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Submitted online

30 November 30 2020

Subject: FSRA Consultation on New Proposed Approach to Pension Asset Transfers

Dear Ms. Blouin,

We are pleased to provide our response to the Financial Services Regulatory Authority's ("FSRA") Consultation on New Proposed Approach to Pension Asset Transfers (the "Consultation" on the "Proposed Approach").

In the 2008 Report of the Expert Commission of on Pensions, which we understand was the impetus for the Transfer Regulations[1] that ended the long-standing moratorium on many asset transfers, Henry Arthurs stated an underlying principle:

> "Ideally, pension plans should not be a major consideration in corporate re-organization — or at least, the regulation of pension plans should be as neutral as possible in this respect. Parties to the transaction should be as free as possible to order their businesses and pension plans so long as they respect the rights and the interests of all stakeholders."

We are pleased to see that the Proposed Approach generally respects this principle and that FSRA is striving to expedite asset transfer approvals. The Proposed Approach is sensible and appears to provide FSRA with the appropriate amount of discretion.

We do offer some suggestions in this submission, identifying some areas of regulatory ambiguity that the Proposed Approach could mitigate. Some of our comments pertain to issues that are caused by errors in the drafting of the applicable regulations (particularly Ontario Regulation

[1] In this submission, capitalized terms will have the same meaning as in the Proposed Approach document, unless otherwise defined herein.

310/13 which contains several errors). We recognized that regulatory drafting errors are beyond FSRA's control; however we raise them here to ensure they are understood and so that FSRA, to the extent it has the authority, can take these issues into account.

Comments on Specific Sections of the Proposed Approach

We have no comments on Section 1 of the Proposed Approach.

With respect to Section 2, although we are aware that guidance on defined contribution asset transfers is being considered, we suggest revising the guiding principle to be "[e]nsure that beneficiaries understand the impact of the asset transfer application on their past and future benefit entitlements*, and, if applicable, investment options and related fees."*

We have one small comment on Section 3. Principles. The final bullet of paragraph 3.2 states that FSRA questions may focus on "Sustainability of the plan – including the implications on the financial stability of the plan sponsors." We believe this was meant to be "implications ***of*** the financial stability"

Section 4.1 states that "Applications should reflect that administrators and their advisors are familiar with and comply with applicable fiduciary duties and regulatory requirements for asset transfer transactions and related professional obligations for advisors". While we certainly agree that fiduciary duties, regulatory requirements and professional obligations must be complied with, it is not clear how fiduciary compliance can be demonstrated in the application, what FSRA will be looking for in this regard or what the result of a failure to reflect this item in the application would have on FSRA's authority to consent to the transfer of assets.

Section 4.3 requires that applications demonstrate sufficient due diligence have been performed with regard to some plan investments that "may require special treatment". It is not clear what this requirement entails, or why it should be subject to regulatory oversight. Operationally there can be challenges in transferring or liquidating assets, but the administrators are most incented to deal with these issues effectively, so regulatory oversight would not seem to provide any benefits to other stakeholders. Practically, this comes up most often in the context of purchase and sale agreements. The parties often have negotiated a resolution to issues related to the assets in a schedule to the purchase and sale agreement which may or may not find its way into the employment agreement. Caution may be required to avoid situations where regulatory oversight initiatives may upset a commercial contract.

Section 4.4.2.2 requires administrators to deal with unresolved regulatory issues before or as part of the asset transfer. While regulatory issues certainly need to be resolved, we do not see why it is necessary to tie this resolution to an asset transfer application, except if the unresolved issue affects the asset transfer.

Section 4.4.4.2 states that an amendment to cease benefit accruals in the original plan is an adverse amendment. From the member's perspective, unless the successor plan does not provide continuing comparable accruals, the amendment is not adverse, as their pension and other entitlements are not affected by the asset transfer. In the case of a Section 80 transfer, the underlying business transaction may still be confidential when the adverse amendment notices are required. In addition, in our experience, the closing date of the transaction may not be known far enough in advance to allow the administrators sufficient time to mail the notices[2]. We recommend that the amendment only be deemed to be adverse in circumstances where the successor plan does not maintain the same benefit accrual as the original plan and that, in such a situation, the adverse amendment notice not be required to include the effective date of the change if it is not known to the parties in advance. The adverse amendment notice requirements are onerous and do not improve member benefit security in these cases.

