

# Approach



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## Supervisory Approach to Defined Benefit Asset Transfers under the PBA

### 1. Purpose and scope

1.1. The Pension Benefits Act (“PBA”) requires FSRA’s<sup>1</sup> prior consent<sup>2</sup> to asset transfers<sup>3</sup>. This Guidance outlines FSRA’s approach to reviewing applications for FSRA’s consent to the transfer of defined benefit (DB) entitlements<sup>4</sup> under sections 80, 81 and 80.4 of the PBA and the corresponding regulations<sup>5</sup> (the “Transfer Regulations”). This guidance uses the phrase “asset transfer transaction” to describe such asset transfers. Section 2.1 describes how these transactions arise.

1.2. To support predictability and transparency for plan administrators, sponsors and members and to protect of the rights of pension plan members, this Guidance sets out how FSRA will exercise its discretion and may provide its consent for the purposes of an asset transfer transaction under the PBA.

1.3. The information provided in this Approach Guidance, modified as needed, will also apply to obtaining a prior consent<sup>6</sup> to a conversion under section 81.0.1 of the PBA. Prospective applicants under section 81.0.1 should approach FSRA before proceeding.

## 2. Rationale and context

2.1. This guidance applies when an asset transfer transaction requires FSRA's consent. These transactions occur where a plan sponsor decides to transfer defined benefit assets and liabilities of one pension plan to another. This may occur when two businesses merge or one business acquires another, and the pension plans are to be partially or fully merged. It could also happen if a single employer pension plan merges into a jointly sponsored pension plan. In some cases, a pension plan sponsor may merge all or portions of different plans into a single plan. Regardless of the underlying reason for the asset transfer transaction, this Approach Guidance supports pension plan administrators' understanding of how to seek FSRA's consent to the transfer and when and how FSRA will exercise its discretion.

2.2. As a prudential and outcome-focused pension regulator, FSRA has created this Approach Guidance for the purposes of administering the framework under the PBA and the Transfer Regulations to facilitate an expeditious review process for asset transfer transaction applications. FSRA's asset transfer supervisory framework as set out in this Approach Guidance strives to achieve the following principles and outcomes within the framework established by the Financial Services Regulatory Authority Act, 2016, the PBA and Transfer Regulations:

- Provide for the protection of the value of beneficiaries' entitlements;
- Ensure that beneficiaries are informed and understand the impact of the asset transfer transaction on their past and future benefit entitlements, and where applicable, consent to the transaction; and
- Support the stability of the original and successor plans and their ability to deliver pension promises over the long-term; and
- Facilitate efficient pension plan management for plan sponsors and administrators.

2.3. FSRA's approach to administering the asset transfer framework under the PBA and the Transfer Regulations includes:

- The completion and submission to FSRA of an Application Summary and an Actuary's Certification (together, the "Information Disclosure")<sup>7</sup>;
- FSRA's exercise of discretion on the content and timing of notices under the PBA;
- FSRA's risk-based and outcomes-focused review process; and
- FSRA's consent or refusal to consent to the proposed asset transfer transaction.

## 3. Principles

3.1. FSRA will strive to be risk-based, transparent and consistent in administering this approach. FSRA will act consistent with our statutory objects<sup>8</sup> to promote good administration of pension plans and protect and safeguard the pension benefits and rights of pension plan beneficiaries.

3.2. Where a proposed asset transfer transaction may be potentially inconsistent with the underlying regulatory principles outlined in Section 2.2 of this Guidance or raise concerns regarding the security of benefits or the administration of the plan, FSRA may undertake a more detailed review of the application. If FSRA is still not satisfied that the requirements of this Approach Guidance are satisfied, FSRA may withhold its consent and ask questions. FSRA may have questions about an application on the basis of an asset transfer transaction's nature, size, complexity, impact on beneficiaries, or compliance with the PBA or the Transfer Regulations. Questions may focus on but are not restricted to:

- Unclear or misleading communications.
- Changes to benefits – for example where past-accrued benefits are not being replicated for active members, there may be a concern as to whether the commuted value has been maintained.
- Consents and objections – including the consents obtained, the role of the union, where applicable, or where administrators are aware of complaints or objections focused on compliance matters within FSRA's jurisdiction.
- Complexity – where a transfer affects benefits subject to pension legislation of another jurisdiction or includes multiple pension plans.
- Impact on the financial position of the plans – where transfers affect the funded level of original or successor plans.
- Sustainability of the plan – including implications of the plan sponsor's financial stability.

