The Voice of the Legal Profession

Draft Regulation regarding Pension Transfers under sections 80 and 81 of the Pension Benefits Act (PBA)

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Submitted to: Pension Policy Branch, Ministry of Finance

Submitted by: The Ontario Bar Association, Pension Section

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to comment on the draft regulation concerning asset transfers between pension plans (the "Draft Regulation") in the context of corporate and public reorganizations, including the sale of a business, under sections 80 and 81 of the *Pension Benefits Act* of Ontario (the "PBA").

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents 18,000 lawyers, judges, law professors and law students.

This submission was prepared by the OBA Pensions and Benefits Section, which has over 300 members, including the leading practitioners in the field. These members serve as legal counsel to virtually every stakeholder in the pension and benefits industry, including plan administrators, employers, plan members, pension and benefit consultants, investment managers, actuarial firms and other advisors.

Over the years, our members have analyzed and provided advice to the Ontario government on every significant legislative and policy initiative in the area of pensions and retirement saving.

Overview

This submission is divided into three sections.

The first section outlines general observations on the Draft Regulation and highlights concerns that we hope will be taken into consideration when finalizing the Draft Regulation and developing future asset transfer rules.

The second section contains our recommendations pertaining to specific sections of the PBA that were identified during our review of the Draft Regulation.

The third section contains our comments on specific sections of the Draft Regulation, along with our corresponding recommendations.

We look forward to an opportunity to assist with the further review and development of the Draft Regulation.

General Observations

For the reasons that follow, we are concerned that the Draft Regulation is restrictive and lacks the flexibility required to facilitate transfers involving large pension plans:

- The Draft Regulation appears to have limited scope as it appears to apply on a prospective basis only and to situations where the provisions of the successor pension plan with respect to reduction of accrued benefits are not more permissive than those of the original pension plan (e.g. SEPP to SEPP, JSPP to JSPP, JSPP to SEPP, etc.).

- The Draft Regulation falls short of implementing the recommendations made by Harry Arthurs. For example, it does not facilitate the growth and operation of large-scale pension plans or enable/encourage cooperation among small and medium sized plans (see Recommendation 9-2).

- The Draft Regulation adopts a prescriptive approach and does not provide the flexibility originally anticipated from the changes to the PBA introduced by Bill 236 (e.g. paragraphs 80(13)3. and 81(6)1. of the PBA imply that administrators would have some scope to negotiate the amount of assets to be transferred).

- A rigid solvency-based approach for establishing the amount of assets to be transferred and the funded status requirements is not appropriate for all plans (e.g. plans with an existing solvency exemption).

We are also concerned that contrary to government statements that accompanied the original amendments to the PBA (e.g. Technical Backgrounder),[1] the Draft Regulation does not appear to simplify the asset transfer process. If anything, the process seems more complicated. For example:

- Compared to Policy Statement #2 ("PS2"),[2] the Draft Regulation, at times, includes some more onerous requirements. For the FSCO application, both the Draft Regulation and PS2 require the following: a copy of the purchase agreement and any amendments thereto, certified copies of notices to transferred members and the union, and an actuarial report. The Draft Regulation, however, also requires two separate reports (one for the successor plan, the other for the original plan), compliance statements from the administrators of the original and successor plans, any amendments to the original and successor plans, and separate notices from both the original and successor plans for transferred members, trade unions and advisory committees, and former/retired members and other beneficiaries.

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[1] See http://news.ontario.ca/mof/en/2009/12/ontarios-proposed-pension-reforms---technical-backgrounder.html

[2] See http://www.fsco.gov.on.ca/en/pensions/policies/active/Documents/A700-200.pdf

- Turning to the notice requirements in particular, in addition to transferred members and the union (which were entitled to notice under PS2), advisory committees, retired/former members and certain others entitled to benefits must receive notices under the Draft Regulation. As noted above, both the original and successor plans must distribute separate notices (each containing somewhat different information) to transferred members, retired/former members and certain others entitled to benefits, unions and advisory committees. The information to be conveyed under the Draft Regulation is more detailed than under PS2. For example, the original plan must include in its notices all information required to be included in annual statements. Further, there are additional "special notice" requirements where the individual's consent to a transfer is required.

