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

January 19, 2024

Andrew Fung
A/Executive Vice President, Pensions
Financial Services Regulatory Authority of Ontario
5160 Yonge Street, 16th Floor
Toronto, ON M2N 6L9
Via email

Re: Consultation on Revised Proposed Guidance: Pension Plan Amendments No. PE0301INT (the "Revised Proposed Guidance")

Dear Mr. Fung,

We are writing to you on behalf of the Association of Canadian Pension Management ("ACPM") regarding the above-noted consultation on the Revised Proposed Guidance.

ACPM is the leading advocacy organization for a balanced, effective and sustainable retirement income system in Canada. Our private and public sector retirement plan sponsors and administrators manage retirement plans for millions of plan members.

This letter acknowledges some positive changes to the Revised Proposed Guidance while also expressing continued reservations about certain elements, as discussed in our October 4, 2022, submission. In particular, we remain concerned that the Revised Proposed Guidance does not appear to be consistent with the *Pension Benefits Act* (the "PBA") or established jurisprudence. Moreover, it may be viewed as an expansion of FSRA's regulatory powers beyond those defined by the PBA.

The positive elements which ACPM acknowledges include the following:

Structure of the Revised Proposed Guidance
FSRA's Guidance Framework includes distinct classifications for Interpretation, Information and Approach. The consequences of non-adherence to a particular guidance varies by each such classification. Accordingly, ACPM welcomes FSRA's revisions to the structure of the Revised Proposed Guidance to clarify between Interpretation versus Approach.

Commitment to Greater Clarity and Transparency
ACPM welcomes FSRA's revisions to the Revised Proposed Guidance to provide greater clarity as to the factors or circumstances under which FSRA may still register Retroactive Adverse Amendments. ACPM also welcomes FSRA's commitment to publishing details of its decisions to support transparency and consistency.

Notice Requirements
Under Section 26 of the PBA, after an adverse amendment is filed, the CEO must require an administrator to send an adverse amendment notice. In the Revised Proposed Guidance, FSRA has better articulated when the CEO will not ordinarily require advance notice. However, ACPM would be supportive of further guidance regarding the circumstances in which the exception in section 26(4)(a) would apply and details as to whom notice must be sent. We stress, however, that failure to give such advance notice cannot invalidate an otherwise valid amendment where notice is sent after filing as directed by the CEO.

ACPM continues to be concerned by the following aspects:

Interpretation Section of the Revised Proposed Guidance:
The Revised Proposed Guidance creates a new category of amendment, Retroactive Adverse Amendments, which is not expressly contemplated by the PBA.

The Revised Proposed Guidance states that:

- "FSRA interprets subsection 13(2) [of the PBA] as permitting a plan amendment to have retroactive effects only in relation to the period of time **after** the date the amendment is filed with FSRA for registration and before the amendment is registered by FSRA." [emphasis in original]
- "FSRA's Interpretation is that the PBA generally does not permit Retroactive Adverse Amendments."
- "Had the legislature intended the PBA to allow retroactive adverse changes to the rights of beneficiaries, this would have been explicitly stated in the PBA." (Appendix A)

The positions in the Revised Proposed Guidance, including Appendix A, are inconsistent with existing case law, the wording of the PBA, and the principles of statutory interpretation. In this regard, while the PBA should be given a large and liberal interpretation that ensures the attainment of its objects, FSRA is not permitted to adopt an interpretation that is wholly unsupported by the statutory framework.

While acknowledging the positive elements as discussed above, we continue to take the view that FSRA's proposed discretionary power to determine whether an "..amendment does not truly have an 'adverse effect'.." creates a high degree of uncertainty for plan administrators, employers and other industry stakeholders. FSRA's Interpretation would likely also generate additional litigation, increasing the costs to administrators and employers who operate and/or sponsor pension plans.

ACPM advocates for a strong retirement system in Canada, and we continue to caution FSRA that this guidance would likely be viewed as more reason for employers not to sponsor a pension plan.

Approach Section of the Revised Proposed Guidance:
ACPM has similar concerns with the Approach section of the Revised Proposed Guidance. FSRA's positions are either inconsistent with existing case law and/or the wording of the PBA or appear to also be an attempt to expand FSRA's regulatory powers beyond the boundaries of the PBA. Section 18 of the PBA specifies the circumstances in which the CEO can refuse to register an amendment.

The Revised Proposed Guidance would create a new category of amendment, broadening FSRA regulatory powers without the required statutory authority. For instance, the obligation for plan administrators to "demonstrate a reasonable and good faith belief the amendment is not a Retroactive Adverse Amendment" is not supported by the PBA.

The Approach also creates additional administrative burden for plan administrators in preparing applications for registering amendments. For instance, the Approach imposes an obligation for plan administrators to file additional documentation in relation to an amendment that may be a Retroactive Adverse Amendment. It goes on to state that plan administrators should "also be prepared to make submissions addressing the registrability of the amendment, including any applicable legal advice that supports registration of the amendment." FSRA does not have the power to require a plan administrator or plan sponsor to waive its legal privilege over legal advice obtained in the course of developing an amendment.

Most importantly, in general, a plan administrator is not responsible for plan design and amendments to pension plans are not subject to scrutiny through a fiduciary lens. By suggesting that the act of merely filing an amendment adopted by the plan sponsor (a statutory obligation) is subject to fiduciary duties, FSRA is attempting to impose fiduciary duties where they do not exist. This is inappropriate and not supported at law.

Similar comments can be made with respect to the question of whether an amendment is "fair and equitable". Subject to certain limitations in the PBA, an employer or plan sponsor is not required to treat different groups "fairly" or "equitably" when amending a pension plan. Again, the Revised Proposed Guidance imports concepts and limitations on amendments that are inconsistent with the law.

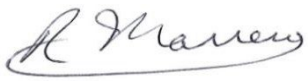
With respect to indexation, FSRA's position that an amendment to remove a variable indexation formula or replace that formula with a fixed indexation rate for accrued benefits is generally void is not consistent with the PBA. For example, Section 14 does not void amendments that "have the potential" to reduce an accrued benefit or a commuted value, and there is case law dealing with the interpretation of Section 14 in the context of an amendment to an indexation formula that is explicit on this point. ACPM is concerned that FSRA's position, for example, may negatively impact a plan administrator's ability to purchase annuities from insurers in the context of an orderly windup.

Last, we note that there are numerous circumstances in which amendments may be affected to better align the plan text with administrative practice, add clarity etc. While on their face it might be argued that these "housekeeping" amendments have some sort of negative impact, often, the plan has been administered in a particular manner for many years and members are familiar with that practice, which may also be reflected in member communications, such that there is no impact on members. The Revised Proposed Guidance suggests that such amendments might be prohibited because "FSRA does not have authority under the PBA to rectify drafting errors". We disagree that FSRA does not have the authority under sections 13, 14, and 18 to accept an amendment of this nature. Further, it is not always clear what is a "drafting error" as opposed simply less-than-ideal wording. Ultimately, amendments of this nature are routinely completed in order to improve certainty in administration. By casting uncertainty over the ability to make such amendments, the Revised Proposed Guidance would disrupt decades of practice in the industry with no discernable improvement to member outcomes.

Conclusion

Thank you for the opportunity to comment on the Revised Proposed Guidance. We would appreciate the opportunity to meet with you to expand upon and discuss our comments. Please contact Ric Marrero at the National Office and we would be pleased to arrange a meeting with the appropriate FSRA representatives.

Yours sincerely,



Ric Marrero
Chief Executive Officer
ACPM
ric.marrero@acpm.com

Karen Burnett
Chair, Ontario Regional Council
ACPM