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Via email

Re: Consultation on FSRA's Proposed Approach to Strengthening Protection of Vulnerable Consumers

ACPM is writing to you in response to FSRA's *consultation on its Proposed Approach to Strengthening the Protection of Vulnerable Consumers* ("Proposed Approach").

ACPM is the leading advocacy organization for plan sponsors and administrators in pursuit of 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, including both active plan members and retirees.

ACPM appreciates the opportunity to respond to the Proposed Approach as it relates to pension plans in Ontario.

Under the Proposed Approach, a vulnerable consumer is someone who is at higher risk of experiencing financial mistreatment, hardship, or harm, due to various factors and personal circumstances. As discussed below, ACPM's view is that there are fundamental differences in the application of the notion of vulnerability between the pension sector and FSRA's other regulated sectors. There are also distinctions in FSRA's statutory objects for pension plans versus other regulated sectors. We encourage FSRA to consider this perspective before potentially "outlining a set of expectations or defining specific requirements for entities across all of its regulated sectors", as noted in Section C of its Proposed Approach.

We would like to offer the following feedback and suggestions:

1) **Pension coverage helps alleviate and prevent financial vulnerability**

   Pension plans are benefits programs that operate with the goal of providing an income to members after they retire. They provide income replacement to retired members, thereby yielding a significant benefit to society by reducing reliance on social programs in retirement.

By facilitating long-term savings and providing retirement income security, pension plans reduce vulnerability, in contrast to other regulated sectors in which profit-making schemes may expose populations to greater vulnerabilities. The Proposed Approach does not appear to have taken this exceptional characteristic of the pension sector into account.

2) Plan administrators are subject to a fiduciary duty and standard of care

Pension plan administrators owe fiduciary duties to their beneficiaries. These duties are recognized at common law and under the Ontario *Pension Benefits* Act (PBA). The legal and regulatory framework in which pension plans operate is designed to minimize the vulnerability of beneficiaries through the application of fiduciary duties, which require pension plan administrators to act in the best interest of plan beneficiaries. The existence of fiduciary duties helps safeguard against conflicts of interest and management practices that are detrimental to the interests of beneficiaries, and supports due diligence in product and vendor selection.

Beneficiaries are often also in an employment relationship with the plan administrator/ sponsor and, to the extent third parties act as plan administrator, it is often in a trustee relationship to beneficiaries or in the governance scheme for the plan which includes beneficiary/membership representatives. Plan administrators also have a duty to provide accurate information that is sufficient to permit plan beneficiaries to make informed financial decisions. Consequently, pension plan beneficiaries are shielded by a robust legal and regulatory framework that supports the long-term security and stability of pension plans and protects the interests of beneficiaries. These critical obligations further distinguish the pension sector from the other financial services sectors regulated by FSRA.

Unlike traditional consumer transactions, beneficiaries in pension plans are not engaging in a typical consumer-provider relationship. Referring to pension plan beneficiaries as “consumers” oversimplifies their status and the nature of their relationship with the pension plan and its administrator. It also ignores the critical point that pension plan members are better regarded as employees than consumers: pension plan participation, and the terms of a pension plan, are closely linked to the employment relationship, and are often the product of careful balancing between the employee, any bargaining agent and the employer or stakeholders. Moreover, a “consumer” approach may downplay or mischaracterize the fiduciary nature of the relationship between plan administrators and beneficiaries. As fiduciaries, pension plan administrators have a legal obligation to act in the best interests of the beneficiaries and to be even handed, emphasizing a higher standard of care than the dynamic of the typical consumer-provider relationship.

Considering these key differences, many of the risks identified in the consultation paper do not apply to pension plan beneficiaries.

3) FSRA's Consumer Research Study found relatively high levels of overall satisfaction and trust by pension plan members

FSRA's *2022 Consumer Research Study* provides some insight on how the pension sector compares to the other regulated sectors and supports the conclusion that the pension sector should not be covered by the Proposed Approach. Some examples from that study include:

- Only 12% of respondents in the pension sector don't trust pension plans very much or at all. That is the lowest of the sectors surveyed, with other sectors having much lower trust levels (e.g., 27% do not trust credit card companies, 30% don't trust insurance brokers/agents and 33% don't trust insurance companies. Only 8% of pension plan members think that their contributions are not secure or well-managed.

