



February 15, 2018

Lester Wong  
Deputy Superintendent, Pension Division  
Financial Services Commission of Ontario  
5160 Yonge Street  
16th Floor  
Toronto, Ontario  
M2N 6L9

Via email: Lester.Wong@fsco.gov.on.ca

Dear Mr. Wong:

**Re: Principles governing the exercise of powers under sections 23.1 and 25.1 of the Pension Benefits Act (the “PBA”)**

ACPM is the leading advocate for plan sponsors and administrators in the pursuit of a balanced, effective and sustainable retirement income system in Canada. We represent plan sponsors, administrators, trustees and service providers and our membership represents over 400 companies and retirement income plans that cover more than 3 million plan members.

ACPM understands that the Financial Services Commission of Ontario (“FSCO”) is likely to develop a policy on the exercise of its new powers under the following provisions inserted into the PBA by Bill 127, the Stronger, Healthier Ontario Act (Budget Measures), 2017:

- section 23.1, which empowers the Superintendent to order a meeting; and
- section 25.1, under which the Superintendent may order a pension plan administrator to provide specified information.

### **Purpose of the powers in sections 23.1 and 25.1**

The 2017 Budget document describes the new powers as “amendments to better protect pension plan beneficiaries and ensure more effective and efficient regulation of the sector, taking into account the experience of other jurisdictions”. This passage suggests that the new powers are intended to be used in order to protect plan beneficiaries, which in turn suggests that the Superintendent ought only to exercise these powers in rare circumstances where the interests of plan beneficiaries are under threat: for example, where the solvency of the plan is in question and the plan is at risk of being wound up. It also suggests that neither the powers in section 23.1 or 25.1 should be utilized as a first step in any investigation or review.

The Superintendent also has other mechanisms to address many PBA infractions through administrative monetary penalties. Accordingly, the Superintendent should thoroughly review and consider each situation and only resort to these new powers as a next to last step.

### **Rationale for developing a policy governing the exercise of the powers in sections 23.1 and 25.1**

There are a number of reasons why it is very important to develop a policy governing the exercise of the Superintendent's powers under sections 23.1 and 25.1, including the following:

- Sections 23.1 and 25.1 confer very wide discretionary powers on the Superintendent.
- Wide discretion creates uncertainty for plan administrators, plan sponsors, beneficiaries and other stakeholders.
- The lack of guidance inherent in such wide discretion also creates risks for the Superintendent, notably that exercise of those powers may be reversed on judicial review.
- As discussed above, sections 23.1 and 25.1 are to be exercised only in rare circumstances, for the purposes of protecting plan beneficiaries. This means that these powers cannot be the first step (or even the second step) for the Superintendent. Further, such powers should be exercised in a manner that not only maximises regulatory effectiveness, but also minimizes the impact on the efficiency of plan administration.

It therefore is in the interests of the Superintendent and of pension plan administrators, plan sponsors, beneficiaries and other stakeholders, that FSCO develop a framework governing how and under which circumstances the powers in sections 23.1 and 25.1 are to be exercised in practice.

In drafting the policy, the Superintendent would want to ensure that a pension plan is not put to inappropriate levels of expense in order to address a minor concern or misunderstanding, or a concern that can be addressed by other means. While employers are often responsible for funding the plans and administrative costs, in many cases these costs indirectly impact the benefit decisions for all members. In some cases where members are contributing to the funding of the plan, the direct financial impact of high levels of administrative costs to these members should be considered. Our letter sets out various cost-saving options for providing information or holding meetings; if information or a meeting is required, it could be very costly, depending on the method. In drafting the policy, FSCO should ensure that the plan administrator has flexibility to communicate efficiently or make directions that are efficient with pension dollars.

## Principles

ACPM submits that the principles set out below could inform the development of the Superintendent's exercise of its powers under sections 23.1 and 25.1 of the PBA.