3.3. Pension plans must be administered, and their assets invested, with the care, diligence and skill required of a fiduciary in accordance with the standard of care prescribed by the PBA, the common law and equity. Administrators are fiduciaries, and, as such, they are responsible for prudently managing risks in their pension plans and making decisions in the best interest of plan beneficiaries.

## 4. Processes and practices

4.1. Administrators, Sponsors and their advisors must be familiar with and comply with any applicable fiduciary duties and regulatory requirements for asset transfer transactions and advisors must adhere to any applicable professional obligations.

4.2. Administrators and their advisors must perform sufficient due diligence as they prepare for and carry out an asset transfer transaction. This identifies potential gaps and issues that may need remediation or consideration. For example:

- the plan may require certain amendments to plan documentation;
- some plan investments may require special treatment;
- the plan may require additional funding contributions; and
- the administrator should identify and address unresolved regulatory issues where necessary.

4.3. FSRA will engage with applicants throughout the application review and decision process. We will be transparent and seek additional information or clarification where appropriate.

### 4.4. Asset transfer process

4.4.1. The process of applying for FSRA's consent to an asset transfer transaction includes the following components:

- Preparing for an Application
- Preparing and Issuing Notices
- Preparing and filing amendments
- Considering treatment of any outstanding letters of credit
- Submitting the application
- Reviewing the application for compliance
- Consenting to the application
- Filing of documents / reports after FSRA's consent

The following subsections describe relevant supervisory practices and FSRA's approach for each component of the asset transfer process.

#### 4.4.2. Preparing for an application

4.4.2.1. For larger or complex transactions, applicants should engage proactively with FSRA's

Advisory Services team. The purpose of the engagement is to explain the transaction, its unique features and / or the rationale for requests for variance from or waiver of specific asset transfer requirements, if applicable.

4.4.2.2. Prior to submitting an application, administrators should contact FSRA to discuss unresolved regulatory issues that may impact the asset transfer application or FSRA's review of it (e.g., outstanding complaints or pending Financial Services Tribunal hearings, outstanding filings, funding issues, etc.). If not resolved before the application is filed, such issues should be identified in the application with an explanation as to how the administrator will resolve each issue and how the proposed asset transfer and treatment of benefits will be impacted and addressed.

4.4.2.3. Applicants are responsible for identifying and including in their application any agreements or consents required under the PBA or Transfer Regulations. Examples include, but are not limited to, employers' agreements, agreements between administrators and / or sponsors of the original and successor plans (e.g. purchase and sale agreements), or the consent or deemed consent of beneficiaries.

### **4.4.3. Preparing and issuing notices**

4.4.3.1. Applicants and their advisors must prepare and issue required notices so that affected beneficiaries are properly informed. The notice should be delivered within prescribed timelines and provide affected beneficiaries relevant information about the asset transfer, including information about their rights, how those rights or their benefits will be impacted by the asset transfer transaction, decisions they need to make (if applicable), and where to obtain additional information or clarification.

4.4.3.2. Beneficiaries impacted by the asset transfer must also be advised of the opportunity to raise compliance concerns about the asset transfer transaction directly to FSRA. Information describing how a beneficiary may do so (i.e., by including contact information for FSRA) must be clearly communicated in the standard asset transfer notice or, where applicable, in the notice of application.

4.4.3.3. Beneficiaries may make written representations to FSRA directly with any concerns about compliance of an asset transfer transaction of the PBA and Regulations.

Representations can be made at any point in the asset transfer process before FSRA gives its consent. FSRA will consider all representations prior to giving consent.

4.4.3.4. Applicants can request a variance in the notice timing and contents from FSRA, if needed. See section 5 below for information about FSRA's ability to vary or waive requirements with respect to the content and timing of asset transfer notices.

#### **4.4.4. Preparing and filing amendments**

4.4.4.1. The applicant must file any amendments to support the asset transfer along with a completed [Form 1.1](#). If the amendments have been filed through FSRA's [Pension Services Portal](#), the application must indicate this. In situations where a signed and adopted amendment is not available at the time the application is filed, a draft amendment should be filed with the application. Ultimately, a signed and adopted amendment must be filed in order to obtain FSRA's consent.

