary of the member), or defined contribution (also known as money purchase), where the contributions made by the member are used to purchase an annuity on retirement.

The scheme may be administered by pension trustees or by a financial services company. Retirement age is dependent on the scheme rules, but cannot be before age 60.

57.5 Personal pension plans

A personal pension plan (PPP) is an investment policy designed to offer a lump sum and income on retirement.

A PPP is provided by a financial services company (including banks, building societies and insurance companies) and is a money purchase arrangement. This means the monies invested (usually on a monthly basis) are used to provide an annuity and a lump sum on retirement. The lump sum is a maximum of 25% of the pension fund value. The earliest retirement age in a PPP is 55.

57.6 Personal pension plans – amount payable

The amount of pension paid to a member on retirement will depend on:

- the amount paid into the PPP
- how well the investment performs
- the annuity rate at the date a person retires

57.7 Retirement annuity contract

Prior to June 1988 (the date that PPPs were introduced), individuals not in occupational pension schemes and those self-employed (and paying UK tax) were able to invest monies in a retirement annuity contract (RAC). RACs took on largely the same features as PPPs from April 2006.

57.8 Stakeholder pensions

Stakeholder pensions are a form of PPP, offered by an employer to its employees. They are structured in such a way as to make them low cost and flexible. The management charges that can be applied by the provider are limited and the flexibility derives from the ability to switch providers without penalty, to start contributions at a low level and to stop and start contributions as circumstances dictate.

57.9 Workplace pensions

Workplace pensions are not a pension schemes in their own right; rather it is a government scheme requiring an employer to enrol its employees in a pension scheme, with deductions being made out of the employees gross salary. The employee has the opportunity to opt out of the enrolment, should they wish.

57.10 Self invested personal pension plans

As the name might suggest, a self invested personal pension plan (SIPP) is a type of personal pension plan (PPP). It differs from a PPP in that it allows a greater flexibility as regards investment opportunity and it allows the member to borrow against the fund for further plan investments. Whereas a PPP is generally structured so that the plan holder pays a regular contribution to the financial services company for that company to invest, a SIPP allows the plan holder to choose their own form of investment, which may be, for example, shares, property, cash savings, antiques or vintage cars.

The official receiver should look closely at a SIPP held by a bankrupt to ensure that it has not been used as a vehicle to transfer assets out of the reach of creditors. Further guidance on this can be found in chapter 32.

57.11 State pension

The state pension is a pension provided by the state that is intended to provide a basic income in retirement. The date at which a person becomes eligible to draw the state pension varies depending on when they were born. The amount payable is dependent on a number of factors.

Further information on '[Your State Pension explained](#)'.

A state pension cannot form part of a bankrupt's estate, no matter when the date of the bankruptcy petition is¹.

1. Social Security Administration Act 1992 section 187 as amended by the State Pension Credit Act 2002 schedule 2(2) paragraph 23

57.12 Second State Pension

The Second State Pension (S2P) provided a top-up to the basic state pension based on the individual's earnings and was based upon earnings on which standard rate class national insurance is paid. It was replaced by the revised state pension in April 2016 for new pensioners.

S2P is also known as Additional Pension and forerunners of S2P were the State-Earnings Related Pension Scheme (SERPS) and, before that, the Graduated Retirement Benefit.

57.13 Pension terms and 'jargon'

The website of the Pensions Regulator contains a [glossary](#) that official receivers may refer to if they encounter a term relating to pensions that they are not familiar with:

Pensions and divorce

57.14 Pensions and divorce – pension earmarking

Generally, a spouse's or civil partner's right to a pension in a divorce/dissolution settlement will be protected by the court making a special attachment order known as an 'earmarking' order¹. This order will require the pension provider to make some form of payment (specified at the time of the divorce) to the former spouse/civil partner when the pension benefits are payable. Either party can subsequently apply to the court to have the amount varied.

A bankrupt's right to benefit from such an order will be excluded from the estate if the order was made on a petition presented after 29 May 2000, otherwise the rights under the order would vest in the estate.

1. Matrimonial Causes Act 1973 sections 25B to 25G

57.15 Pensions and divorce – pension sharing

The other form of pension protection in divorce is pension sharing (where the pension 'pot' is split on divorce). This will provide both parties with their own pension for the future. This scheme did not come into force until December 2000¹, and has no retrospective effect, so any pension sharing arrangement will affect only excluded pensions.

1. Welfare Reform and Pensions Act 1999 sections 27 to 30

Annuities, fund values and income drawdown

57.16 Transfer fund value and cash equivalent transfer value

The transfer fund value is the cash value of the pension, and is simply the value of accumulated funds and associated benefits.

The cash equivalent transfer value, of a pension is the expected cost of providing the member's benefits within the scheme, – generally, this will be in relation to an

occupational pension scheme. Depending on the type of scheme this may simply be the value of accumulated funds, or may require some more complicated calculations related to assumptions regarding events affecting the scheme.

The relevance of the fund transfer value for the official receiver, as trustee, will be in the realisation of a vesting pension scheme.

57.17 Annuity

Most defined contribution pensions operate in the way that the funds invested in the pension accumulate and, at the time that the pension holder wishes to draw down the benefits they will use the accumulated funds to take a lump sum and/or purchase a separate policy known as an annuity. The annuity is simply a policy that provides for periodic payments to the individual until a defined date/event – generally the death of the policy holder.

Defined benefit schemes operate similarly (in that they provide for a lump sum and periodic payments), but the benefits are set out in the rules of the scheme and accrue independently of the contributions payable, often based on length of service and/or the level of salary at retirement.

57.18 Income drawdown

An income drawdown plan (also known as an unsecured pension) is where the pension-holder leaves the funds invested in the pension policy and draws an income from that fund.

Exclusion of pensions from a bankrupt's estate

57.19 Pensions excluded from the bankruptcy estate

The legislation¹ provides that, where a bankruptcy order is made on a petition presented on or after 29 May 2000, all rights and benefits under approved pension arrangements will be excluded from the bankrupt's estate.