- Once the transfer was completed under PS2, the administrator was required to file an actuarial report within 120 days. Under the Draft Regulation, the administrator must file, within 60 days, a statement certifying compliance (and, if applicable, a statement that transferred members are being given the option of purchasing additional service), and an actuarial cost certificate.

While it may be the case that greater specificity in the process is required to increase certainty and decrease queries from FSCO, the Draft Regulation does seem to create a more onerous process for plan administrators and employers that is no more likely to be utilized than the existing process.

In light of the foregoing, we are concerned that the practical application of the Draft Regulation may be limited to a small subset of pension plans (e.g. small plans on a prospective basis).

Comments on Specific Sections of the PBA

During our review of the Draft Regulation, we indentified specific sections of the PBA that we believe should be examined in greater detail. We recognize that the focus of the current consultation is on the Draft Regulation, but understand that comments on the PBA itself are also welcome for further consideration.

Sections 79.2(8) & (9)

When read in the context of the Draft Regulation, subsections 79.2(8) & (9) of the PBA are not clearly drafted. We understand that the Ministry of Finance's intent is that the provisions are to work as follows:

- the excess amount (i.e. the difference between the commuted value of the benefit in the original plan and the commuted value of the benefit in the successor plan) is the result of a limitation of the eligible service that can be recognized in the successor plan;

- the excess amount must be kept locked-in and transferred to a prescribed retirement savings arrangement up to the amount permitted under the *Income Tax Act* ("ITA"); and

- the amount in excess of the amount that the ITA permits to be transferred to a prescribed retirement savings arrangement must be paid out in cash.

Subsection 147.3(3) of the ITA does not restrict the quantum of assets that may be transferred from one DB pension plan to another where benefits become provided to members of the receiving plan who were formerly members of the transferring plan. Accordingly, it is unclear how this translates to subsection 79.2(8) which refers to an “amount of assets to be transferred” being “greater than the amount allowed under the ITA” and to pay “the portion that exceeds that allowed amount into a prescribed retirement savings arrangement”.

In addition, the Summary of the Draft Regulation posted on the Regulatory Registry has also raised issues with respect to these provisions. The Summary of the Draft Regulation states as follows:

> …allow the pension benefits of transferring employees to be different in the new plan while protecting the commuted value of their accrued benefits by requiring any part of such value, not transferred to the successor plan be paid to the member.

This suggests that the member will be paid the difference between the commuted value and the amount transferred (where less). However, our understanding was that the intention behind the new asset transfer rules was for the member to be paid the amount by which the commuted value of the benefit in the original plan exceeds the commuted value of benefit in the successor plan because of limitations under the ITA (not the actual amount transferred between plans).

Recommendation: Subsections 79.2(8) & (9) of the PBA should be amended to eliminate any ambiguity and clarify the original intention.

Subsections 80(6), (7) & (11)

Subsections 80(6) and (7) of the PBA speak to the original employer and successor employer entering into a transfer agreement while subsection 80(11) provides that the administrator or such other person as may be prescribed is to apply for the Superintendent's consent. This could cause issues for MEPPs or JSPPs where employers could enter into a transfer agreement without the input from or knowledge of the plan sponsors and/or administrators.

Recommendation: Amend the PBA to require employers to obtain approval from the sponsors and/or plan administrators prior to establishing an asset transfer agreement, or, for public sector pension plans, MEPPs and JSPPS, amend the PBA to provide that the asset transfer agreement be established between the administrators.

Comments on Specific Sections of the Draft Regulation

Section 3

Under the definition provided in this section, there may be more than one effective date of the transaction if a reorganization of a business has several phases. This will lead to uncertainty in applying the rules, since other provisions of the Draft Regulation require that specific timelines be met based on the effective date. For example, subsection 5(3) requires the application to be filed within 180 days after the effective date of the transfer, and subsection 17(2) requires notice to be given within 90 days after the effective date of the transfer.

