



Variable Life Benefits

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ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
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Introduction

The Ontario Bar Association (“**OBA**”) is pleased that the Ontario government is developing a framework that supports Canadians in their retirement by permitting variable life benefits (“**VLBs**”) to be provided in pooled registered pension plans (“**PRPPs**”), defined contribution (“**DC**”) pension plans, and pension plans that provide for additional voluntary contributions (“**AVCs**”). A regulatory approach to VLBs that permits innovation and evolution of VLBs while minimizing regulatory burden should increase the likelihood that this decumulation option is available to as many Canadians as possible.

Executive Summary

The OBA submits that the VLB legislation should allow for flexibility in VLB design and administration, including with respect to the number of hurdle rates, the frequency of benefit adjustments, offering a return of capital on early death.

The VLB market should be allowed to develop in a flexible way, promoting design innovation to encourage industry and member uptake. In that regard the OBA also proposes that members should be permitted to transfer only a portion of their pension or PRPP account to a VLB, subject to certain limitations.

Such flexibility is balanced with regular actuarial review of plans and disclosure of key information to assist members in making informed decisions about VLBs as a decumulation option. Additional protections for spousal entitlements should be adopted through waivers and the ability to divide VLBs on relationship breakdown.

Consideration should be given to adopting the PRPP approach to benchmarking fees, considering the potential impact of fees on benefit payments, since PRPPs may be the primary providers of VLBs.



Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Pensions and Benefits Law section. Members of this section include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have extensive experience dealing with all aspects of pensions and VLBs.

Comments & Recommendations

General Comment

The OBA encourages the Ontario Government to adopt a **principles-based and risk-based approach** to the VLB regulatory framework. Such an approach provides greater flexibility with respect to the design and administration of VLBs. It also recognizes that the characteristics of VLBs will vary by plan and will evolve over time. An overly prescriptive approach to regulating VLBs potentially risks restricting innovation, increasing regulatory burden, and reducing industry uptake.

A principles-based and risk-based approach would also be consistent with the Financial Services Regulatory Authority of Ontario's ("FSRA") approach to regulating pension plans and the Office of the Superintendent of Financial Institutions' ("OSFI") approach to regulating PRPPs.



Similarly, **harmonization** with pension benefits standards legislation in other Canadian jurisdictions and PRPP legislation is key to reducing regulatory burden, facilitating the implementation of VLBs, and potentially leading to lower administration fees for participants. Harmonization would facilitate transfers between registered pension plans and PRPPs, since the most scalable VLB implementations may come in the form of decumulation-only PRPPs.

Benefit Determination and Adjustment

1. The hurdle rate is used by a VLB provider to determine the size of the monthly payment. It is an important operational element of the benefit. Should there be limits on the level or number of hurdle rates? A hurdle rate other than the expected rate of return can add complexity to a VLB. Should it be required to approximate the expected rate of return of the investments? Why or why not?

Existing VLBs provide benefits using a variety of plan designs. The VLB framework should provide flexibility and allow for a variety of VLB designs, including a hurdle rate (or hurdle rates) that is consistent with the objectives of the VLB design and the demographics of the VLB. As such, VLB providers should not be limited to establishing a hurdle rate that approximates only the rate of investment return. The administrative challenges and operational risk associated with an overly complex VLB fund should, as a practical and risk mitigation matter, reduce the likelihood that providers will establish overly complex designs.

Providers should be required to disclose factors that were considered in establishing the hurdle rate, including the expected rate of return and any relevant assumptions. Disclosure is key to participants making informed decisions about their retirement income options and should be consistent with disclosures for other types of investments.



2. Would annual investment adjustments and triennial mortality adjustments be appropriate? Why or why not? Should alternative timelines be considered depending on the size of VLB? Should investment experience adjustments require an actuarial report certified by an actuary and filed with the regulator? Is a regulatory filing without an actuary sufficient? Why or why not?

As a practical matter, multiple timelines for regulatory filings would increase administrative complexity for VLB administrators and the related operating fees. It would also increase regulatory burden and complexity in reviewing such filings for FSRA or OSFI.

