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

June 12, 2017

Administrative Penalties Regulations
Pension Initiatives Unit, Pension Policy Branch
Ministry of Finance
5th Floor, Frost Building South
7 Queen's Park Cr. East
Toronto, Ontario M7A 1Y7
Via Email: pension.feedback@ontario.ca

To Whom It May Concern:

Re: Proposed Amendments to Regulation 909 of the PBA Administrative Penalties

The Association of Canadian Pension Management (ACPM) is pleased to have the opportunity to provide comments on the proposed amendments to Regulation 909 under the *Pension Benefits Act* (PBA), posted on May 9, 2017, which would provide the Superintendent of Financial Services with the authority to impose administrative monetary penalties (AMPs).

Who We Are
ACPM is a national non-profit volunteer-based organization acting as the informed voice of plan sponsors, administrators, and their service providers, advocating for improvement to the Canadian retirement income system. Our membership represents over 400 retirement income plans consisting of more than 3 million plan members.

General Comments on the Application of AMPs to Pension Sector

Overall, we are concerned that the way the regulations are currently drafted will have a chilling effect on the willingness of employers to continue offering DB plans. The AMPs and particularly general AMPS, need to be restricted to discrete, definable requirements under the PBA. Provisions such as the standard of care set out in section 22, which captures vague, complex concepts with no bright line test are simply inappropriate for this kind of regulatory power.
Below, we describe our concerns and offer suggestions on:

- Where AMPs ought to apply;
- The criteria to be considered by the Superintendent;
- Stacking; and
- Payment of AMPs from the pension fund.

Where AMPs Ought to Apply

AMPs are used in other Ontario statutes. This does not make them appropriate in all respects for pension regulation. First, we are concerned about the broad application of the General Penalties to virtually every regulatory element of the PBA (as opposed to discrete regulatory requirements of particular concern). Second, we are concerned about the restriction on payment of AMPs from the pension fund.

As a general principle, we understand that the purpose of an AMP is to act as an enforcement tool when there is clear evidence that a party is not complying with the law. We understand an AMP to be an intermediate step between a warning and an offence prosecution, and that it is intended to encourage regulatory compliance and prevent financial benefit from violations.

For the pension sector, our understanding is that there already is a high degree of compliance. The Financial Services Commission of Ontario's (FSCO) published statistics for 2016 show that out of 18,887 inquiries, only 129 (0.7%) were complaints against administrators. Given the nature and purpose of an AMP, we do not object to their application to discrete, easily definable obligations, such as giving notice within a prescribed timeframe (but not whether the content of the notice met the requirements of the PBA) or filing a document by the specified deadline. However, the application of the general AMPs goes well beyond discrete regulatory requirements to extend to general concepts for which there is no "bright line test".

For example, it is proposed to permit the application of a general AMP to alleged violations of section 22. Violations of this duty cannot be ascertained in a summary manner. Breaches of fiduciary duty require consideration of a broad range of facts and circumstances as well as a focus on practices and procedures as opposed to a specific outcome. We believe it is grossly inappropriate to apply an AMP to alleged breaches of this duty, particularly given that the PBA does not provide administrators with an opportunity to make submissions before the NOID is issued (as discussed below).

There are also provisions proposed to be covered by general AMPs where to date, FSCO has applied an interpretation of the PBA that is not supported by its language. Other areas that lack clarity are whether an administrator provided a notice to members explaining an adverse amendment that was adequate; there is no prescribed content for an adverse amendment notice. The inability of an administrator to make submissions to FSCO in advance of the imposition of a penalty eliminates the ability of the administrator and the regulator to have a discussion and come to an understanding without the need for formal regulatory proceedings.

The Superintendent already has the ability to make an order where he is of the opinion that the administrator of the pension plan, the employer or the other person is contravening a requirement of the PBA or the Regulations. While this power may not be well-suited for addressing the very small percentage of filings made past their regulatory filing deadlines, it has in our experience worked well to ensure administrators are otherwise making good faith efforts to comply with the requirements of the PBA.

We are also highly concerned about the interaction between the power to impose AMPs and FSCO's current plan examination powers. Currently, FSCO can attend at the premises of an administrator for several days, requiring the administrator to provide a wide range of documents, such as pension committee minutes and internal policies that are not otherwise required to be filed with FSCO. Based on its examination, FSCO will typically issue a letter outlining its findings. Often, these "findings" make requests that go beyond the discrete boundaries of the requirements of the PBA, such as making suggestions about various governance practices. Plan governance is a murky concept that does not manifest itself in the same way for all organizations. Often, FSCO's suggestions are determined by an administrator, after consulting with external service providers, such as legal counsel, not to be necessary. If the administrator reviews a suggested FSCO action and concludes that it is not necessary for good governance, will FSCO then take steps to impose a general AMP based on the examination and the administrator's resistance to the examination finding? If that is how the information from a plan examination is to be used, we expect that there will be legal challenges to the current "fishing trip" approach FSCO takes to examinations.