This section also defines the effective date for a transfer entirely in terms of the effective date of the sale, assignment or disposition of all or part of the original employer's business or all or part of the assets of the business to the successor employer. Consequently, timelines under other sections of the Draft Regulation (including those noted above) will have already expired for some asset transfers by the time the sections takes effect – which means historical asset transfers and/or those who are "in the queue" will be entirely excluded from the new provisions. Moreover, is not clear what rules would apply to "pre-Bill 236" transfers since there is no transitional provision for asset transfers that are not covered by the new rules.

In summary, we are concerned that the new rules will only apply prospectively and do nothing to help those plans with historical assets transfers and/or plans with applications "in the queue".

Recommendation: Prescriptive timelines set out in the Draft Regulation should be eliminated to allow the regulator to develop and issue a policy on timelines that accommodates practical considerations, including transitional issues.

Section 4

It is not clear why the effective date for transfers under section 81 of the PBA is based on the effective date of the amendment. This could lead to interpretation issues (e.g. if a prospective effective date is built into the original or successor plan text).

Recommendation: The Draft Regulation should be amended to allow the regulator to develop a policy on effective dates. Alternatively, section 4 should be amended to allow more flexibility for the effective date of transfers.

Section 5

This section requires that the application must be filed within 180 days after the effective date of the transfer.

We believe that the prescribed timeline is too short. It is also not clear if the Superintendent has authority to extend timelines under the Draft Regulation. Moreover, there is no indication of the consequences if the timeline is not met - e.g. would this mean that the transfer cannot go through?

As noted above in the comments on section 3, it is also not clear how the requirement in section 5 is to be interpreted if there are multiple effective dates.

Recommendation: The Draft Regulation should allow the regulator to develop a policy on timelines with appropriate flexibility to accommodate unforeseen situations.

Section 7

Inclusion of grow-in benefits in the determination of a member's commuted value is inconsistent with the deemed non-termination of employment in section 80 of the PBA and continued employment with the same employer in events contemplated by section 81 of the PBA.

It is administratively problematic/confusing for a member who would be given a statement showing a commuted value determined as of the effective date which includes grow-in, if that member terminates shortly thereafter without grow-in.

It should also be made clear whether grow-in would apply to JSPPs that have elected to opt out under section 74.1 of the PBA. If one plan includes grow-in and the other does not, there could be an inappropriate shortfall or windfall for the member.

Recommendation: Do not include grow-in in the determination of a member's commuted value.

Section 9

An original pension plan is required to transfer surplus to the successor plan.

However, in the case of some plans (e.g. MEPPs or JSPPs), ownership of surplus (and the responsibility for funding a deficit) may already be established in the plan documents and/or the governing sponsorship agreement. Forcing a new method of dealing with surplus for these plans is contrary to the policy and governance framework on which they are based.

Recommendation: The regulations should provide flexibility on surplus transfers for MEPPs and JSPPs that already have a surplus mechanism in place.

The Draft Regulation does not address events that may occur during the period of time between the effective date and the time when the assets are actually transferred.

Recommendation: The asset transfer amount should be defined to include adjustments related to the transaction/event (for example, benefit payments and investment returns after the effective date but before the asset transfer).

Subsections 80(15) and 81(7) of the PBA provide that the Superintendent may waive one or more of the funding requirements in the prescribed circumstances. Currently, no such circumstances are prescribed.

Recommendation: The Draft Regulation should be revised to set out the circumstances under which the funding requirements may be waived.

Sections 9 & 10

Solvency based tests are not appropriate for plans that are solvency exempt (e.g. prescribed JSPPs).

Recommendation: The Draft Regulation should be revised such that solvency exempt plans are not subject to solvency based tests.

Section 11

The intent and application of this provision is not clear. Is a receiving plan to be required to prepare a valuation reflecting additional unfunded liabilities to be funded separately from existing unfunded liabilities? Does "new" refer to increased unfunded liabilities even where the funded ratio of the receiving plan is not decreased as a result of the transfer, or does it apply to unfunded liabilities relating solely to a decrease in the funded ratio of the receiving plan?

