ACPM | ACARR

The Association of Canadian Pension Management
L'Association canadienne des administrateurs de régimes de retraite

September 9, 2013

ACPM Comments on Draft Regulation regarding Pension Asset Transfers under Section 80 and 81 of the Pension Benefits Act

15878369.2

ACPM CONTACT INFORMATION

Mr. Bryan Hocking
Chief Executive Officer
Association of Canadian Pension Management
1255 Bay Street, Suite 304
Toronto ON M5R 2A9
Tel: 416-964-1260 ext. 225
Fax: 416-964-0567
Email: bryan.hocking@acpm.com
Web: www.acpm-acarr.com

TABLE OF CONTENTS

Foreword **3**

Introduction **3**

Part I **3**

Part II.. **5**

Conclusion.. **8**

FOREWORD

<u>The Association of Canadian Pension Management (ACPM)</u>

The Association of Canadian Pension Management is the informed voice of Canadian retirement income plan sponsors, administrators and their allied service providers. We are a non-profit organization and our objective is to advocate for an effective and sustainable Canadian retirement income system. Our membership represents over 400 retirement income plans consisting of more than 3 million plan members, with assets under management in excess of $330 billion.

The ACPM promotes its vision for the development of a world-leading retirement income system in Canada by championing the following Guiding Principles:

- Clarity in legislation, regulations and retirement income arrangements;
- Balanced consideration of other stakeholders' interests; and
- Excellence in governance and administration

<u>Introduction</u>

The ACPM is pleased to have the opportunity to provide comments on the draft regulation relating to pension asset transfers under the Ontario *Pension Benefits Act* (the "Draft Regulation"). Our submission is organized into two parts: the first part provides general overview comments and the second part provides ACPM's technical comments and recommendations with respect to various sections and schedules of the Draft Regulation. We would be pleased to review any further versions of the Draft Regulation being considered by the Ministry of Finance in response to the feedback obtained from stakeholders during this consultation process.

<u>Part I: General Comments</u>

The ACPM has the following general comments and recommendations regarding the Draft Regulation:

- We are pleased to see that separate rules for the transfer of defined contribution plan assets between plans have been included and are relatively simple for plan administrators to follow.

- The Draft Regulation only applies to asset transfers between pension plans agreed to by the plan sponsors/employers after the new rules come into effect . Transition provisions are needed to assist with assets transfer agreements already executed but in respect of which no asset transfer application has been filed and transfer applications already filed that are currently awaiting approval. In particular, we strongly urge the Ministry of Finance to provide transition provisions that eliminate the current asset transfer approval criteria requiring a successor trust with identical trust provisions where the exporting plan is funded by way of a trust.

- The Ministry of Finance summary of the Draft Regulation makes it clear that it does not address the 2013 Ontario Budget commitment for a framework that would permit assets to be transferred from single employer pension plans (SEPPs) to jointly sponsored pension plans (JSPPs). In this regard Section 13 of the Draft Regulation should operate to prevent the transfer of assets from a SEPP to a JSPP or multi-employer pension plan (MEPP). However, there is nothing the Draft

Regulation to prevent their application to a transfer of assets from a JSPP/MEPP to a SEPP or to another JSPP/MEPP. Given the distinct operational and legal structures of JSPPs and MEPPs, the Draft Regulation in our submission should not apply to any transfer involving JSPPs or MEPPs. It would be inappropriate and prejudicial to JSPPs and MEPPs to be subject to transfer rules that do not reflect their unique characteristics (eg, going concern funding only, joint governance, ability to opt-out of grown-in, etc.).

■ We also applaud the government's commitment to a framework that would permit assets to be transferred from SEPPs to JSPPs. We see this as a high priority for government. However to be effective, such a framework needs to operate separate from the transfer regulations for SEPP to SEPP transfers. Thus it is important that the concepts provided for in the Draft Regulations do not ultimately impair an effective and workable transfer framework for JSPPs. For example, if SEPP to SEPP transfers are to be on solvency basis, it should not preclude going-concern based only transfers in respect of JSPPs. If such a framework does not respect the distinct nature of JSPPs, the benefits of consolidation of broader-public sector SEPPs under JSPPs could be impaired or precluded.

■ In our view, the Draft Regulation effectively removes the flexibility contemplated by Bill 236, specifically the flexibility contained in new Sections 80(13)(3) and 81(6)(1) of the Ontario *Pension Benefits Act* (the "PBA"), which provide for the administrators of the two pension plans to agree between them the manner of determining the amount of assets to be transferred. Further, the Draft Regulations may not enable the Superintendent to waive conditions as contemplated by, for example, sections 80(15) and 81(7).