The Government should take guidance from the pension regulatory requirements for filing actuarial valuation reports and cost certificates, including with respect to when the report must be filed, the content of such reports, and the role of an actuary. Accordingly, we generally adopt the Canadian Bar Association's comments regarding such filings in relation to the proposed Federal legislative framework for VLBs, subject to minor changes:

- Triennial valuations should be the default valuation frequency for VLBs, to reduce benefit volatility while limiting plan administrative burden. Generally, there should be limited variations on such triennial valuation rule.
- Examples of variations on the triennial valuation rule are:
 - The VLB provider should be required to file a valuation before adjusting benefits outside the range permitted under the most recently filed valuation.
 - The VLB provider should have discretion to file a valuation at any time.
 - FSRA or OSFI, as applicable, should have the power to order a valuation at any time.



3. Should mortality experience adjustments be set out in an actuarial report certified by an actuary and filed with the regulator? Why or why not? Should the mortality table be prescribed? Why or why not?

These questions are generally actuarial in nature, not legal. As such, we will defer to qualified actuaries. However, as a practical matter, a prescribed mortality table would require legislated updates. Moreover, if a mortality table is prescribed, it may not be appropriate for certain VLBs, which could impact benefit payment adjustments.

4. How much time is required to calculate the annual investment experience adjustment after the fund's year end? What would be a reasonable deadline to require notices of the annual investment experience adjustment be sent to members?

The first question is actuarial in nature, not legal. As such, we will defer to qualified actuaries. However, we note that the question assumes that benefits will in all cases be adjusted for investment experience annually. As noted above, a VLB can be designed in a variety of ways. Requiring annual benefit adjustments may be inconsistent with a particular plan design. It also potentially creates administrative complexity for administrators (and members) by requiring more frequent adjustments (and relatedly) member disclosures than may be necessary for the sustainability of the VLB.

With respect to notices, to the extent an adjustment is required, a notice should be sent as soon as possible but before the payment is adjusted.

5. What other requirements should be considered with respect to benefit adjustments under the fund?

In lieu of annual benefit adjustments, the legislation could contemplate required adjustment where the anticipated benefit adjustment exceeds a certain threshold. This approach would limit the volatility of payments and reduce administrative burdens and costs associated with making such adjustments. It would also recognize that certain VLBs may be designed to address long-term volatility, such that frequent adjustments may not be necessary in all cases for the viability of the fund.



6. A VLB may be able to offer a partial return of capital on death of the member, if the sum of the member's monthly receipts did not at least equal the capital invested. Should this be permitted or required in a VLB? How can this be provided, and does it raise any concerns?

A VLB should be permitted, but not required, to offer the option of a return on capital if the sum of the member's monthly receipts did not at least equal the capital invested.

The return of capital could be a return of the full amount of the capital not yet received as monthly payments or a portion thereof. There should be flexibility in incorporating such a feature into the VLB design, provided it is incorporated in an actuarially sound manner. The details of any such feature should be disclosed in the VLB Option Statement.

The ability to withdraw at least some capital may be a feature that members value, like early death payouts in life annuities. However, it may increase the cost of the VLB and it may not be valued by all members, depending on their personal circumstances.

As such, in addition to permitting a return of capital in the VLB, the legislation should provide members with more flexibility as to how they allocate their pension or PRPP account balance to retirement income options. The legislation should permit participants to transfer all or a portion of their pension or PRPP account to a VLB fund, with the remainder of the account allocated to a different transfer option at the election of the member. Any such division of the member account could be subject to the small benefit limits and any limitations the VLB may impact to protect the integrity of the fund (e.g., a minimum transfer amount).

Such an approach would allow members to have flexibility in combining income sources that addresses their requirements for decumulation and estate planning. The additional flexibility should mitigate risks related to a VLB that does not offer a return of capital by permitting the member to allocate only a portion of their retirement income to such a VLB. In our view, additional flexibility would also increase the likelihood that members avail themselves of a VLB as a decumulation option.



Family Law

While the Consultation Document does not include any specific questions regarding family law matters, we have included some commentary below in that regard.

A spousal waiver should be required for members electing VLB benefits in all cases other than with respect to AVCs,¹ even where the VLB offers a 60% survivor pension.

Since VLB payments can vary, it would be administratively complex to determine in each case whether the survivor benefit payment would be less than 60% of the member pension. Future variations in benefit payments could subsequently undermine any such determination. Otherwise, clarification would be required as to how the administrator should determine whether the survivor benefit is less than 60% of the benefit payable during the member's lifetime.

A spousal waiver requirement mitigates risk to the VLB administrator without unduly increasing the administrative burden, since pension plan administrators and PRPP administrators already administer other spousal waivers. A form of waiver could be published by FSRA or OSFI for consistent disclosure.