4.4.4.2. Any amendments to cease benefit accruals in the original pension plan are adverse amendments<sup>9</sup>. Therefore they must, to the satisfaction of FSRA, comply with the requirements for such amendments under the PBA. Administrators must file those amendments and evidence of required compliance with FSRA. Members should be notified of such amendments on or prior to their effective date and administrators should ensure they comply with applicable member notification requirements.

#### **4.4.5. Considering the treatment of any outstanding letters of credit**

4.4.5.1. The determination of the amount of assets transferred must include the value of any letters of credit (LOC). Pension plan sponsor(s) may need to make additional contributions to replace assets covered by the LOC. Administrators should carefully consider the implications of LOCs on original and successor plans, given that: (i) LOCs are uniquely written for a specified legal entity; and (ii) certain activity could trigger an immediate funding requirement. Administrators should describe how any LOC will be addressed, in their application to FSRA.

4.4.5.2. We note that where the employer with an LOC in the transferring plan will also be participating in the receiving plan, it may be possible to amend and transfer the LOC so that it becomes an asset of the receiving plan, if the issuer and trustee agree.

4.4.5.3. Applicants may contact FSRA to discuss any proposal for dealing with an LOC in the context of an asset transfer.

#### **4.4.6. Submitting the application**

4.4.6.1. FSRA may exercise its discretion to extend the deadline for applications for a maximum of 60 days if the administrator demonstrates there are reasonable grounds for this request. FSRA may extend the time limit for further periods if satisfied there are extraordinary grounds and that no person will be unduly prejudiced<sup>10</sup>.

4.4.6.2. FSRA developed the Information Disclosure to facilitate efficient regulatory review of applications. The Information Disclosure is not a regulatory requirement but rather, a helpful tool for the applicant and FSRA.

4.4.6.3. The Information Disclosure identifies key requirements in the asset transfer process. The Information Disclosure includes:

- the Application Summary, certified by the plan administrator; and
- the Actuary's Certification, signed by the plan actuary.

Each document in the Information Disclosure can be signed in counterpart.

4.4.6.4. If an application includes DC and DB assets, the application should identify both components. However, the Actuary's Certification should only address DB plans or the DB component of a pension plan. The same application can address the transfer of both DB and DC assets, or DC assets may be addressed in a separate filing.

4.4.6.5.. A separate Information Disclosure should be completed for each original pension plan in an application.

4.4.6.6. Applications may be submitted without the Information Disclosure, but applicants should expect longer review times.

#### **4.4.7. Reviewing the application for compliance**

4.4.7.1. FSRA will periodically conduct in depth reviews of all or portions of an application to confirm compliance with regulatory requirements. FSRA may, at its discretion and as noted

above in section 3.2, undertake a more detailed review of an application. If the additional review is expected to result in our review period being longer than our expected review time, FSRA will notify the applicant. FSRA may determine that future applications from administrators and / or their advisors will be reviewed in detail where FSRA finds that incomplete or inaccurate information has been provided

4.4.7.2. By June 27, 2021, FSRA will strive to process complete applications within 120 business days of receipt, unless it has advised the applicant that more information is required. Incomplete applications or applications where FSRA requires additional information may result in delays.

#### **4.4.8. Consenting to the application**

4.4.8.1. Generally, where FSRA has determined that an asset transfer application is compliant, it will provide its consent to the transfer through a letter signed by an authorized delegate of the CEO.

4.4.8.2. FSRA must use the Notice of Intended decision (NOID) process where it intends to refuse to consent<sup>11</sup> or to attach terms and conditions to its consent. FSRA may in any case exercise its discretion and choose to issue a NOID in advance of consenting to an asset transfer transaction.

4.4.8.3. When FSRA issues a NOID, the plan administrator of each original plan and the successor plan are required to post the NOID electronically. Members should be able to easily access it. If electronic posting is not possible, administrators should consider other means that the members' employer would typically use to communicate to its employees. Administrators may contact FSRA to discuss potential options.

4.4.8.4. When FSRA issues a NOID, there will be a 30-day period in which impacted persons or entities may request review of the NOID by requesting a hearing before the Financial Services Tribunal (FST). If no request for an FST hearing is made within the 30-day period, FSRA may issue a final order consenting to the application. Where an FST hearing is requested during the 30-day period, no final order in respect of the NOID will be issued until a final decision has been issued by the FST or any court hearing an appeal of the FST's decision.