Criteria to be considered by the Superintendent

As mentioned above, the application of AMPs to regulatory requirements that are not discrete and clear-cut may have a chilling effect on the willingness of employers continuing to offer DB plans. Accordingly, we believe general AMPs should apply only in cases of serious or persistent breaches of the legislation that involve actual or potential harm to the interests of beneficiaries. In addition, the criteria to be considered by the Superintendent need to be transparent and clear. Our additional comments are as follows:

a. The Description of the Proposed Amendments states that the listed criteria are the only ones the Superintendent "is required" to consider when imposing an AMP. Does this mean that the Superintendent could consider other criteria? If the criteria the Superintendent can consider are not public and applied consistently from one situation to another, there is the potential for a breach of the principles of natural justice.

b. The amendments to the Regulation should clarify that the criteria that must be considered when imposing an AMP apply to both: (i) the *decision* whether to impose a penalty and (ii) the *level* of any such penalty. This accords with the language in the PBA suggesting the Superintendent has discretion in both of these matters.[1]

c. Although the PBA states that one purpose of AMPs is to encourage compliance,[2] in our view this objective is not reflected in the criteria. The Superintendent should be required to consider whether, in any case, a penalty would have a deterrent effect or if, for example, the breach was a one-off event that is not likely to be repeated or if it occurred for reasons outside the payee's control.

d. In our view, the criterion relating to previous breaches is overbroad, as it suggests that any breach of any financial services legislation in any jurisdiction would hang over an individual or organization for five years. A previous breach ought only to be considered where there is some link with the breach before the Superintendent.

e. The criteria should clarify the circumstances in which it will be appropriate to impose a fee on an individual. Individual liability ought only to be imposed in exceptional circumstances involving, for example, wilful misconduct or self-enrichment by that individual.

Stacking

The amendments to the Regulation should clarify what is to happen where one act or omission results in a number of breaches. This could be the case where a breach affects multiple members. It is likely to be disproportionate to "stack" penalties where multiple breaches are the result of a single default.

Procedure

In relation to general administrative penalties, we believe that, as a matter of procedural fairness, the Superintendent should be required to consider submissions from the payee and other interested parties before issuing a notice of intended decision to impose a general administrative penalty (a "NOID"), for the following reasons:

[1] sections 108.2(1) and 108.3(1).
[2] section 108.1(2).

a. There may be an explanation or extenuating circumstances for the breach that are not known to the Superintendent. For example, the plan administrator may not have sent out a statement of benefits at termination in a timely manner because it is waiting on information from the employer. We suggest that if a payee is not given the opportunity to speak to a breach prior to the issuance of a NOID, the result may be a steep rise in hearings before the Financial Services Tribunal, which will impair that body's proper functioning and consume the resources of the Superintendent, the Tribunal and the payee.

b. Because a NOID is a public document posted to the FSCO website, the issuance of a NOID would entail significant reputational risk for a plan administrator or other payee.

Payment of AMPs from the Pension Fund

We agree with the proposal to suspend the requirement to pay AMPs if the order is being appealed.

However, subsection 108.1(4) of the PBA states that an AMP may not be paid out of a pension fund. While this would cause the AMP to be borne by the administrator/employer in a single-employer pension plan, it is unclear in the proposal who would be responsible for payment under a plan with a plan administrator who is not an employer.

If a plan administrator is not an employer, is unable to pay an AMP out of a pension fund and has no separate account from which to make a payment, there would be no way to pay the AMP without violating the *PBA*. Ministry of Finance representatives have suggested that if the AMP cannot be paid from the pension fund, the Government's intention is that it would be imposed on the individual directors of an administration corporation or the individual trustees of boards responsible for administering such plans, many of whom often serve without remuneration. The appointing organizations often do not provide any indemnity to the trustees that they appoint. Fiduciary liability insurance does not normally provide coverage for administrative fines or penalties. If AMPs cannot be paid from the pension fund, there is a high likelihood that jointly sponsored pension plans (JSPPs) and multi-employer plans (MEPPs) will be unable to find individuals who are willing to serve or continue to serve on an administration board of trustees, and plans who are administered by an administration corporation would have difficulty finding directors willing to serve. This restriction also conflicts with pension plans created by legislation who are only able to meet expenses out of plan funds.

While is it important to ensure that boards are properly overseeing the administration of the plans, we believe it would be unreasonable to attribute liability for AMPs to board directors and trustees personally in such circumstances. Such a policy would deter potential candidates from taking up board appointments. Accordingly, we recommend that AMPs assessed against the plan administrator should be payable from the pension plan fund in situations where the plan administrator is a Board of Trustees or administration corporation, or where it is a legislative requirement under the plan text that the administrator pay expenses out of the plan fund.

Thank you for considering our comments. We are available to discuss any of our comments at your convenience.

Yours very truly,

Bryan D. Hocking
Chief Executive Officer, ACPM