The vast majority of pensions encountered by an official receiver in current cases will be excluded from the estate by the virtue of these provisions, though it may still be possible for pension funds to be claimed by the official receiver, as trustee, for the

benefit of the estate through an IPA/IPO in relation to any scheme brought into payment during the period of bankruptcy or an existing IPA/IPO.

1. Welfare Reform and Pensions Act 1999 section 11(1)

57.20 Trustee has no power to require that a pension comes into payment

The court has considered whether the definition of ‘income’ for the purposes of an IPO/A should include an entitlement to an undrawn pension and has found that there is no entitlement to receive the pension monies until the decision is made on how to draw the pension. Therefore a pension fund is not within the definition of ‘income’ unless the bankrupt decides to draw it, and the official receiver cannot require that it is drawn¹.

1. Horton v Henry (a bankrupt) [2016] EWCA Civ 989

57.21 Unapproved pensions – excluded by court order or agreement

It is possible for the rights and benefits under an unapproved pension to be excluded from the bankrupt’s estate by court order or agreement with the trustee. See the guidance later in the chapter relating to unapproved pensions.

57.22 Pensions where petition presented prior to 29 May 2000

Where the official receiver is dealing with a pension in a case where the order was made on a petition presented before 29 May 2000 (and the pension is therefore not excluded from the estate), they should follow the guidance later in this chapter concerning the realisation of vesting pensions.

57.23 Exclusion of all rights and benefits under the pension

All rights and benefits under an approved pension are excluded from the bankrupt’s estate. This exclusion would include not only the right to receive a pension payment and lump sum, but also any ancillary benefits such as a death benefit. Any right to bring a claim (a right of action) where that right arises from the pension arrangement would similarly be excluded from the estate.

57.24 Establishing whether the bankrupt has abused the protection given to pensions in bankruptcy

Where the bankrupt is aged 55 or over and holds an undrawn personal pension fund, the official receiver should obtain the current fund value¹. Where the pension fund value exceeds the total unsecured liabilities and, in a debtor's application case, the bankrupt might have elected to draw the pension before applying for bankruptcy, official receivers are asked to consider whether the bankrupt met the insolvency test. Where they did not, the official receiver should consider making an application for annulment on the grounds that the order ought not to have been made.

1. PENSIONP5254

57.25 Claiming pension income where pension drawdown is available

Where a pension has been claimed (drawn-down) by the bankrupt in the period of their bankruptcy or the period of an existing IPA/IPO, the guidance in chapter 35 should be followed as regards the amount that can be claimed from the monthly pension and any associated lump sum.

57.26 Exclusion of state pensions

As with other forms of benefits, the right to receive a state pension is excluded from the bankrupt's estate¹.

In other words, the right to receive the pension cannot transfer to the official receiver, as trustee, but they can still access, in theory, the pension benefits through an IPO/A.

1. Welfare Reform and Pensions Act 1999 section 11(1)

Establishing whether a pension arrangement is approved

57.27 An approved pension arrangement

An approved pension arrangement is defined in the legislation¹ as, in summary:

- any pension schemes registered under the tax legislation² (in essence, schemes tax-approved by HM Revenue and Customs)
- an annuity purchased in relation to a tax-approved pension scheme
- an occupational pension scheme set up by a government outside the UK for the benefit, or primarily the benefit, of its employees

1. Welfare Reform and Pensions Act 1999 section 11(2)

2. Finance Act 2004 section 153

57.28 No need to seek verification of tax approved status/registration

It can be assumed by the official receiver that the vast majority of occupational pension schemes and personal pensions will have tax approval/registration from/with HM Revenue and Customs.

As such, the official receiver should not normally need to write to the pension provider seeking confirmation of approval and may assume that the pension is approved and, therefore, excluded from the estate.

57.29 A pension administered outside the UK

A pension arrangement administered outside the UK is unlikely to have achieved the necessary UK tax-approval to qualify it as an approved pension that would be excluded from the estate. The exception to this is an occupational pension scheme set up by a government outside the UK for the benefit, or primarily the benefit, of its employees, which is automatically excluded from the estate¹.

If the pension is held in another European Union (EU) country, the guidance later in this chapter should be followed, in particular paragraph 57.39. Otherwise, the official receiver, as trustee, will need to consider the value of the pension against the likely costs of obtaining the orders required to deal with the pension in that other country. The cost of such an order is likely to be prohibitive and the best way to deal with the pension interest is likely to be to enter into a qualifying agreement with the bankrupt. Guidance on qualifying agreements can be found later in this chapter.

1. Welfare Reform and Pensions Act 1999 section 11(2)(c)

Exclusion of unapproved pension schemes

57.30 Exclusion of unapproved pension arrangements – general

If a pension is unapproved it is still possible for the bankrupt to seek to exclude their rights under the pension from the bankruptcy estate^{1, 2, 3}. The relevant regulations provide that the question of whether the pension is one in relation to which the bankrupt can seek exclusion is dependent on the type of pension arrangement⁴, and certain conditions relating to the pension⁵ being satisfied.

It is likely that any arrangement termed a ‘pension’ that is not an approved pension is likely to fall within one of the definitions given in the regulations and therefore be one in relation to which the bankrupt can seek exclusion from the estate.

1. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 4

2. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 3

3. Welfare Reform and Pensions Act 1999 section 12

4. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 3(1)

5. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 3(2)

57.31 Methods of exclusion of an unapproved pension arrangement

In order to exclude their rights under an unapproved pension, the bankrupt may¹:

- enter into a qualifying arrangement with the official receiver as trustee, or
- make an application to court for an exclusion order

Both methods are subject to time limits – see below.

1. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 4

57.32 Qualifying agreements – general

A qualifying agreement is an agreement between the official receiver as trustee and the bankrupt that their rights under the pension will not form part of the estate.

