



Consultation on Revised Pension Plan Amendments Guidance (ID: 2023-013)

Submitted to: Financial Services Regulatory
Authority of Ontario

Submitted by: Ontario Bar Association

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Executive Summary

The Ontario Bar Association (“**OBA**”) welcomes the opportunity to make this submission in response to the Financial Services Regulatory Authority of Ontario’s (“**FSRA**”) second public consultation regarding *Proposed Guidance on Pension Plan Amendments (PE0301INT v.2)* (the “**Proposed Guidance**”).

The Pension and Benefits Law section supports FSRA’s mandate to promote good pension plan administration through a principles-based approach to regulation. While a principles-based approach allows for flexibility in the regulation of pension plans, in order to avoid uncertainty, we would encourage FSRA to ensure, to the extent possible, that the guidance clearly articulate criteria, timelines and tests that it purports to apply as “interpretation” or “approach”-level guidance. This includes presenting the Proposed Guidance in a manner that could reasonably be understood and actioned by non-lawyer personnel of a pension plan administrator. To that end, we respectfully submit the following comments for consideration by FSRA in respect of the Proposed Guidance regarding the effective date of amendments.

Please note that this submission represents areas of consensus among the OBA’s Pension and Benefits Law Section (the “**Section**”), which includes a broad range of stakeholders and perspectives. *It is not intended as an endorsement by the Section of any statements in the Proposed Guidance not expressly discussed herein, or FSRA’s related legal analysis (where applicable).*

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 Pension and Benefits Law section. Members of this sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario.

Comments & Recommendations

Clarification Recommendations

"Non-material" Negative Retroactive Amendments

We understand that, under the approach set out in the Proposed Guidance, FSRA will register pension plan amendments bearing an effective date that is prior to the date it is filed with FSRA where certain criteria are met. It states:

Where an amendment purports to be retroactive prior to the date of filing with FSRA, the administrator must demonstrate to FSRA that it is appropriate to register such an amendment on the basis that it does not have an 'adverse effect'. FSRA will generally exercise its discretion and register such an amendment where the plan administrator is able to demonstrate that:

- The negative retroactive impacts on the rights and benefits of plan members and beneficiaries are non-material.
- These impacts are offset by considerations of transparency, reasonableness and equity.¹

While the Section appreciates the examples of amendments that would meet the above criteria,² we are concerned that the criteria will be difficult to apply in practice, absent

¹ Page 6.

² See pages 7.



further clarification. First, it is not clear whether satisfying *either* of the above bullet points would be sufficient to support registration. Second, we recommend that the Proposed Guidance set forth further definitions, or additional examples, of “non-material” negative retroactive impacts, in each case, on a non-exhaustive basis.

At minimum, we encourage FSRA to briefly indicate which criterion is satisfied by each of the existing examples, or specify whether both criteria are satisfied, and why. For example, FSRA states in relation to *Nolan v Kerry* that “[t]his is limited to the specific, or equivalent, fact situation in that case.”³ FSRA may wish to point to any specific circumstances, processes or timelines in the *Nolan* case that would be required for *Nolan* to apply to a fact situation in FSRA's view. It would also be helpful for FSRA to explain and clarify why its application of the *Nolan* decision is limited to the specific or equivalent facts.

Application to Multi-Employer Pension Plans

As section 14(1) of the *Pension Benefits Act* (“**PBA**”) does not apply to multi-employer pension plans (“**MEPPs**”), the CEO need not require section 26(1) notices in the case of MEPPs per section 26(4)(c) of the *PBA*, and MEPPs are permitted to reduce accrued benefits, the analysis of Retroactive Adverse Amendments expressed in the guidance does not apply to MEPPs in our view. We recommend that FSRA explicitly state that this guidance is not intended to apply to MEPPs .

Retroactive Amendments Purporting to Rectify Drafting Errors in the Plan Terms

We recommend that FSRA clarify that an amendment with retroactive effect to fix a drafting error in the Plan terms may be registered where FSRA determines that it is not “adverse” and therefore, not a “Retroactive Adverse Amendment”.

³ Page 7.



Brewers Retail

We are concerned that citing *Brewers Retail Inc. v. Campbell* ("***Brewers Retail***")⁴ in support of the following principle mischaracterizes the ratio of that case:

"FSRA has discretion under section 18 of the PBA to refuse to register an amendment that interferes with an existing benefit or status such that it would constitute a Retroactive Adverse Amendment."

While we acknowledge that paragraph 75 of *Brewers Retail* references the FSRA CEO's refusal to register a plan amendment, it did so for the purpose of illustrating a scenario in which the Financial Services Tribunal may have exclusive jurisdiction over a pension dispute (as opposed to the scenario in the application then before the court, over which the Court found the Court had jurisdiction). The Ontario Court of Appeal in *Brewers Retail* does not cite section 18 of the *PBA* nor does it interpret any other *PBA* provision as authority for the CEO refusing to register an amendment; rather, the decision dealt with procedural questions of jurisdiction and availability of class proceedings.⁵ Therefore, we recommend that the reference to *Brewers Retail* supporting the above-noted principle be removed.

Effective Dates of Plan Amendment and Filing Timeline

We submit that the Proposed Guidance may give rise to confusion for pension plan administrators when determining the effective date for a pension plan amendment, particularly where such amendment is intended to have retroactive effect. We recommend that the final version of the Proposed Guidance more clearly illustrate FSRA's expectations regarding the setting of effective dates, and the timing of notice (if applicable), adoption, and filing of, an amendment that purports to have retroactive effect, including when the 60-day

⁴ 2023 ONCA 534 at para 75.

⁵ See, for example, *Brewers Retail* at paragraph 48.



filing window begins and ends in relation to the adoption date and/or effective date of the amendment.

Conclusion

The Section appreciates the opportunity to provide this submission in response to FSRA's consultation. We also appreciate the collaborative approach FSRA has taken with stakeholder engagement and we would welcome the opportunity to arrange a call to discuss any of our comments if that would be helpful.