■ The asset transfer rules reflected in the Draft Regulation are highly prescriptive whereas the focus of the Ontario Expert Commission on Pensions (Chaired by Harry Arthurs) recommended a less prescriptive (principled) approach to pension regulation. Therefore, we are concerned that the Draft Regulation is out of step with the recommendations of the Ontario Expert Commission's recommendations in several respects. A prime example of the prescriptive approach are the strict deadlines that the Draft Regulation imposes on employers and plan administrators for the completion of certain steps in the asset transfer process. If a particular deadline is missed, the implication is that the asset transfer may not be approved (although consequences of non-compliance are not clear). We recommend that the Draft Regulation remove these deadlines and instead provide the Superintendent with discretion to determine timelines for filing as appropriate. It is important to note that if an applicant misses a deadline and an asset transfer is not approved, it will often be to the detriment of the plan members if the transfer does not proceed. We do recommend, however, that the strict timelines be imposed on the Superintendent in the Regulations for issuing Notices of Intended Decision (NOIDs) in respect of asset transfer applications filed with FSCO. In our experience, the most significant delays to plan asset transfers are while the application is being reviewed by FSCO. These unnecessary delays have caused additional administrative burdens for the pension plans involved and are not in the best interests of those members for whom an asset transfer/consolidation of benefits would increase their pensions.

Part II: Technical Comments on Specific Provisions

Section 2: Interpretation

Definition of "solvency ratio":

The Draft Regulation should be clearer as to how Letters of Credit (LOCs) will be dealt with in an asset transfer. We assume that LOCs will not be transferrable and will remain in the original pension plan, which may result in its funded ratio be compromised when the asset transfer is undertaken. We recommend that the rules be clarified in this regard. Otherwise, it may be difficult for those pension plans that currently use LOCs as part of their solvency funding strategy to undertake an asset transfer.

Section 3: Effective Date of Transfer under Section 80

Section 3 defines the effective date of transfer as the date of the sale, assignment or disposition of a business. However, section 80 asset transfers often occur over a period of time, for example in circumstances involving outsourcing arrangements or where there are unionized employees and an agreement is made with the union to permit transfers of employees following the sale. Section 3 needs to contemplate more than one effective date. In addition, as noted above, we recommend that transitional provisions be added to include Section 80 transfers currently in process.

Section 4: Effective Date of Transfer under Section 81

Section 4 defines the effective date of transfer as the effective date of the plan amendment relating to the transfer. This provision may have a retroactive effect for plans with Section 81 asset transfers currently in the "queue" with FSCO. It is not clear whether this was intended and if so, how existing Section 81 applications will be transitioned from the old to the new rules as reflected in the Draft Regulation. We ask that the Ministry of Finance provide clarity to plan administrators in this regard.

Section 5(3): Applying for the Superintendent's Consent to Transfer of Assets

Section 5 requires that a Section 80 application be filed with FSCO within 180 days of the effective date of transfer, which is the effective date of the corporate transaction. This timeline is too short. Some corporate transactions require a new pension plan be established to receive the assets. The registration of a new plan can require significant time and, as such, it may not be feasible for the transfer application to be filed within that timeframe. Also see our comments under Section 3 regarding the effective date of Section 80 transfers and general comment recommending the need for flexibility in deadlines for filing.

Section 7(2): Criterion re Commuted Value of Benefits

We question why "grow in" benefits must be included in the calculation of the commuted value of a transferred member's benefit under the Draft Regulation if the member's employment is deemed continuous under Section 80. Grow-in benefits are required to be provided under the PBA only in the event that the member's employment is terminated by the employer. As such, they are contingent benefits. Including the value of grow-in benefits in the calculation inflates the commuted value of benefits reflected on member statements creating an expectation (or misunderstanding) that they are entitled to these benefits. We recommend that grow-in benefits not be included in the calculation of transferring members' commuted values.

Section 8: Application of Part II

Section 8 should recognize that a pension plan may have both defined contribution (DC) and defined benefit (DB) components and that Part II applies to the DB component only. We suggest the following revision:

> This Part applies with respect to a transfer of assets under section 80 or 81 of the Act if both the original pension plan and the successor pension plan provide defined benefits, **in whole or in part**, and if the transfer of assets is in respect of defined benefits.

Section 9: Amount of Assets to be Transferred

Section 9 requires that a proportional amount of surplus be transferred from the original plan to the successor plan. In our view, the requirement for any surplus to be transferred to the successor, other than a "buffer" amount (similar to a PFAD), is detrimental not only to the original plan and its plan members but also to the transferring members' entitlements as the surplus amount transferred would be diluted in the successor plan. If the public policy goal of the asset transfer rules is to preserve and protect the funding of transferring members' benefit entitlements, we strongly urge the Ministry of Finance to remove the requirement for a full proportion of surplus to be included in the transfer value and instead prescribe a lesser amount deemed appropriate as a top up or "buffer" value to ensure the full funding of the transferring benefits when they are transferred into the successor plan. Transferring members' entitlements to surplus in the original plan would continue after the transfer and continue to be subject to the surplus sharing rules under the PBA. The requirement for a full proportion of surplus to be included in the transfer value would likely discourage employers from entering into asset transfer arrangements, to the detriment of affected members who stand to benefit greatly from the consolidation of their pension benefits.