57.33 Qualifying agreement to be by deed

The qualifying agreement must be by deed (in writing and signed by both parties) and incorporate all agreed terms.

57.34 Pension provider/trustee to be given notice

The official receiver, as trustee, must notify the pension provider and trustee of the qualifying agreement, within 30 days of the date that the agreement was made¹.

1. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 6(5)

57.35 Qualifying agreements – time limits

The legislation provides that a qualifying agreement must be made within nine weeks of¹:

- the vesting of the bankrupt's estate in the official receiver as trustee, or
- the date that the pension ceased to have HMRC tax approval/registration if that date is after the vesting of the estate in the trustee

There is no facility for this time limit to be extended.

1. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 6(1)

57.36 Qualifying agreements for unapproved pensions

Where the official receiver is minded to enter into a qualifying agreement in relation to an unapproved pension, they will need to consider entering into an agreement that provides for some return to the creditors, because an unapproved pension is a vesting asset which the official receiver should realise. In reaching such an agreement the official receiver should take into account the types of matters considered by a court when dealing with an application for an exclusion order and also any excessive pension contributions.

As the calculation to be made in this regard will vary on a case-by-case basis, the official receiver may seek the advice of the Senior Official Receiver's Office before entering into the agreement.

Where however the pension is one that is administered in a foreign EU state, the qualifying agreement should be unconditional, provided that the pension is 'approved' within the state of its establishment. Further information on this can be found below.

57.37 Qualifying agreements – excessive pension contributions

The official receiver should, before entering into any qualifying agreement, consider whether there have been any excessive contributions into the pension fund¹ and, if so, the agreement should not be proceeded with unless recovery of the excessive contributions forms part of the agreement.

1. Section 342A

57.38 The seeking of information from pension providers

Where the bankrupt seeks information from the pension provider, and that information is required in connection with the negotiation of a qualifying agreement, the provider is required to produce such information with a period of nine weeks beginning with the date on which the request is received¹.

That period can be extended by order of court, where good cause is shown².

1. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 10(1)

2. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 10(2)

Exclusion of a pension administered from another EU member state

57.39 The exclusion of a pension administered from another EU member state

A pension administered from another EU member state is likely to be an unapproved pension.

In order to ensure parity of treatment for any EU national who has exercised their right to freedom of movement within the EU, The Insolvency Service has, as a matter of policy, decided to instruct the official receiver to seek to exclude the majority of EU pension arrangements by entering qualifying agreements with the bankrupt.

Such a qualifying arrangement should be sought if the EU pension arrangement is an occupational pension scheme (where the bankrupt was an employee but not a director of the company), or the arrangement is a recognised pension scheme under the laws of the EU state in which it is based.

Where the pension arrangement is not recognised under the laws of the EU state in which it is administered, the official receiver should still enter into a qualifying

agreement, but on the same terms as for a non-EU unapproved pension. Where there is doubt, the advice of the Senior Official Receiver's Office should be sought.

57.40 Establishing if scheme would be tax approved in country in which it is administered

HMRC provide a list of pensions that they have recognised as meeting tax requirements of the country in which they are established. If a scheme is not on the list, it does not necessarily mean that the scheme does not meet tax requirements in its own country, it may be that the scheme provider has not applied for HMRC recognition:

<https://www.gov.uk/government/publications/list-of-qualifying-recognised-overseas-pension-schemes-qrops>

Alternatively, information may be sought from the bankrupt (in whose interest it will be to provide the information), or from the pension provider.

57.41 Qualifying agreements – EU pensions

Where the official receiver is required to enter into a qualifying agreement in relation to an EU pension, the terms of the agreement will be, essentially, unconditional except for some requirements in respect of IPA/IPOs in that the bankrupt should agree to provide information regarding the drawing of the pension during bankruptcy or the term of any existing IPA/IPO.

[Annex A](#) is a letter that can be sent to the bankrupt explaining this position and enclosing a draft agreement ([Annex B](#)) for signature. [Annex D](#) is a letter that should be sent to advise the pension provider to inform them that a qualifying agreement has been entered into.

Revocation of a qualifying agreement

57.42 Revocation of a qualifying agreement

Where the bankrupt has failed to make a full disclosure of all material facts in respect of any pension agreement which is the subject of a qualifying agreement; and that failure has resulted in a pension being excluded where it otherwise would not have

been, the official receiver, as trustee, may revoke the qualifying agreement by giving the bankrupt notice of the revocation¹.

1. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 6(3)

57.43 The notice of revocation

Where the official receiver, as trustee, needs to revoke a qualifying agreement, they must issue a notice of revocation that¹:

- is dated
- is in writing
- specifies the reasons for revocation
- specifies the date on which the agreement shall be revoked (which shall be at least 30 days after the date of the notice)
- informs the bankrupt that they have the right to apply for an exclusion order within a period of 30 days of the date of the revocation
- The official receiver, as trustee, must also notify the pension provider/trustee of the revocation, within 30 days of the date of the notice²

1. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 6(4)

2. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 6(5)

Exclusion orders

57.44 Application to court for an exclusion order – matters for the court to consider

In deciding whether to make an order excluding the bankrupt's rights under an unapproved pension from the bankruptcy estate, the court will take into account the future needs of the bankrupt and their family and whether the bankrupt is, or is likely to be, in receipt of benefits or pension (other than a UK state pension) that will assist in meeting those needs.

The court can make an order that all or part of the pension benefits are excluded from the estate¹.

1. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 5(3)

57.45 Application to court for an exclusion order – time limits

The bankrupt's application for an order excluding from the bankruptcy estate their rights under an unapproved pension must be made¹:

- within 13 weeks of the vesting of their
- within 13 weeks of the date that the pension ceased to have HMRC tax approval/registration if that date is after the vesting of the estate in the trustee, or
- within 30 days of the revocation of a qualifying agreement with the trustee
- the court can extend these periods, before or after they have expired, where good cause is shown²

1. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 5(1)

2. Occupational and Personal Pension Schemes (Bankruptcy) (No.2) Regulations 2002 regulation 5(2)

Realising pension benefits

57.46 Realising pension benefits – general

This section of the chapter is concerned only with pensions that are vesting assets by virtue of being property of a bankrupt in a case made on a petition presented prior to 29 May 2000.

