Sackers

The 2021/22 PPF Levy Determination

Alert | 02 February 2021

Introduction

On 26 January 2021, the PPF published its final levy rules for the 2021/22 levy year.

Key points

- As confirmed by the PPF in December (see 7 Days), the levy estimate for 2021/22 is £520 million (retaining a levy scaling factor of 0.48).
- The "small scheme adjustment" will be implemented, to better reflect the risk posed by these schemes. Risk-based levies for schemes with less than £20 million in liabilities are halved, with the reduction tapering between £20 and £50 million of liabilities. The PPF expects this "to be a long-term feature of the levy".
- The PPF will reduce the risk-based levy cap to 0.25% of liabilities, from 0.5%. This will be kept under review for future years.
- The PPF has made a few minor changes to their rules and guidance which are intended to clarify, amongst other things, their operation post Brexit.
- Schemes intending to certify a guarantee should consider whether an updated legal opinion will be required.
- The PPF will continue monitoring the impacts of COVID-19 on schemes and sponsors, and "respond flexibly" to issues that arise.
- Soft copy submission of contingent asset documentation, such as a guarantor strength report, is required from this year.

Brexit – overseas guarantors

With effect from 1 January 2021 and the end of the Brexit transition period, the UK is no longer subject to the Recast Brussels Regulation (which governs the treatment of jurisdiction clauses and the enforcement of judgments in EU member states). In its place, the UK has signed up to the Hague Convention on Choice of Court Agreements ("the Hague Convention"), which applies only to exclusive jurisdiction clauses. Historically, the PPF's standard forms have contained a non-exclusive jurisdiction clause under which the English courts have jurisdiction to settle disputes between the parties unless the trustees wish to issue proceedings in an alternative jurisdiction.

The PPF notes that a "practical consequence" of Brexit is that it may now "be harder to enforce a judgment obtained in the UK in relation to a standard form contingent asset in an EU member state". In recognition of this, the PPF has:

- amended its contingent asset standard forms, enabling parties to choose **either** an English/Scottish/Northern Ireland courts exclusive jurisdiction clause, **or** a non-exclusive jurisdiction clause, and
- updated its guidance to confirm that an amendment to a contingent asset that was entered into before 1 January 2021 to include an exclusive jurisdiction clause would be a permissible change to the standard form document.

The PPF makes clear that it does not require any action to be taken by schemes. Existing contingent assets are not required to be re-executed using updated standard form documentation.

However, schemes intending to certify a guarantee where the guarantor is based in an EU or EFTA (Switzerland, Iceland, Norway, and Liechtenstein) state should consider whether an updated legal opinion will be required. The PPF guidance states that "a new or revised formal legal opinion is not generally necessary, but trustees should provide one if they think the legal position may have changed since the original opinion was given, such as might prevent the trustees from giving the relevant certifications on Exchange unless the opinion is updated". As the certifier is required to confirm that the guarantee is "a legally binding, valid and enforceable obligation of the Guarantor(s)…", unless the trustees have already received legal advice specifically covering post-Brexit enforcement issues, updated legal advice would be required.

Other changes

Re-execution of contingent asset documentation – clarificatory change

In Levy Year 2018/19, the PPF introduced rules requiring re-execution of its forms for certain types of contingent asset (those containing a fixed monetary sum). The PPF has now introduced a new rule to make it clear that if a scheme has already satisfied the re-execution requirement in a previous levy year (commencing on or after 1 April 2018), it does not have to re-execute the documentation again.

"Acceptable Financial Institutions"

One of the requirements for contingent assets to receive levy recognition is that "Acceptable Financial Institutions" (eg banks) are domiciled in a "Nominated Jurisdiction". The definition of Nominated Jurisdiction historically included EU and OECD countries, but Liechtenstein (a member of the EEA) fell outside it. As Liechtenstein is subject to EU financial services regulation, the PPF believes it appropriate to expand its definitions of Nominated Jurisdiction to include it. Contingent asset agreements which have already been executed will continue to be suitable for levy recognition if they used the standard form in force at the time of execution, and there is no need for schemes to re-execute on the new forms.

Dun & Bradstreet

The PPF confirms that it will continue to measure insolvency risk on the basis in use since April 2020, using credit ratings and the PPF-specific insolvency risk model operated by Dun & Bradstreet which it will continue to review, to ensure that the model remains risk reflective. Experian services are being phased out by mid-

2021.

The PPF reminds schemes that it is important to ensure that D&B have accurate information: “in particular, if you previously self-submitted accounts to Experian, you will need to provide these to D&B as well.”

COVID-19

The PPF acknowledges that it is “publishing this policy statement at an extremely difficult time due to the pandemic”. It “will continue to monitor economic and other developments carefully and consider what, if any, changes to our rules are necessary in view of these exceptional circumstances in future years”.

It is making a temporary move away from its typical multi-year approach to levy rules design. This aims to allow the PPF to take “a more flexible approach, in the event this is called for, as a result of the impact of COVID on schemes and their employers”. It expects to be able to move back to a multi-year approach for 2023/24 (on which it will consult in 2022).

In considering any changes to the levy calculation, the PPF “will start from a position of preserving stability, unless there is a clear case for change”. However, it acknowledges that the anticipated rise in overall insolvency risk due to the pandemic “may increase the overall collection required in future years”.

Retaining the additional levy payment flexibility introduced in June 2020 was supported, with many respondents acknowledging that, although take up of the easement has been low so far, the full impact of COVID-19 is yet to materialise. The PPF states that it will continue to monitor the economic environment through 2021 before deciding whether to announce any easements for 2021/22 invoices in the autumn.

The Corporate Insolvency and Governance Act 2020 (“CIGA”)

The PPF has updated its Contingent Asset Guidance to help schemes consider whether they need to take into account the change in creditor priority introduced by CIGA (see our Alert) in certain circumstances when certifying “the realisable recovery” (a fixed cash sum that they are satisfied the guarantor(s) could meet in an insolvency situation if called upon to do so) for a Type A contingent asset (parent or group company guarantee).

Commercial Consolidators

Although the market in commercial consolidators (ie superfunds) is evolving, the PPF does not yet consider there to be a need to update its methodology in respect of these. It will continue to monitor developments.

The PPF has published draft guidance to accompany its Commercial Consolidator Appendix and opened a short consultation on the content (which closes on 16 February 2021) to allow stakeholder feedback on the drafting.

Contingent asset submissions and next steps

As ever, trustees and employers who intend to put in place or retain contingent assets should start the process as soon as possible – in current circumstances, where there may have been a significant change in a sponsor’s economic condition / realisable recovery.

Although this isn't a year with lots of change, there are various elements that clients will need to consider carefully, and for some, this will include addressing practicalities. Speak to your usual Sackers contact sooner rather than later to ensure you are prepared.

Historically, submission of contingent asset documents has had to be made in hard copy to the offices of the PPF. The PPF has reviewed its processes and has agreed that "it is most likely useful" for stakeholders to be able to submit documentation in soft copy format. It has amended its rules to reflect that supporting documentation should be submitted to the PPF by email, to information@PPF.co.uk .

Beyond this, all the usual requirements in relation to taking advice, completing the relevant formalities, and the documents that need to be submitted, continue to apply.

The deadline for certification / re-certification on Exchange is midnight on 31 March 2021. Relevant documentation must be sent to the PPF by email by 5pm on 1 April 2021. (Please click here for the PPF's timeline.)

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