4.4.8.5. FSRA will provide applicants an opportunity to address any issues identified through the review of their application. If those issues are not or cannot be addressed, or an application does not conform to the principles outlined in this Guidance or the requirements of the PBA or Transfer Regulations, FSRA will not consent to the transfer.

#### **4.4.9. Filing documents / reports after FSRA's consent**

4.4.9.1. Until assets have been substantially transferred to the successor plan, the original plan and the successor plan continue to operate as separate plans, and the liabilities of the original plan remain the responsibility of that plan. The affected plans continue to fund on a separate basis, pay benefits separately and to separately make all required filings.

4.4.9.2. Where a full asset transfer is in process and the actual transfer of assets has not substantially occurred by the end of the plan's fiscal year, all filings, fees and assessments are required with respect to that fiscal year. For example, consider an original plan with a fiscal year end of December 31. If an asset transfer application received FSRA's consent in October of a given fiscal year, but the assets were only transferred in February of the next year, all filings, fees and assessments with respect to the given fiscal year are generally required to be filed for the original plan by the applicable deadline.

## **5. Variance of notice timing and content**

5.1. The PBA<sup>12</sup> allows FSRA to vary or waive some of the requirements for assets transfers. This includes the requirements for the content and timing of notices.

5.2. Whenever possible, applicants should inform FSRA of their intended requests for waiver or variance early in the asset transfer process (i.e., before notices are issued). The Application and/or Information Disclosure should detail any such request including supporting documentation, as appropriate. While each party to an asset transfer transaction is responsible for complying with requirements of the PBA and the Transfer Regulations that apply to it, the Applicants can agree that one party will make all waiver or variance requests on behalf of both parties.

5.3. FSRA's review of these requests will include, among other things, consideration of

compliance with the PBA and the Transfer Regulations, and overall alignment with the principles set out in this Guidance. Where FSRA is satisfied that the terms of a proposed asset transfer transaction adhere to such requirements and principles, FSRA will provide the requested variance or waiver.

5.4. The following are examples of requests to waive or vary requirements for asset transfer transactions which FSRA may accept:

- Use of the most recently distributed **annual pension statement** rather than duplicating information in the asset transfer notice, where the information is the same or substantially similar, including where the date of information in the annual pension statement does not align with the Transfer Regulations.
- Use of an existing summary of benefits or **employee booklet** where the transferred benefits are not being changed, rather than reproducing information in the notice.
- Provision of **summary information** to members with a reference to where they may receive further detailed information, if desired (for example upon request, or on an administrator’s website).
- Extending time, where the **timing requirement** of notices may be logistically challenging, such as the requirement to send all notices on the same day.
- Where permitted, variation in notice content, where the content of a notice is **technically non-compliant**, but where the non-compliance is not material to the transfer and could not reasonably be expected to affect a decision to consent to the transfer, if consent is required.

5.5. To support transparency, predictability, effective plan administration and ensure consistent treatment of similar applications, FSRA may publish approved variances and waivers on at least an annual basis. FSRA will determine, based on the circumstances, the level of detail that will be published in its report.

## 6. Multi-jurisdictional asset transfers

6.1. The asset transfer provisions of the PBA and the Transfer Regulations apply to asset transfers affecting Ontario members of pension plans registered in Canada. They do not apply to an asset transfer if none of the assets to be transferred are in respect of benefits accrued by Ontario regulated beneficiaries, regardless of whether assets are transferred to or from a FSRA-registered pension plan.

6.2. Transfers that include members whose benefits are regulated by legislation in other

jurisdiction(s) will be subject to the transfer notice and benefit calculation rules of the jurisdiction(s) associated with those members. The asset transfer application will generally be filed with the regulator of the jurisdiction in which the original pension plan is registered. That regulator will review the transfer with respect to the requirements in all affected jurisdictions. Applications should clearly identify each jurisdiction whose laws apply to any plan beneficiary affected by the proposed asset transfer. Applications must comply with and should confirm compliance with the relevant laws in each applicable jurisdiction.

6.3. In an asset transfer where assets and liabilities related to non-Ontario members are transferred into a JSPP registered in Ontario, the applicant is expected to ensure that the legislation of jurisdiction(s) of the non-Ontario members does not prohibit either the participation of those non-Ontario members in a JSPP, or the transfer of assets and liabilities into the JSPP. To the extent that an application does not contain evidence that each applicable regulator accepts transfers to and participation in a JSPP by members in their jurisdiction, then FSRA will contact the relevant regulatory agency to confirm their acceptance; this could delay our review.