The majority of pensions in cases where the order was made on a petition presented after 29 May 2000 will be excluded from the bankruptcy estate and, therefore, the official receiver should take no action to realise those pensions.

57.47 Dealing with a vesting pension – ensure that pension is one that vests

Before taking any action arrange for the realisation of a bankrupt's rights under a pension arrangement, the official receiver should be certain that the pension is one that forms part of the, and should consider the guidance for pensions in cases where the order was made under the Bankruptcy Act 1914.

57.48 Pensions in cases made under the 1914 Act

The Service has taken a policy decision that official receivers will take no action to recover benefits in relation to pension arrangements in cases administered under the Bankruptcy Act 1914.

57.49 The vesting of a pension in the official receiver as trustee

Apart from those pensions that are excluded from the estate, the bundle of contractual rights that make up the bankrupt's rights under a pension will vest in the official receiver as trustee by virtue of the provisions of the Act^{1, 2, 3}. It is irrelevant that those rights may not be due for payment for some time, even after discharge^{4, 5}. Equally, it has been held that the vesting of pension rights is not contrary to the European Convention on Human Rights^{6, 7}, and forfeiture clauses (and similar) are generally ineffective against the trustee in bankruptcy.

1. Section 283

2. Section 306

3. Section 436

4. *Re Landau* [1998] Ch 223

5. *Jones v Patel* [1999] BPIR 509

6. *Krasner v Dennison and others*; *Lawrence v Lesser* [2001] Ch 76

7. *Malcolm v Mackenzie* [2005] 1 WLR 1238

57.50 Official receiver as trustee has no better claim on pension than bankrupt

Where the pension rights and benefits vest in the official receiver, as trustee^{1, 2}, they will have no better title to the asset than the bankrupt. In practice this means that the trustee must wait until the bankrupt reaches the earliest retirement date under the terms of the scheme before any benefits can be realised. In occupational schemes (those without a valid forfeiture clause), the benefits are unlikely to be available until the person chooses to retire.

1. Section 283

2. Section 306

57.51 Protection of the estate's interest in pension rights and transfer to LTADT

Where the (former) bankrupt is below the pension scheme's normal retirement age, or a vesting pension interest has otherwise not been dealt with, the official receiver

should ensure that their interest in the pension has been noted by the pension provider, before taking the following steps:

- the pension details should be recorded on the case file as an asset
- the official receiver should ensure that as a minimum the bankruptcy order and creditor details are present on the case file
- all relevant documents from the case/court file, including details of the former bankrupt and/or the pension company should be scanned as a single PDF document and uploaded to the asset documents area on the case file
- if, in older cases, neither the court or case file is available the following note should be added to the case file 'Court and OR file requested but no longer available'
- the case file should have a note added to confirm how the pension has come to light and confirm that all relevant and available documents have been up loaded
- the case should then be transferred to the LTADT Pensions Team

57.52 Protected rights

Where an individual contracted out of SERPS , the portion of the pension rights that related to SERPS were protected from a trustee in bankruptcy¹ – these rights being known as protected rights.

The concept of protected rights was abolished on 6 April 2012, and pension scheme trustees are now allowed to treat protected rights as ordinary benefits.

This does not, however, affect the pre-April 2012 principle that rights identified as protected rights at the date of bankruptcy were excluded from the bankruptcy estate.

1. Pension Schemes Act 1993

57.53 Realisation of pension rights – contractor appointed

The Service has appointed a contractor to realise the benefits in pensions in relation to cases made on petitions presented under the 1986 Act prior to 29 May 2000.

The pension will be passed by the LTADT to the contractor for realisation

57.54 Professional offers to realise pension benefits

Any approach to official receivers by independent financial advisors, professional pension trustee companies, insolvency practitioners or others with a plan to realise pension benefits as an immediate lump sum payment should be refused if this

involves the realisation of pension benefits before the earliest retirement age (usually age 55). This early realisation is known as 'pension liberation' and is usually illegal.

57.55 Action to take when pension has been realised

When the former bankrupt's pension benefits have been realised (whether from selling the official receiver's interest or by realising the pension benefits – i.e., at the conclusion of five years of annuity payments), the contractor will inform the pension provider and bankrupt that the official receiver has no further interest in the pension.

The matter will then be passed back to the LTADT to arrange for distribution of the realised sums.

57.56 Forfeiture clauses – general

A forfeiture clause is a clause in the rules of a pension that forfeit the member's rights under the pension in the event of certain events occurring. Some schemes have a clause that seeks to forfeit the rights in the event of bankruptcy.

Any dispute regarding the validity (or otherwise) of a forfeiture clause is likely to have arisen at the point that the pension provider was notified of the official receiver's interest in the pension.

57.57 Forfeiture clauses in personal pensions invalid

A forfeiture clause in a personal pension is, in principle, invalid against the official receiver, as trustee and should be challenged¹.

1. Krasner v Dennison and others; Lawrence v Lesser [2001] Ch 76

57.58 Forfeiture clauses in occupational schemes generally valid

Occupational schemes will often have forfeiture clauses which, if properly worded, will be effective and the official receiver should not seek to challenge such a clause.

57.59 Non-assignment clauses

All approved pensions will contain a general clause which prevents benefits being assigned or charged – such a clause being necessary for the scheme to gain the relevant tax-approval.

Such clauses are not effective against the official receiver as trustee as any asset vests in a trustee without conveyance, assignment or transfer¹. The official receiver should not accept any refusal by the pension provider to pay funds or note their interest based on such a clause.