Recommendation: Revise the Draft Regulation to clarify funding requirements after the transfer.

Section 13

We understand that pursuant to section 13 of the Draft Regulation, asset transfers are not allowed from SEPPs to JSPPs, MEPPs and target benefit plans.

In the broader public sector context, this would mean the Ontario Public Service employees who are part of a SEPP (e.g. the Public Sector Pension Plan) and who are subject to a divestment under section 80 would not be permitted to transfer their pension assets to other public sector pension plans or JSPPS (e.g. OMERS, HOOPP, OPSEU Pension Trust).

At the same time, Ontario Public Service employees who are part of a JSPP (e.g. OPSEU Pension Trust) who are subject to the same section 80 divestment will be given the option to transfer their pension assets to other public sector plans or JSPPs. As divestments typically affect Ontario public service employees in both plans at the same time, this will create an inequity with respect to the portability options offered to members, based solely on the members' plan affiliation.

Recommendation: Amend section 13 so as not to prohibit transfers from a public sector SEPP to a public sector JSPP.

Section 15

The requirement that members credited with less service in the successor plan than they were credited with in the predecessor plan be allowed to purchase past service will be problematic for most plan sponsors, particularly in the private sector. It creates the potential for increased plan-sponsor liability to fund the additional benefits over the course of the member's service. It seems inappropriate that such a substantive requirement could be imposed by regulation.

In addition, the requirement imposes a huge administrative burden on the successor employer in terms of communications, administering the purchases, compliance with ITA reporting requirements, etc. Given that the legislation already protects member's commuted values in the successor plan and limits any reduction in the amount of the member's accrued pension benefits to 15%, this measure is not necessary for the protection of member benefits, while serving to create a huge impediment to private sector asset transfers.

Recommendation: The requirement to allow past service purchases should be removed from the Draft Regulation.

Section 16

The deadline for transferring the assets is too inflexible, especially if assets to be transferred are illiquid.

Recommendation: The Draft Regulation should allow the regulator to develop a policy on timelines with appropriate flexibility to accommodate unforeseen situations.

Schedule 2, sections 5 & 6

Recommendation: The certification by the administrator should be "to the best of the administrator's knowledge and belief", consistent with the wording that is used in FSCO Form 1.1.

Schedule 3, section 5

Recommendation: For some plans (e.g. MEPPs and JSPPs) it would be more practical to provide inspection of documents at the administrator's office (not the office of the employer).

Schedule 5, section 7

The statement that the pension benefits and ancillary benefits are the same under the successor plan as those under the original plan could restrict flexibility in cases where the benefits would be more generous or different but of equivalent value.

Recommendation: This requirement should be removed from the Draft Regulation.

Schedule 6, section 1

This notice must be provided within 90 days after the effective date of the transfer and must include a copy of the application to the Superintendent. The application is not due until 180 days within the effective date of the transfer.

Recommendation: Timelines should be consistent with the sequencing set out in the regulation.

Paragraph 3 requires the name and number of transferred members to be provided in the notice given to a trade union. Providing the name of non-union members to a trade union raises privacy considerations.

Recommendation: Only the information of the transferred members who are represented by the union should be provided.

Schedule 7, section 1

This notice must be provided within 90 days after the effective date of the transfer and must include a copy of the application to the Superintendent. The application is not due until 180 days within the effective date of the transfer.

Recommendation: Timelines should be consistent with the sequencing set out in the regulation.

Paragraph 4 requires the name and number of transferred members to be provided in the notice given to a trade union. Providing the name of non-union members to a trade union raises privacy considerations.

Recommendation: Only the information of the transferred members who are represented by the union should be provided.

Schedules (Generally)

Currently, the Schedules allow the predecessor and successor administrator to combine notices in some circumstances but not others.

Recommendation: Administrators should be given the flexibility to be able to combine notices whenever they consider it appropriate, as long as the prescribed information is provided to transferred members.

Conclusion

The Ontario Bar Association appreciates the opportunity to provide feedback on the Draft Regulation, and we look forward to an opportunity to assist with further review and development.