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making financial sense of the future

Actions trustees can take

The three R's - Recognise, react, resolve

Who am I

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- Richard is a Partner in HRS who is responsible for leading the Pension Deficit Solutions initiative within the firm
- He has recently advised both the Pension Protection Fund on the risk based levy and The Pensions Regulator on anti-avoidance powers and clearance. He was seconded to The Pensions Regulator for 4 months
- He has previously been Finance Director or Chairman of a number of quoted companies, both through flotation or restructurings/take private
- Richard brings to the area of pensions deficit solutions a boardroom perspective to create right solutions for corporates, trustees or government

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Actions trustees can take
Agenda

- The new relationship between Trustees and their Employers
- Information
- Confidentiality
- Conflicts of interest
- Negotiate, negotiate….
- Actions to improve scheme security
- The role of the Pensions Regulator

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Actions trustees can take
Key Messages

- The pension scheme, if in deficit, is an unsecured creditor of the employer – and a "robust debate" should ensue
- Trustees should plan how they would deal with issues that might affect the pension scheme
- The relevance of Confidentiality Agreements
- How to avoid negotiating with themselves
- Should also seek specialist advice which may include actuarial, legal, and creditor advisory
- Trustees can protect themselves – banks do it all the time
- The Regulator is risked-based pragmatic and wants to be a referee – let it!

Actions trustees can take
The new relationship between Trustees and their Employers

- The pension scheme, if in deficit, is an unsecured creditor of the employer
- Like an unsecured loan by the scheme members to the company
- The Regulator has said that the trustees should learn from the way a bank with a large unsecured loan would negotiate with the company
- Trustees are now in a strong position to negotiate with the employer – not least because the Regulator has the power to issue CNs and FSDs.
- Should not be an adversarial relationship – a "robust debate"

Actions trustees can take
The new relationship between Trustees and their Employers

- Greater power means greater responsibility
- Trustees should plan how they would deal with issues that might affect the pension scheme:
  - monitor what is happening to the employer
  - insist on information on proposed corporate transactions at an early stage (especially Type A events)
  - ensure that the employer understands when Clearance is needed
  - be involved when necessary
  - ensure that conflicts of interest are dealt with

Actions trustees can take
Information and Confidentiality

- Negotiate properly and be seen as a equal
- Need a considerable amount of information
- But much of this information will be commercially sensitive
- Trustees must respect this
- Confidentiality agreements (with the scheme's sponsoring employers and other parties to the corporate activity)
- The Regulator has the power to remove trustees that do leak information as they will be considered "not fit and proper" to do their job as a trustee

Actions trustees can take
Conflicts of interest

- The negotiation over securing the proper funding of the scheme could create conflicts of interest for trustees
- Member-nominated trustees could learn about possible job losses
- Employer-nominated trustees could find themselves pressing the company for more assets to be paid into the scheme
- Trustees could find themselves negotiating with themselves
- Where conflicts arise, trustees will need to draw any conflicts to the attention of other trustees

Actions trustees can take
Conflicts of interest

- Exclude themselves from any negotiations or discussions between the employer and the other independent trustees?
- Resign from the trust board?
- Appoint an independent trustee to deal with negotiations
- Get independent advice

Actions trustees can take
Negotiate, Negotiate…

- The aim of the negotiation is to ensure that the scheme is properly supported and funded following a corporate event or a change in the financial position of the employer.
- Trustees are expected to engage to ensure that scheme members do not lose out
- The need to have necessary skills to assess what the employer is proposing
- Should also seek specialist advice which may include actuarial, legal, and creditor advisory
- Trustee engagement in the negotiation is expected to be "robust"
- The Regulator's suggested mitigating factors……

Actions trustees can take
Measures to improve scheme security

1. Schedule of contributions
2. Additional cash or other assets
3. Negative pledges
4. Covenants and monitoring rights – if breached, will allow the trustees formally to reassess their position
5. Insurance guarantees
6. Special accounts (escrow accounts)
7. Security over assets

If agreement cannot be reached….the trustees or employer may apply to the Regulator to help negotiations

Actions trustees can take
The Role of the Pensions Regulator

- Given the number of corporate events, and financial changes of each employer…
- The Pensions Regulator has said it will take a risk-based approach
- The Regulator will seek the active involvement of the trustees and their advisers to negotiate with the employer over the corporate event
- Its objective is to strike the right balance between the employer and the scheme
  - On the one hand it wants to protect the scheme and the pensions of scheme members
  - On the other, it does not want to intervene in the running of companies

Actions trustees can take
The Role of the Regulator in Clearance – a taste of things to come?

- Referee not player
- If the Regulator is satisfied:
  - with the application for Clearance
  - with the negotiation between the employer and trustees
  - that the corporate activity will have no material consequences for the pension scheme
- Then Clearance will be granted.
- Regulator will encourage further negotiation if sufficient mitigation may not in place
- It may encourage – or indeed propose – further negotiation, or make constructive suggestions…….

Actions trustees can take
Key Messages

- The pension scheme, if in deficit, is an unsecured creditor of the employer – and a "robust debate" should ensue
- Trustees should plan and sign Confidentiality Agreements
- Don't negotiate with yourself
- Seek specialist advice - actuarial, legal and creditor advisory
- Trustees can and should protect themselves – banks do it all the time
- The Regulator is risked-based pragmatic and wants to be a referee – let it!

Recognise your predicament, react to your situation and resolve your position