1. section 306(2)

57.60 Pensions in cases where insolvency practitioner trustee has obtained release

Where a case, in relation to which an insolvency practitioner trustee has obtained their release, has an unrealised pension, the official receiver should write to the pension provider(s)¹ to inform them that the case is now being dealt with by themselves and requesting that the provider update their records accordingly, before passing the matter to the LTADT.

1. RTLUPEN2

Pension schemes operated by the insolvent as an employer - background

57.61 The administration of an occupational pension scheme

An occupational pension scheme will have three people (or groups of people) involved in its operation – the employer, who sponsors and/or contributes to the scheme, the employees/members who benefit from the scheme and the trustee who manages the scheme on behalf of the members. The employer and/or the members(s) may, in some cases, also be the trustee.

In an insolvency context, the official receiver, as liquidator or trustee, will be the employer.

57.62 The effect of the insolvency of an employer on a pension scheme

The effect on the pension scheme of the insolvency of an employer will be set out in the scheme's trust deed and rules.

Unless the official receiver, as office holder, is the sole trustee, the responsibility for considering and dealing with the effect of the insolvency on a pension scheme operated by an insolvent will rest with the scheme trustees.

57.63 Trustee of a pension scheme

The role of a trustee of a pension scheme is to run the scheme in accordance with the trust deed and rules for the benefit of the scheme members/beneficiaries.

The trustees (at least one third of whom should be nominated by the members) may be drawn from:

- employees
- scheme members
- professional trustees
- the employer
- a business involved in running the scheme (such as a financial services company).

In reality, in many of the companies dealt with by the official receiver, the trustees (who are likely to be the company and the director(s) of the company) will have appointed a financial services company to run and manage the pension scheme – though the trustees still bear ultimate responsibility for the correct operation of the scheme.

57.64 Disqualification of pension scheme trustee

It is a criminal offence to act as the trustee of a pension scheme whilst disqualified from doing so. An individual who is subject to a disqualification order under the Company Directors Disqualification Act 1986 or who is an undischarged bankrupt is disqualified from being a trustee of a pension scheme¹. Any company that has a director that is disqualified from being a trustee is also disqualified².

The Pensions Regulator may waive the disqualification, on the application of the disqualified person³.

1. Pensions Act 1995 sections 29(1)(b) and 29(1)(f)

2. Pensions Act 1995 sections 29(1)(c)

3. Pensions Act 1995 sections 29(5)

57.65 Pension Protection Fund

The role of the Pension Protection Fund (PPF) is to provide a minimum level of benefits to members of a defined benefit pension scheme. The compensation will be paid where there is a qualifying insolvency event, a shortfall in the funding of the scheme needed to pay minimum levels of benefit, and it has not been possible to rescue the pension scheme.

The PPF and its compensation scheme is funded by levies on each defined benefit scheme.

Further information regarding the PPF can be found below.

57.66 Pensions Regulator

The Pensions Regulator is the UK regulator of work based pension schemes; its specific objectives are provided for in the legislation governing pensions^{1,2}. The Pension Regulator has a duty to ensure that all parties responsible for providing access to and managing work-based pensions fulfil their obligations.

The Pensions Regulator has enforcement powers; for example, it can seek a contribution notice where an employer has failed to fulfil its duty to properly fund a pension scheme – leaving the PPF to deal with the shortfall. The contribution notice requires the responsible person to make good the loss to the PPF³. Such an order cannot be made against the official receiver for acts carried out in accordance with their duties⁴.

The Pensions Regulator also maintains a list of independent pension trustees, and has the power to make an appointment of a trustee from the list to a pension scheme.

1. Pensions Act 2008

2. Pensions Act 2004

3. Pensions Act 2004 section 38

4. Pensions Act 2004 section 38(2)

57.67 Winding-up of a pension scheme

A pension scheme will normally be wound-up if the employer is unwilling or unable to continue to make contributions to the scheme. In these circumstances, it will be for the trustees of the scheme to decide if the scheme should be wound-up. If the official receiver as liquidator is the only employer (i.e., if there are no other trustees and no

independent trustee has been appointed), they should follow the guidance below regarding winding-up.

Action to take regarding a pension scheme operated by the insolvent

57.68 Pension schemes operated by the insolvent – overview

This section of the chapter gives information and guidance regarding the official receiver's duties when a pension scheme operated by the insolvent for the benefit of the insolvent's employers is encountered by the official receiver. Such a scheme would generally be termed an occupational pension scheme.

The flowchart attached to this chapter gives the official receiver an overview of the process of dealing with a pension operated by an insolvent.

57.69 Stakeholder pensions 'operated' by the insolvent as an employer

Stakeholder pensions are not a pension scheme operated by the employer, as such. Instead, they are effectively personal pension schemes that are accessed by the employee through the employer. The key difference is that the operation of the scheme is unlikely to be unaffected by the insolvency of the employer and it is not, therefore, necessary for any action to be taken as regards these types of pension schemes.

57.70 A summary of the official receiver's duties/actions as regards an occupational pension scheme

There are a number of duties on the official receiver, and actions for them to carry out as regards the insolvency of an employer that operated an occupational pension scheme:

- to issue the standard letter to the pension scheme trustees/administrators
- to notify certain interested parties in the event of the insolvency of an employer that operated an occupational pension scheme

- to provide the pension scheme trustees with information required to manage the pension, if so requested¹
- to provide information, usually on request, to the PPF, the Pensions Regulator and the Redundancy Payments Service
- to report concerns regarding the past operation of the pension to the Pensions Regulator
- to add the PPF to the list of creditors if the pension is accepted into the PPF assessment process
- defer dissolution in some cases
- in exceptional circumstances, the official receiver may have other duties if the insolvent employer were the only trustee of the pension scheme and no other trustee can be appointed. Guidance on those other duties is given later in the chapter

1. Pensions Act 1995 section 26

57.71 Establishing if official receiver is sole trustee

The official receiver ought to be able to establish if they are the sole trustee (as employer) from documentation available. In short, if the trust deed shows the company as the only trustee then the official receiver, as liquidator of the company, will be the sole trustee.

