



**OBA Submission on the Consultation on the FSRA Guidance Document
“Supervisory Approach to Asset Transfers under the *Pension Benefits Act*”**

Date: November 19, 2020

Submitted to: Financial Services Regulatory
Authority of Ontario (FSRA)

Submitted by: Ontario Bar Association



Table of Contents

General Introduction.....	2
The Ontario Bar Association	2
General Comments.....	2
Part 4: Processes and Practices.....	3
• Section 4.1.....	3
• Section 4.4.2.1.....	3
• Section 4.4.4.1.....	3
• Section 4.4.4.2.....	3
• Section 4.4.6.1.....	4
• Section 4.4.8.1.....	4
• Section 4.4.8.2.....	4
• Sections 4.4.9.1 and 4.4.9.2.....	4
Part 5: Variances and Waivers.....	5
Part 6: Multi-Jurisdictional Plans.....	5
Part 7: Future Review.....	5
Information Summaries and Certifications.....	6
Other Comments.....	6
Conclusion.....	7



General Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to provide a submission on the Guidance document put forward by the Financial Services Regulatory Authority of Ontario (“FSRA”): *Supervisory Approach to Asset Transfers under the Pension Benefits Act* (the “Guidance Document”).

The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides dozens of submissions to government for the profession and the public interest, and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission has been prepared on behalf of the OBA’s Pensions and Benefits Law Section. This Section represents lawyers who serve as legal counsel to stakeholders in the pension and benefits industry, including pension and benefit plan administrators, employers, plan members, bargaining agents, pension and benefit consultants, investment managers, actuarial firms and other stakeholders. Our members have analyzed and provided assistance to decision makers over the years on several important legislative and policy initiatives in the pension field.

General Comments

The OBA appreciates the efforts by FSRA to provide additional guidance on its expectations in respect of asset transfers. We would ask FSRA, however, to balance their need for information against the regulatory burden it would create, especially as the regulations with respect to asset transfers (O. Reg. 310/13 and O. Reg. 311/15) are already relatively detailed.

Since the Guidance Document is focused on asset transfers involving defined benefit pension benefits, the words in bold could be added to the title: “Supervisory Approach on **Defined Benefit** Asset Transfers under the *Pension Benefits Act*”.



Part 4: Processes and Practices

Section 4.1: The decision to engage in an asset transfer is not necessarily made as plan administrator. It may be made in a plan sponsor capacity. Under the *Pension Benefits Act* (“PBA”), it is the “employer” who applies for a transfer under section 80.4(11) (unlike sections 80 and 81). To that end, it would be helpful to include a reference to employers in this section. Similarly, we would suggest indicating that in all cases applications should reflect compliance with the PBA, rather than fiduciary duties.

Section 4.4.2.1: It would be helpful to provide some context, benchmarks, or examples for what constitutes “larger transactions”. We note that two examples of complex transactions are included under Section 3.2 and query if there are other examples. We assume the contact information for the “FSRA Advisory Services Team” would be included in the Guidance Document or on FSRA’s web site.

Section 4.4.4.1: Additional guidance on the types of situations that may require draft amendments would be beneficial.

Section 4.4.4.2: In the context of an asset transfer transaction, an amendment to close the original plan is not necessarily an adverse amendment. In some cases, the member’s benefits are the same in the successor plan; the benefits under the original plan are simply being transferred to the successor plan, which is sometimes a plan sponsored by the same employer or a related employer.

This view of such amendments being adverse, and thus requiring advance notice as per section 26 of the PBA, can create several challenges and obstacles for plan sponsors and plan administrators, namely:

- Characterization of the asset transfer as an adverse amendment could confuse or concern members, and it may cause extra work for unions and administrators in addressing member questions and concerns.
- It may be challenging to provide notice to plan members prior to the effective date of a transfer when the effective date is dependent on the closing of a transaction between arm’s length parties, where the closing date may not be known with any certainty or may change at the last minute (thereby rendering notices and amendments incorrect).



- Advanced notice of certain assets transfers could require disclosure of non-public information for a transaction that has not been finalized, which could be contrary to a number of contractual obligations and other laws (e.g., securities, competition) or frustrate the underlying transaction itself.

The Guidance Document should recognize that it may not be legally possible to provide notice prior to the effective date of the amendment. We recommend the application of section 26(1) of the PBA be 'softened' or limited such that advance notice is not required in all cases.

Section 4.4.6.1: This section indicates that FSRA will publish, at least annually, the circumstances when discretionary extensions are granted. If the purpose of this disclosure is to provide practical examples of the circumstances where FSRA may exercise its discretion to grant an extension we recommend such disclosures be made on an anonymous basis (not name the pension plan in question).