6.4. For partial multi-jurisdictional transfers, the asset allocation should clearly be outlined in the actuarial report that supports the asset transfer and must be determined in accordance with the [2020 Agreement Respecting Multi-jurisdictional Pension Plans](#) / the 1968 Memorandum of Reciprocal Agreement, as applicable.

## 7. Effective date and future review

FSRA will collect and publish metrics associated with asset transfer applications, how it applied its discretion and the consents provided. This data will inform FSRA's review of this Guidance and its internal processes to reduce regulatory burden and improve regulatory effectiveness.

This Guidance is effective **January 28, 2021**. FSRA will review the Guidance within three years of the effective date based on its experience meeting performance targets and input from pension sector stakeholders.

Once this Approach Guidance is effective, the following FSCO FAQs and Policies have no

further effect and should no longer be relied upon:

- Asset Transfer - Frequently Asked Questions (s. 80, 81) including:
  - Frequently Asked Questions - Plan Administrators
  - Frequently Asked Questions - Member
  - Frequently Asked Questions - Actuarial
- Frequently Asked Questions - Single Employer Pension Plans to Jointly Sponsored Pension Plans
- Asset Transfer on Reorganization (FSCO Policy A700-100)
- Change of Custodian – Filing and Amendment Requirements (FSCO Policy A700-151)
- Types of Asset Transfers (FSCO Policy A700-154)
- Interim Transfer of Assets on Purchase and Sale (FSCO Policy A700-176)
- Asset Transfer Resulting from Sale of Business (FSCO Policy A700-200)
- Partial Asset Transfers Under s. 81 - Superintendent's Consent Required (FSCO Policy A700-226)
- Full Asset Transfers Under s. 81 - Superintendent's Consent Required (FSCO Policy A700-251)
- Withdrawal of Application for Consent to a Transfer of Assets (FSCO Policy A700-301)

## 8. About this guidance

This document is consistent with FSRA's [Guidance Framework](#). As an Approach, it describes FSRA's internal principles, processes and practices for supervisory action and application of FSRA's discretion.

## 9. Appendices and references

### Appendices

- Appendix A – Section 80 and 81 Information Disclosure ([Application Summary](#) and [Actuary's Certification](#))
- Appendix B – Section 80.4 Information Disclosure ([Application Summary](#) and [Actuary's Certification](#))

### References

- See Pension Benefits Act sections 22, 26, and 79.2 through 81.0.1, 87, and 105.
- See Regulation 310/13 and Regulation 311/15 under the Pension Benefits Act.
- See Financial Services Regulatory Authority Act sections 3(1) and 3(3).
- See FSRA's Pension Sector Guiding Principles at <https://www.fsrao.ca/industry/pension-sector/guidance/pension-sector-guiding-principles>

- See FSRA’s Guidance Framework at <https://www.fsrao.ca/regulation/guidance/fsra-guidance-framework>
- See the 2020 Agreement Respecting Multi-Jurisdictional Pension Plans at <https://www.fsrao.ca/media/1996/download>
- See FSCO Form 1.1, Application for Registration of a Pension Plan Amendment at <http://www.fSCO.gov.on.ca/en/pensions/Forms/Documents/1159E.pdf>

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1] Pursuant to the provisions of the PBA, the Chief Executive Officer of FSRA (“CEO”) is granted regulatory authority to provide the consent. However, for purposes of this Approach Guidance, the reference will be to FSRA providing the consent because this power is exercised on behalf of FSRA and the CEO delegates these powers within FSRA. This reference also applies to the use of discretion.

2] PBA sections 80(13), 80.4(13), and 81(6).

3] PBA section 79.1.

4] For clarity, this Guidance applies to the DB portion of a proposed transfer that involves both DB and Defined Contribution (DC) assets. Transfers of DC assets will be addressed under separate FSRA guidance/process.

5] See Regulation 310/13 and Regulation 311/15.

6] PBA section 81.0.1(14).

7] See Appendices A and B.

8] Financial Services Regulatory Authority of Ontario Act, 2016 sections 3(1) and 3(3).

9] PBA section 26(1).

10] PBA section 105.

11] Section 89(4) of the PBA.

12] PBA sections 80(16), 81(8), 80.4(12.1) and 81.0.1(13.1).