57.72 Establishing information regarding the scheme

To assist in dealing with the pension, the official receiver should obtain the following information from the pension scheme trustee/administrator, using the standard letter:

- a copy of the trust deed or declaration of trust that established the scheme
- a copy of the scheme rules, together with any amendments
- for larger schemes, any explanatory booklets for scheme members
- a list of scheme members, both current and deferred (that is, those members who have left the company's employment but still have a right to benefits from the scheme)
- details of payments into the scheme during the two years prior to the winding-up order

57.73 Standard letter to obtain pension information must be sent

There is a standard letter¹ for the purpose of obtaining pension scheme information from the trustees, which should be sent in all cases.

If all/some of the information requested in the letter has been obtained from other sources, the letter should be amended as appropriate but should contain, as a minimum, the official receiver's claim, as liquidator of the company or trustee of the bankrupt's estate, for surplus funds.

1. PNCSTN

57.74 Notices to be issued to interested parties

The official receiver is required to issue:

- a notification of insolvency event (known as a 'section 120 notice')¹ on the making of a winding-up order or a bankruptcy order and
- a scheme status notice (known as a 'section 122 notice')²

As soon as reasonably practical^{3, 4} to the following interested parties^{5, 6}:

- the Pension Protection Fund (PPF)
- the Pensions Regulator, and
- the pension scheme trustees or managers

1. Pensions Act 2004 section 120

2. Pensions Act 2004 section 122

3. Pension Protection Fund (Entry Rules) Regulations 2005 regulation 9

4 Pensions Act 2004 section 122(7)

5. Pension Protection Fund (Entry Rules) Regulations 2005 regulation 5(2)

6. Pensions Act 2004 section 122(6)

57.75 PPF to be listed as a creditor

Assuming the PPF accepts the pension into an assessment process (guidance on which follows), the PPF will assume all the creditor rights of the pension scheme trustees. This means that the official receiver will be required, after that date, to issue to the PPF all documents usually sent to creditors.

57.76 Issuing the section 120 notice

As outlined above, the official receiver is required to issue a notice to certain interested parties of the making of a winding-up or bankruptcy order¹. The notice is accessed by following this link:

<http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/s120notice.pdf>

The form asks for details of the type of scheme, but there is no requirement that this part of the form is completed², so the official receiver should not spend time trying to establish these details.

If the insolvent operated more than one pension scheme, a separate notice is required for each scheme.

The form can be sent in paper format but there is an on-line facility, the use of which will cause the form to be sent to the PPF, the Pensions Regulator and the scheme trustees. Use of this facility requires registration, which is a simple process:

<http://ppf-forms.org.uk/>

1. Pensions Act 2004 section 120

2. Pension Protection Fund (Entry Rules) Regulations 2005 regulation 4(2)

57.77 Section 120 notice – time limits

The official receiver is required to issue the section 120 notice with 14 days of the later of¹;

- the making of the winding-up or bankruptcy order, or
- the date on which the official receiver became aware of the existence of the scheme

1. Pensions Act 2004 section 120(2)

57.78 Issuing a section 122 notice

Assuming the PPF accepts the pension scheme into an assessment process, the official receiver, as liquidator or trustee is required to decide whether rescue of the pension scheme is possible. Such a rescue would only be possible if the insolvent employer is continuing as a going concern. In the vast majority of cases dealt with by the official receiver there will be no continuation of business and, therefore, the official receiver will be required to issue a notice that scheme rescue has not been possible¹.

The form may be found by following this link:

<http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/s122notice.pdf>

The form should not be issued if a case with a trading business is to be handed over to an insolvency practitioner. Responsibility to make the decision regarding the rescue of the scheme will rest with the practitioner appointed.

57.79 Official receiver unable to issue section 122 notice

Where the official receiver's appointment as liquidator or trustee comes to an end through the rescission or annulment of the order, they should notify the interested parties of this fact.

The relevant form can be found by following this link:

http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/s122_ceasing%20to%20act.pdf

57.80 Provision of information to the trustee

The employer has a general duty to co-operate with the trustee of a pension scheme¹ and to provide such information as may reasonably be required to facilitate the effective operation of the scheme. This duty is extended to the official receiver², as liquidator or trustee, but is subject to their ability to recover any costs incurred in dealing with the duty. If not, they may require the pension scheme trustee to meet the expenses.

There are civil penalties for failing in this duty and the official receiver should, therefore, deal with requests for information from the trustee expeditiously – seeking the guidance of Technical Section as appropriate.

1. Occupational Pension Schemes (Scheme Administration) Regulations 1996 regulation 6

2. Pensions Act 1995 section 26

57.81 Provision of information to the Pensions Regulator

The Pensions Regulator has wide powers to seek information from parties dealing with a pension scheme, including the official receiver¹. Correspondence from the Pensions Regulator should be dealt with promptly.

1. Pensions Act 2004 section 72

57.82 Deficiency in contributions – claim to Redundancy Payments Service

If any of the insolvent employer's contributions to the scheme, or those contributions deducted from employees, are outstanding as at the date of the insolvency, it is possible for the trustee of the pension scheme to make a claim on the National Insurance Fund, via the Redundancy Payments Service (RPS).

The official receiver, as office holder, has a duty to co-operate with the RPS^{1,2} and any reasonable request for information or documents (which is likely to involve completion of an RP15) should, therefore, be complied with.