Section 4.4.8.1: Since the Ontario pension regulator has traditionally not issued a NOID in respect of section 80 or 81 asset transfers, it would be helpful if the Guidance Document provided some examples of when FSRA might issue a NOID.

We also note that NOIDs should generally not be required where consent has already been obtained from members (for example, under a section 80.4 transfer), and we are pleased to see the recent FSRA publication dated October 22, 2020 which indicates that NOIDs will not be issued for Section 80.4 transfer. The October 22, 2020 publication indicates that FSRA will issue its approval following a 10-day notice period. We query whether such 10-day period is required since members already had the opportunity to object to the asset transfer.

Section 4.4.8.2: Expressly requiring the parties to a merger to post the NOID electronically is problematic for a number of reasons, including that it adds an additional requirement not expressly evident under the PBA, and raises timing issues. For example, when exactly is the posting "required" and how does that affect the 30-day period to contest the NOID.

Sections 4.4.9.1 and 4.4.9.2: In the case of a full asset transfer, we recommend specifying that the filing obligations for the original plan are limited to filings that are due prior to the date the assets are transferred rather than the effective date of a given filing (e.g. if FSRA issues approval February 1, 2021, for the asset transfer then the



valuation for the original plan that is effective January 1, 2021 and is to be filed by September 1, 2021 should not be required if the assets are transferred before September 1, 2021). The alternative is to create unnecessary burden and expense on the plan administrator.

In this regard, we note that Section 4.4.9.2 does seem to suggest some flexibility, as the word “generally” is used in the example at the end of the paragraph, however, additional clarity would be beneficial to plan administrators/plan sponsors.

In addition, it seems Sections 4.4.9.1. and 4.4.9.2 are not necessarily applicable for a section 80.4 transfer. After the effective date but before the actual transfer of assets, the successor plan could be paying benefits and receiving contributions. In such cases, it is not clear that the original plan would be required to make certain filings/have certain regulatory obligations during the period after the effective date of the merger but before the actual asset transfer date, especially if, for example, FSRA’s approval had also been received at that time. We suggest clarifying this or carving section 80.4 transfers out of section 4.4.9.

Part 5: Variances and Waivers

Section 5.5: This section indicates that FSRA will publish annually circumstances when variances and waivers are granted. If the purpose of this disclosure is to provide plan sponsors with practical examples of the circumstances where FSRA may exercise its discretion to grant variances and waivers, we recommend such disclosures be made on an anonymous basis (not name the pension plan in question).

Part 6: Multi-Jurisdictional Plans

Section 6.4: Given the brevity of the 1968 Memorandum of Reciprocal Agreement, additional guidance on the application of the rules is required. However, we appreciate that this will be difficult and dependent on the circumstances. We recommend indicating that this is a situation that would be considered ‘complex’ and that plan administrators should contact FSRA’s Advisory Services team.

Part 7: Future Review

Certain publications such as the Frequently Asked Questions (e.g. Actuarial FAQ and SEPP to JSPP FAQ) provide helpful guidance to plan administrators and while certain



questions may need to be updated, the content of these publications is not entirely covered by this new Guidance Document. Therefore, we recommend that these relevant publications remain in existence.

Information Summaries and Certifications

The following comment relates to the Asset Transfer Application Summary proposed form/checklist (Transfers under PBA s. 80 and s. 81):

- Question 4(a) – The requirement for a “transfer agreement” is optional under section 80(6) of the PBA, and asset transfers between plans of the same employer would not normally involve a transfer agreement. Could a “N/A” box be added here, for clarity.

The following comments relate to the Asset Transfer Application Summary proposed form/checklist (Transfers under PBA s. 80.4):

- Question 4(a) should refer to “active” members. While it is understandable from a practical perspective that FSRA may want to ask whether for active members the benefits will be at a minimum, the same, the question should also reflect the requirement of section 80.4(13)(7), i.e., whether the CV test is met.
- Question 5(a), second bullet, should refer to the “commuted” value, and have a box for YES or NO.
- Question 5(b), first bullet, should refer to the language in section 80.4(13)(8) “at a minimum, the same as”, and not “replicated or improved”.

We note that the Actuarial Certificate has two separate sections for certification of the actuary of the original plan and successor plan, anticipating that in some transactions there may be two separate actuaries involved. It may be worthwhile indicating in the form that the Certification can be signed in counterparts by the actuaries.

Other Comments

We look forward to the release of guidance for assets transfers involving defined contribution pension benefits, including a simplified process for DC assets transfers and guidance on issues such as transferring account balances of missing members in a wind up context to ongoing DC plans.



Conclusion

Once again, the OBA appreciates the opportunity to provide comments to the call for consultation on the Guidance Document put forward by FSRA and would be pleased to answer any questions that may arise. We look forward to participating in future consultations as FSRA moves forward.