We agree that a VLB should be subject to property division rules on relationship breakdown. The legislation should address such a division, including where the VLB benefits are not yet in pay, and contemplate a division of any payments at source.

Fee Restrictions and Disclosure Requirements

1. What is the most appropriate way to regulate the fees charged for the investment and administration costs associated with operating a VLB fund to ensure a VLB is operational but also protects members?

As noted in the Consultation Document, the *Pension Benefits Act* does not limit fees for defined contribution pension plans, but plan members cannot transfer their account until

¹ AVCs are not subject to the joint and 60% survivor rules



termination of employment, even if they disagree with the fees. As such, plan members are limited in options while employed relative to the options available for retail retirement savings accounts.

We understand that the policy objective in the PRPP was to establish a benchmark so that PRPP members would be subject to the same fees as large defined contribution plan members, and to avoid retail customer fees in PRPPs. Considering the potential impact of fees on retirement income and the fact that VLB members cannot withdraw their funds, and that PRPPs may be the primary provider of VLBs, such an approach may also be appropriate for VLBs.

Consideration should also be given to whether the VLB provider would be obligated to maintain low fees as a matter of their general fiduciary obligation. While the costs will vary, and will depend on a number of factors, the plan administrator's fiduciary obligation require that fees be monitored and remain competitive to the market of institutional pricing for plans of similar benefits and sizes, rather than retail pricing.

2. In considering the three examples of disclosure above, do they capture the relevant information that would be useful to members in understanding the benefits and risks of a VLB? Are there other disclosure or information requirements that would be valuable to members?

VLB Option Statement

The option statement should include the targeted rate of return for the fund, as well as information such as:

- the hurdle rate(s),
- the objectives of the fund (e.g., level of risk as it relates to likelihood of benefit adjustment);
- any assumptions used in estimating the targeted rate of return;
- the projected rate of return or the mortality experience and how those impact the amount of the benefit, as applicable;
- any options for a refund (including on death);



- the form of payment of the benefit, including any guarantee, survivor benefits, or refund;
- details regarding fees;
- how any refund is to be calculated; and
- the implications of VLB termination.

The option statement should include not only forward-looking estimates, but also historical information. Forward-looking statements should be identified as such.

The option statement requirements should not prescribe content such as a requirement to "clearly state that the payments will vary every year". Depending on the VLB design, payments may or may not vary each year. Some VLBs may be specifically designed to reduce the likelihood of annual adjustments.

Rather, the statement should describe how VLB payments are determined and the circumstances under which an adjustment may arise. The legislation could also include a requirement to generally state that the nature of VLB payments is that they may increase or decrease.

Consideration should be given to whether members will be provided with the option to transfer to a VLB only at a retirement eligible age or prior to a retirement eligible age. If a VLB does not offer a refund on pre-retirement death, then electing a VLB at an early age could result in forfeiture of such assets. Moreover, consideration should be given to the impact, if any, an extended deferral period should have on benefit payments if the VLB option is offered before retirement eligibility.

Annual VLB Statement

Like the option statement, the annual statement should include VLB performance-related information, fees charged, and information about the monthly payment. The annual statement requirements should not prescribe content that assumes a member's monthly payment will be adjusted for the following year.

VLB Termination Statement

The termination statement should clarify a member's portability or payment options at termination and how the value of the termination benefit is determined.

Retired and deferred VLB members, as well as surviving spouses, should have access to the value of the remaining VLB, as well as all the same transfer options as are available to



terminated members of a pension plan or a PRPP, including a transfer to another VLB. The Consultation Document also contemplates a potential obligation for the termination statement to set out "the possible value of those options." However, it is unclear what is meant by this obligation or how it is to be determined.

Clarification is required regarding the nature of the potential obligation in the Consultation Document for the termination statement to set out "how the VLB fund's assets will be distributed and what restrictions would be placed on the member's assets", as it relates to the transfer options, particularly where a return of capital is not applicable.

3. In considering the three examples above, are there additional events or circumstances that ought to require disclosures to members?

Disclosure should be required on the death of the participant if there is a benefit payable, including if there is a refund of capital, a survivor benefit or a guarantee payable. Disclosure should also be required for family law purposes, as described above.

4. Are there any other approaches that the government should consider that would support informed decision-making and transparency in contemplating a VLB framework?

The Government should consider taking guidance from disclosure requirements for certain investments funds.

The OBA would be pleased to discuss this further and answer any questions that you may have.