1. Pension Schemes Act 1993 section 125

2. Pension Schemes Act 1993 section 157

57.83 Concerns regarding operation of the pension scheme

Where the official receiver has concerns regarding the operation of the pension scheme, they may be reported/discussed as follows:

- concerns regarding the tax compliance of the scheme may be reported/discussed with the HMRC Pension Schemes Office
- concerns regarding breaches of law in relation to the operation of the pension scheme should be reported to the Pensions Regulator (see [Annex H](#) for address). Whether or not the official receiver is trustee of the pension scheme, they are under a duty to report breaches to the Regulator¹

1. Pensions Act 2004 section 70

57.84 Dissolution to be deferred – company only

When the official receiver has completed the liquidation of the company, a letter should be sent to the trustees and/or administrator of the scheme to check that the imminent dissolution of the company will not hinder the administration/winding-up of the scheme.

If the scheme's trustees or administrators wish the company to remain on the register, the official receiver should reach an agreement with them for a suitable period of deferral of dissolution of the company.

The official receiver may nevertheless apply for release as liquidator, since they can exercise the company's functions in relation to the scheme as liquidator ex-officio at any time before dissolution, if required^{1,2}.

1. Section 136(3)

57.85 Appointment of an independent trustee

Following receipt of the section 120 notice, the Pensions Regulator has the power to seek the appointment of an independent trustee to a pension scheme¹.

It is the general policy of the Pensions Regulator to seek the appointment of a trustee where the insolvent employer is the sole trustee and/or where the (other) trustees are no longer contactable. Where the official receiver is aware that the insolvent employer is the sole trustee, they should encourage the Pensions Regulator to make such an appointment, if this is not already in process or has not already been carried out.

It is unlikely, therefore, that the official receiver, as office holder, will have to carry out any of the functions of a trustee of a pension scheme.

1. Pensions Act 1995 section 23

57.86 Exercise of company discretion

Depending on the terms of the pension scheme rules, the official receiver as liquidator may be requested to exercise the discretion of the company to, for example, allow the scheme to continue.

The exercising of such discretion often gives rise to a conflict between the liquidator's duties to the scheme members and company creditors. Conversely, the official receiver may be under a duty to exercise discretion¹.

The official receiver should therefore not exercise such discretion without first obtaining legal advice that this is the correct way to proceed. The parties requesting the exercise of discretion should pay the costs of obtaining that advice.

1. *Bridge Trustees Ltd v Noel Penny (Turbines) Ltd* [2008] Pens LR 345

57.87 Recovery of funds from the scheme

The rules relating to the operation of pension schemes provide that the scheme is operated as a separate entity to the employer, and that the funds are not mixed with company monies. It is extremely unlikely, therefore, that the funds in a pension scheme would be available to the official receiver as liquidator. In certain circumstances, however, some or all of the scheme funds might be claimed by the liquidator. Some examples are as follows:

- when the scheme is wound-up, it might have more funds that required to pay the pensions of fund members. The standard letter to the pension scheme trustee/administrator includes a claim for any surplus
- if sums were paid into a scheme for the benefit of directors at a time when they knew, or ought to have known, that the company was insolvent
- if there was no reduction in pension contributions when the employees wages were reduced, or they left the employment
- if the rules of the scheme provides that contributions are recoverable if the scheme is wound up soon after creation

As regards the final two bullet points, above, it is likely that the official receiver will need specialist/legal assistance as regards recovery, which might be obtained from any appointed antecedent recovery contractors.

57.88 Deficiency in pension scheme

Where, following winding-up of the scheme, there is a deficiency in the assets of the scheme such that it is not possible to pay the benefits due under the scheme in full, that deficiency is a provable debt against the company in liquidation or the bankruptcy estate¹.

Since a defined contribution (money purchase) scheme generally pays out benefits based on the monies accumulated in the scheme, it is far more likely that a deficiency in the scheme assets will be found in a defined benefit (final/average salary) scheme.

1. Pensions Act 1995 section 75

57.89 Enquiries from scheme members

Enquiries regarding the pension scheme from scheme members should be directed to the pension scheme trustees unless the PPF has assumed control of the pension.

If the enquiry regards the operation of the PPF compensation scheme, the enquirer may be directed to the PPF.

Pension Protection Fund (PPF) assessment of the pension scheme

57.90 PPF assessment of pension scheme

On receipt of the notice of insolvency and scheme status, the PPF decide, within 28 days, if the scheme is to enter into an assessment process. The PPF will assess the pension scheme for eligibility for the compensation scheme based on the type of insolvency event and the nature of the pension scheme. The types of insolvency dealt with by the official receiver will meet the PPF eligibility criteria, as will most occupational pension schemes that are defined benefit schemes¹.

The assessment period may take up to two years, but the official receiver need have no direct involvement, and will have little indirect involvement unless they remain as the sole pension trustee, which is unlikely.

1. Pensions Act 2004 section 126(1)(a)

57.91 Conclusion of PPF assessment

Assuming the scheme meets the eligibility criteria, the PPF will issue a notice to the official receiver and assume responsibility for the pension scheme from the trustees. If any of the relevant eligibility criteria are not met, the PPF will have no further involvement in the pension scheme. Similarly, the PPF will not assume control of the pension if it is assessed that there are sufficient assets to pay the benefits due under the scheme. In that case, it will become the responsibility of the scheme trustees to wind-up the scheme.

57.92 Responsibility for pension during PPF assessment

During the period of a PPF assessment, the pension scheme trustees will continue to have responsibility for the scheme.

Any sums due to the scheme from the employer, during the assessment period, should be passed to the PPF rather than the scheme trustees. In reality, such a need to pass over monies is unlikely to arise in cases dealt with by the official receiver. If in doubt, the official receiver should seek advice from Technical Section.

Enquiries from pension scheme members can be directed to the trustees or, if the question is about the PPF compensation, the enquirer may be directed to the PPF.

Functions of official receiver when acting as trustee of a pension scheme

57.93 Trustee functions – basic overview

This Annex gives a overview of the actions that are most likely to be required of the official receiver when they are liquidator or trustee and when acting as the sole trustee of the pension scheme (as employer in the form of the office holder). For the reasons given elsewhere in this chapter, it is extremely unlikely that the official receiver will ever be in this position and instead the Pensions Regulator should be encouraged to seek the appointment of an independent trustee, particularly in view of the potential for a conflict of interest.