- The pension sector contains the lowest number of vulnerable consumers at 14% with the provincial average being 20%.

- The pension sector is not even mentioned as one of the industries in which consumers have been offered products on "unreasonable terms". This reinforces the argument that pension plan beneficiaries are not consumers in the normal sense of the word.

- FSRA is particularly concerned that vulnerable consumers may be less likely to complain when they have an issue with a regulated entity. Only 8% of pension sector respondents had an "issue" relating to the plan and did not complain. The corresponding figures are markedly higher in all other sectors (ranging from 14% for life and health insurance to 29% for mortgage brokers). The fact that the pension sector had the lowest rate of vulnerable respondents who had an issue and did not lodge a complaint suggests that vulnerable pension plan beneficiaries have by far the lowest incidence of "barriers to making a complaint".

It is also important to bear in mind that creating additional and unnecessary requirements for plan administrators or sponsors could disincentivize them from offering or continuing to offer workplace pension plans. As pointed out above, pension plans help alleviate vulnerability for their members; any decrease in plan coverage would therefore yield an increase in financial vulnerability, undermining the objective of the Proposed Approach.

4) **FSRA's proposed approach to defining 'vulnerable consumers' reflects a model that does not transpose well to Ontario pension plans**

In its webinar on February 8, 2023, FSRA noted that the Proposed Approach has been influenced by the vulnerable consumer guidance from the U.K. Financial Conduct Authority (UK FCA), which uses a similar definition and concepts.

In contrast to the Ontario *Financial Services Regulatory Authority of Ontario Act, 2016,* and the PBA, the U.K. *Financial Services and Markets Act 2000* includes an express consumer protection objective. Moreover, that objective, and the U.K. FCA guidance that flows from it, is focused on firms regulated by the FCA that operate in retail financial services markets. Conversely, U.K. pension plans fall under the mandate of the Pensions Regulator, which has applied the U.K. FCA vulnerable consumer framework in a more limited context, such as pension cash-outs, which operate quite differently from the locking-in protections under the PBA.

In Ontario, the application of a vulnerable consumer lens to pensions might be similarly narrow. For example, to the extent any insurance or other products used by pension plan beneficiaries fall within the scope of FSRA's regulated sectors, such guidance would more appropriately apply to those vendors, and not the pension plan or plan administrator. This would support FSRA's overall objective, insofar as plan administrators selecting such products within the context of their fiduciary duty and plan design would have confidence that the market providers have applied vulnerable consumer principles to such products.

5) **FSRA can support its consumer objectives through pension education and awareness**

We appreciate FSRA's commitment to education, as demonstrated by initiatives like Pension Awareness Day and other educational campaigns. Existing regulations mandate that pension plans keep beneficiaries informed about their benefit entitlements and rights under the pension plan. Against that backdrop, rather than creating specific additional pension plan requirements, FSRA may better support the overall objectives of its consumer focus by continuing to prioritize its member education activities, which will help build the understanding of pension plan rights that beneficiaries have.

When looking to strengthen its education efforts, FSRA should leverage existing retirement research, and relevant resources from other regulatory bodies (potentially including such topics as wills, estates, family law and power of attorney information).

Conclusion

Overall, we encourage FSRA to take an approach that recognizes that pension plan beneficiaries differ from consumers in other regulated financial services sectors. When it comes to pension plans, the existing legislation, best practices, and regulatory guidance mean that pension plan administrators already operate in an environment in which strong legal and fiduciary duties govern their activities and provide protection for plan beneficiaries. Rather than crafting a one-size-fits-all approach to defining vulnerable consumers, FSRA should explicitly recognize the differences in the relationships between pension administrators and their beneficiaries and focus its attention on general awareness and education about pensions.

Once again, we are grateful to FSRA for this opportunity to provide input. We trust that these comments will be helpful as FSRA finalizes the Proposed Approach.

Sincerely,

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