We also recommend that the asset transfer value amount be defined to include adjustments for such items as benefit payments, expenses and investment returns during the period between the effective date and the actual transfer date.

Section 14: Requirement re Accrued Pension Benefits

We query why an additional funding test is imposed on section 81 transfers (plan mergers) requiring the transfer amount of a member's benefit be equal to at least 85% of the amount of accrued pension benefits under the original plan. If, in respect of Section 80 transfers, protection of benefits is determined to be the preservation of 100% of the commuted value, we fail to see why the same is not the case for plan mergers under Section 81. The extra 85% testing required under the Draft Regulation suggests that the Ministry of Finance views plan mergers negatively in comparison to Section 80 transfers. However, plan mergers are opportunities to gain efficiencies by merging better funded and poorer funded plans together. As we do not see the policy rationale for the difference in treatment of Section 80 and 81 transfers, we recommend that this additional funding requirement be removed.

Section 15: Requirement re Purchasing Service

In our view, the requirement that members credited with less service in the successor plan than they were credited with in the original plan is problematic. If the purpose of the asset transfer rules is to preserve and protect the value of members' benefits, we question why a service buy-back requirement should be imposed on successor employers. Unlike the public sector plans, service buy backs are not

common in the private sector. While the member may bear the upfront cost of the buyback, the successor employer will bear the long term liability for funding it over the course of the member's employment. This requirement represents a significant change to the current rules relating to asset transfers and will create a significant impediment to private sector asset transfers. As such, we recommend that the buy-back requirement be eliminated.

If the concern the Ministry of Finance wishes to address with the service buy back provision is the inclusion of credited service accrued in the original plan for purposes of determining eligibility for benefits (such as early retirement subsidies) in the successor plan on a Section 81 transfer, we recommend that a provision be added to the Regulations or Section 81 similar to Section 80(1)(b) of the PBA. Section 80(1)(b) provides that the member is entitled to credit in the successor plan for the period of membership in the original plan for purposes of entitlement to benefits.

Section 21: Amount in Individual Accounts

We query what this provision is intended to protect.   The account balance should have the same value immediately before and immediately after the transfer. However, the question arises as to whether this is achievable. For example, if there are transactional costs that are borne by the member in cashing out investments , is the intention of this provision to require can the divestment and re-investment be timed such that there is no loss? This may not be possible.

Schedules

In Schedule 1, section 1(1)1 refers to filing the "employers' agreement". "Employer" is a defined term and it may not be correct in all instances to refer to an "employers' agreement".   For example, if two parent entities enter into an agreement to cause the employers to take certain actions, it is not accurate to describe the agreement as being the "employers' agreement".   Rather, it may be preferable to refer to "the agreement" or "the transfer agreement".

Schedule 1, section 5 requires that a report concerning the successor plan be included in an application. It seems unusual that an applicant would file a report in respect of a pension plan to which it otherwise has no relationship. In some instances, the content of the report might contain information that the administrator of that plan would prefer not to share with the applicant. As such, it would be preferable if administrator of the successor plan were required to file the report.

Schedule 5, section 7 requires a statement that "the pension benefits and ancillary benefits provided under the successor plan are the same as those provided under the original plan" be provided to transferred former members and retired members. However, the amendments to the PBA made by Bill 236 do not require the "same" benefits be provided. Section 14(4) has been added to the PBA together with revised sections 80 and 81 to provide for the new asset transfer regime. The effect of these provisions is to avoid the need for benefit replication for active members; for inactive members, the existing understanding of replication would continue (i.e. "the same or better" benefits). We recommend that the requirement for this statement be removed from the notice to former and retired members as it does not capture the full meaning of replication. In many cases, it may not be possible for the successor plan to provide benefits that are exactly the same as the those provided under the original plan, and the existing approach has some flexibility.

Schedule 6, concerning notice to trade unions and advisory committees, requires that a list of transferred members be provided to the union or committee, as applicable. We suggest that, with respect to the union, the list should apply only to transferred members that the union represents. It would be inappropriate to require the provision of names or other information concerning individuals who are represented by another union or who are non-represented.

Conclusion

We thank you for the opportunity to comment on the Draft Regulation. We look forward to assisting the Ministry of Finance with further pension reforms in future.