Similarly, the duties described in this Annex will be carried out by the Pensions Protection Fund, if that organisation takes control of the pension scheme.

For clarification, therefore, the official receiver should not be concerned with the guidance in this section unless they are sole trustee of the pension scheme.

57.94 Official receiver acting as pension trustee – possible conflict of interest

Apart from the administrative difficulties that the official receiver would encounter when acting as pension trustee, there is also the risk of a conflict of interest.

The insolvent employer is entitled to any surplus pension funds following the winding-up of the scheme. Many pension scheme rules provide that the pension trustee has discretion over how these funds are utilised during the winding-up process (they may, for example, be used to pay enhanced benefits to members).

In the event that the official receiver was acting as both pension trustee and insolvency office holder, there would be an obvious conflict of interest over those funds.

57.95 Official receiver acting as pension trustee – priority action

Where the official receiver is the sole trustee of the pension scheme, the priority will be to seek the early winding-up of the scheme. Normally this may be effected by writing to the financial services company that is administering the scheme to request that it is wound up¹. Subject to scheme rules, the costs of the winding-up would be borne by the scheme.

If this is not possible, perhaps because there is no financial services company appointed, or the scheme rules do not allow winding-up to commence in that way, the official receiver should seek the guidance of Technical Section, as it is likely that

legal/specialist advice will be required. Subject to the rules of the scheme, the costs of such advice are recoverable from the scheme and will not be an expense to the liquidation or bankruptcy estate^{2, 3}.

1. PNCSTL

2. Trustee Act 2000 section 31

3. Trustee Act 2000 section 32

57.96 Transfer requests – background

A member of a pension scheme has the right to request the transfer of their pension benefits to another scheme^{1, 2}. Such an event is particularly likely to occur during the winding-up of a pension scheme. The administration of this would fall to the pension trustee to deal with, and must generally be dealt with within six months of receipt³.

1. Pension Schemes Act 1993 section 94

2. Pension Schemes Act 1993 section 95

3. Pension Schemes Act 1993 section 99

57.97 Transfer request made to official receiver

Where a transfer request is made to the official receiver as trustee of the scheme, or employer, they should agree to the transfer provided the following documents and information are obtained:

- a copy of the written transfer request
- confirmation that the calculation of the cash equivalent of the member's benefits can be made without the need for the official receiver to exercise the discretion of the employer or trustee
- a certificate from the administrators of the desired scheme confirming that their scheme is eligible to receive the transfer and that the cash equivalent will be applied to acquiring rights under the rules of that scheme

Provided that this request is satisfied, the official receiver can sign the necessary paperwork relating to the transfer without the benefit of further advice – though they may consult Technical Section if desired.

In the event that any of this is not able to be provided it is likely that legal/specialist advice will be required. Subject to the rules of the scheme, the costs of such advice are recoverable from the scheme and will not be an expense to the liquidation or bankruptcy estate^{1, 2}.

1. Trustee Act 2000 section 31

2. Trustee Act 2000 section 32

57.98 Information to scheme members

The regulations relating to pension schemes require the trustees of a scheme to issue a Members' Booklet and disclose various pieces of information to scheme members, including an annual report, audited accounts, an investment report for the scheme, a statement of investment principles and a schedule of contributions.

Assuming there is one appointed, the official receiver may request that the financial services company administering the pension deal with such matters. Subject to scheme rules, the costs of this would be borne by the scheme.

If this is not possible, perhaps because there is no financial services company appointed or the financial services company declines to act, it is likely that legal/specialist advice/assistance will be required. Subject to the rules of the scheme, the costs of such advice are recoverable from the scheme and will not be an expense to the liquidation or bankruptcy estate^{1, 2}.

1. Trustee Act 2000 section 31

2. Trustee Act 2000 section 32

57.99 Appointment of advisors

Depending of the type of scheme, occupational pension schemes are required to appoint an auditor, an actuary and/or a fund manager.

An auditor is not required for schemes where all members are trustees (so this will be of no concern to the official receiver).

An actuary is not required for a money purchase scheme, and a fund manager is not required for wholly insured schemes.

Assuming there is one appointed, the official receiver may request that the financial services company administering the pension deal with such matters. Subject to scheme rules, the costs of this would be borne by the scheme.

If this is not possible, perhaps because there is no financial services company appointed or the financial services company declines to act, it is likely that legal/specialist advice/assistance will be required. Subject to the rules of the scheme, the costs of such advice are recoverable from the scheme and will not be an expense to the liquidation or bankruptcy estate^{1, 2}.

1. Trustee Act 2000 section 31

57.100 Resolution of disputes

The trustees of an occupational pension scheme must ensure that arrangements are made and notified to members for resolving disputes about matters in relation to the scheme. The procedures must provide for a nominated person, on the application of a complainant to give a decision on such an agreement. The trustees are required, following a decision made by the nominated person, to reconsider the matter in question. Where the official receiver is sole trustee of the pension scheme, they may rely on the existing dispute resolution procedure.

Where there is no procedure in place, the official receiver may request that the financial services company administering the pension deal with such matters. Subject to scheme rules, the costs of this would be borne by the scheme.

If this is not possible, perhaps because there is no financial services company appointed or the financial services company declines to act, it is likely that legal/specialist advice/assistance will be required. Subject to the rules of the scheme, the costs of such advice are recoverable from the scheme and will not be an expense to the liquidation or bankruptcy estate^{1, 2}.

1. Trustee Act 2000 section 31

2. Trustee Act 2000 section 32

57.101 Tracing scheme members

If it is necessary to contact a scheme member, but it has not been possible to ascertain the member's current address, the official receiver may use the Letter Forwarding Service operated by the Department for Work and Pensions.

Further information about this service is given in the following web-page:

<https://www.gov.uk/government/publications/pensions-and-insurance-tracing-and-letter-forwarding-service>