



September 27, 2019

Ms. Claire Ezzeddin  
Manager of the Approvals Team  
Private Pension Plans Division  
Office of the Superintendent of Financial Institutions  
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Ottawa, ON K1A 0H2  
Email: [Claire.ezzeddin@osfi-bsif.gc.ca](mailto:Claire.ezzeddin@osfi-bsif.gc.ca)

**RE: Proposed changes to Instruction Guide – Authorization of Amendments Reducing Benefits in Defined Benefit Pension Plans (the “Draft Guide”)**

Dear Ms. Ezzeddin,

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 millions of plan members.

We are writing to you in response to OSFI’s call for comments on the Draft Guide. We note that the Draft Guide updates a similar guide published by OSFI in 2012 (the “**2012 Guide**”). Our comments are as follows:

**AMENDMENT THAT COULD REDUCE AN ACCRUED PERIODIC AMOUNT**

The Draft Guide includes new and revised descriptions and examples of what OSFI would likely consider an amendment caught by s. 10.1(2)(a) (a “reducing amendment”). A new description has been included for an amendment that “reduces or could reduce any accrued periodic amount”. The example given for this new description is an amendment to change CPI-linked indexation to a fixed rate of indexation.

Respectfully, we do not think that the language in s. 10.1(2) captures an amendment that merely *could* reduce an accrued pension benefit at some point in the future. First, s. 10.1(2)(a) applies only to amendments that “would have the effect of reducing” those things enumerated in s.10.1(2)(a)(i) and (ii). We note that “would” and “could” have distinct legal meanings. Specifically, “would” has been interpreted by courts and others to require that there be a reasonable basis to believe that something will happen; whereas “could” merely implies a possibility that something may happen.

Second, s. 10.1(2)(a) protects from reduction “pensions benefits accrued before the date of the amendment”. These words imply that the effect of an amendment be ascertainable on the date of the amendment. Respectfully, in the context of an amendment that deals with a pension benefit that is conditional or contingent on future unknowable factors, like CPI, we think that an amendment that does not reduce a member’s pension benefit credit, and therefore is reasonably likely to provide an equivalent pension benefit to the member over the long term following the amendment, should not be considered a reducing amendment.

In this regard, we note the Financial Services Tribunal (“FST”) decision in *McGrath*<sup>1</sup> which dealt with void amendments under the Ontario *Pension Benefits Act*. In *McGrath*, the FST was tasked with determining whether an amendment to a CPI-based indexation formula was void. In doing so, it assessed both the amount of the pension benefit and its commuted value (or pension benefit credit) on the effective date of the amendment. It refused to find an amendment to a CPI-based indexation formula void where the evidence showed that (i) over the long-term the indexation formula was reasonably likely to result in a similar monthly pension for affected members and (ii) the commuted value of the pension benefit was no less immediately after the amendment. We also note a decision of the New Brunswick Superintendent of Pensions, dated March 16, 2017, which allowed the substitution of an actuarially equivalent fixed rate of indexation for a CPI-based one based on similar reasoning.<sup>2</sup>

Moreover, regarding the specific example of an amendment to change CPI-linked indexation to fixed rate indexation, we urge OSFI to take the view that substituting fixed rate indexation of an equivalent value to CPI based indexation is not a reducing amendment. We urge this as a policy choice because CPI-based indexed annuities, especially with a complex formula, are unattractive to insurers, and thus deters annuity purchases. A policy decision that allows the substitution of CPI-based indexation for fixed rate indexation would encourage a more competitive annuity purchase market for plans that have CPI-based indexation and would be consistent with the general policy of encouraging annuity purchases reflected in other recent changes to the PBSA.

## **REDUCING AMENDMENTS AND FUNDING**

We recognize that a reducing amendment may be used to correct instances of plan underfunding. However, we do not think that OSFI should always require evidence of financial need in order to use its authority to allow a reducing amendment. We would instead encourage OSFI to consider the wider context within which the amendment is occurring. For example, as a means of encouraging annuity purchases, OSFI could provide a framework for reducing amendments that occur in the context of an annuity purchase where the amendment addresses a benefit design that is expensive or impossible to replicate through an annuity purchase.

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<sup>1</sup> *McGrath v. Ontario* (Superintendent Financial Services), 2010 ONFST 5 (*McGrath*)

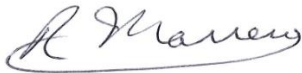
<sup>2</sup> See paragraph 41: [http://cooppension.eckler.ca/wp-content/uploads/2017/03/Decision-of-the-superintendent-of-pensions\\_16March2017.pdf](http://cooppension.eckler.ca/wp-content/uploads/2017/03/Decision-of-the-superintendent-of-pensions_16March2017.pdf)

## **EMPLOYER OR ADMINISTRATOR**

We note that there are several instances in s. 3 of the Draft Guide where OSFI articulates expectations for either the “employer” or “administrator” or both. As you know, the legal implication of assigning duties to an administrator or an employer is significant. For the section dealing with negotiated contribution pension plans, we agree that the administrator would be tasked with making amendments and would have a duty to hold an even hand, subject to the plan terms. However, for a single employer pension plan, where the employer is making the amendment, we are concerned that the description of duties and new references to “employer” do not reflect the legal nature and the distinct roles of the employer and administrator.

We thank you for the opportunity to comment on the Draft Guide and would be delighted to discuss the foregoing with you at your convenience.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ric Marrero". The signature is written in black ink and is positioned above the typed name.

Ric Marrero  
Chief Executive Officer  
ACPM