### 1. **Contents of a policy governing the exercise of the Superintendent's power to require a meeting under section 23.1 of the PBA**

- a. When the power to require a meeting is to be exercised:
  - i. This is an exceptional power that should only be exercised where the Superintendent reasonably believes that it is necessary to hold a meeting on the basis that there is a real and significant threat to the interests of plan beneficiaries.
- b. Manner in which the power to require a meeting is to be exercised:
  - i. the Superintendent should consult with the plan administrator before making any order under section 23.1, and such consultation should permit the administrator to provide its views to the Superintendent on:
    1. the necessity of such an order;
    2. the particulars of the order to hold a meeting, including when the meeting is to be held and who is to be invited to the meeting (see ii below); and
    3. any other information that, in the administrator's view, should be taken into account by the Superintendent before an order is made.
  - ii. The only individuals or groups of individuals that are to be invited to the meeting are those beneficiaries identified by the Superintendent as affected by that threat or those threats, along with their representatives. In this regard, if an order requiring a meeting is made, the Superintendent should identify:
    1. the specific threat or threats to the interests of plan beneficiaries;
    2. the beneficiaries affected by the threat or threats identified.
  - iii. The order should allow a reasonable time for the plan administrator to arrange the meeting. We would propose that a reasonable time would be at least 60 days from the date the Superintendent sends the order to the plan administrator.
  - iv. the Superintendent should permit plan administrators to hold a meeting electronically (as is, for example, the case with shareholder conference calls). This would be to the benefit of both plan administrators and to attendees, particularly where attendees are scattered over a wide area.

**2. Contents of a policy governing the exercise of the Superintendent’s power to order that information be provided under section 25.1 of the PBA**

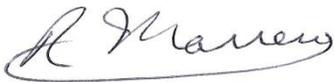
- a. When the power to order that information be provided is to be exercised:
  - i. This is an exceptional power that should only be exercised where the Superintendent reasonably believes that it is necessary to provide the information in question on the basis that there is a real and significant threat to the interests of plan beneficiaries (such as where there is a real concern as to the solvency of the plan and the plan is at risk of being wound up).
  - ii. An order to provide information should only be made where there is an urgent need for the immediate dissemination of such information and where other channels (e.g., providing the information in an annual report, as part of a statement to members, or on request) would be insufficient to protect the interests of plan beneficiaries.
  
- b. Manner in which the power to order that information be provided is to be exercised:
  - i. the Superintendent should consult with the plan administrator before making any order under section 25.1, and such consultation should permit the administrator to provide its views to the Superintendent on:
    - 1. the necessity of such an order;
    - 2. the particulars of the order to provide information, including what information is to be provided and to whom, and the time frame for doing so; and
    - 3. any other information that, in the administrator’s view, should be taken into account by the Superintendent before an order is made.
  - ii. If an order to provide a communication or information is made, the Superintendent should identify:
    - 1. the specific threat or threats to the interests of plan beneficiaries;
    - 2. the beneficiaries affected by the threat or threats identified.
  - iii. The order should require that information be sent only to beneficiaries specified in the order, which are those identified by the Superintendent as affected by the threat or threats identified by the Superintendent.

- iv. The information that the plan administrator is required to send should be:
  - 1. clearly and specifically particularized in the order; and
  - 2. limited to no more than what is reasonably necessary in order to address the threat or threats to the interests of plan beneficiaries as identified by the Superintendent.
- v. the Superintendent should permit the plan administrator to send the information by electronic means, where the member has consented to this form of communication with the plan administrator.
- vi. The order should allow a reasonable time for the plan administrator to send the information. We would propose that a reasonable time would be at least 60 days from the date the Superintendent sends the order to the plan administrator.

We trust that the foregoing will be of assistance to the Superintendent.

If you have any questions or would like to discuss this matter, please do not hesitate to contact us at your earliest convenience.

Sincerely,



Ric Marrero  
Interim CEO  
ACPM