Section 4.4.5 notes that letters of credit may need to be replaced with cash contributions in order to meet the requirements of the asset transfer regulations. This is a shortcoming of the asset transfer regulations that does not improve benefit security and unnecessarily creates a significant obstacle to asset transfers where the original plan holds a letter of credit. We recommend a provision to allow the successor plan to put in a new letter of credit to replace the original plan's letter of credit, and to allow the original plan to dissolve its letter of credit at the same time, without further funding. Such a provision would continue to protect member benefit security while removing a major asset transfer hurdle for plans that have a letter of credit.

Section 4.4.6.1 states that FSRA will publish the circumstances when discretionary application filing extensions are granted. Deadline extensions for asset transfers do not adversely impact plan members (in fact, plan administrators generally have the greatest incentive to expedite the transaction); we suggest that FSRA be free to grant extensions at its discretion and that FSRA need not be obligated to publish information regarding this.

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[2] Consider (1) a transaction that requires regulatory approval to proceed: the date on which the transaction closes is, to some extent, beyond the control of the parties and (2) a transaction that fails immediately before closing.

Section 4.4.7.1 notes that FSRA will notify the applicant if it undertakes a more detailed review. We applaud this provision; it will be very helpful for reporting on project status to various stakeholders.

Section 4.4.7.2 indicates that the clock pauses on the 150 day review turnaround target if FSRA advises the applicant that more information is required. The pause provision is reasonable and appropriate; however, we have seen entities (not necessarily FSRA) use such provisions to buy more review time by asking immaterial questions; it would be preferable that staff somehow not be incented to ask immaterial questions.

Section 4.4.8.1 indicates that FSRA will use its discretion as to whether to issue an NOID before consenting to an asset transfer. We suggest that FSRA exercise this discretion rarely, that is, only in situations where it is apparent that the transfer may adversely affect persons or entities. Otherwise, a single disgruntled employee or former employee may significantly disrupt a transaction that meets all regulatory requirements.

Section 4.4.9 indicates that, in the case of a full asset transfer (i.e. a plan merger), both the original and successor plans operate as separate plans until the assets actually transfer. Though it would be administratively preferable to have the merger recognized immediately on the effective date, we recognize it is internally consistent and clearer to treat the plans as distinct until the assets are actually transferred. However, we do suggest that FSRA exercise some discretion in particular cases where separate filings do not make sense. Using the example in Section 4.4.9.2, the transferred assets could be treated as an in-transit as at December 31, 2019, which would then support the filing of 2019 filings fees and assessments in respect of the successor plan only. As another example, a SEPP that merges into a JSPP should only be required to pay PBGF premiums in respect of the period for which benefits are covered by the PBGF.

Section 5 pertains to notice requirements for transfers or conversions to a JSPP. We support the ACPM's position on NOID's for Section 80.4 asset transfers as described in their November 25, 2020 submission on this Consultation.

We have no comments on Section 6.

Section 7 indicates that the FSCO Asset-Transfer Frequently Asked Questions will lose effect once the Approach Guideline is effective. There is a considerable amount of highly useful practical information in those FAQ's that are not addressed in the more principle based Approach document. We request that the FAQ's be updated rather than eliminated, or that they be

replaced by a detailed asset transfer policy that addresses the many detailed practical industry questions that have developed since the applicable regulations were first released.

Comments on the Asset Transfer Application Summaries and Actuaries' Certifications

The Asset Transfer Application Summary will be a useful tool for both applicants and FSRA, and is to be commended. We note that bullet 4 of Section 7(a) of the Summary, pertaining to notices, seems to be based on a FSRA position that requires notices be provided to trade unions and advisory committees that represent members of the successor plan. Our view is that this is based on an error in the Transfer Regulations or in the interpretation of those regulations and that notices should not be required for trade unions and advisory committees with respect to the successor plan.

General Asset Transfer Issues

- Section 9 of Regulation 310/13 prescribes the formula for determining the asset transfer amount. The formula is erroneous as it does not provide for interest on the assets and liabilities during the interim period between the effective date and the actual asset transfer date, nor does it provide for the increase in original plan liabilities due to service accruals during the interim period. This leads to an inappropriate and systemic misstatement of the asset transfer amount, which FSCO has previously acknowledged.

  Subsection 80(13), paragraph 3 and subsection 81(6), paragraph 1 of the Act (the Administrator Agreement Provisions) indicate that the original and successor plan administrators are to agree upon the asset transfer calculation method. We interpret these provisions to allow details such as the interim period's interest and service accrual methodology to be set by the plan administrators. However, we understand that FSRA or the Ministry of Finance does not agree with this interpretation.

  We therefore suggest that either the erroneous formula set out in Section 9 of Ontario Regulation 310/13 be fixed or that FSRA confirm that the aforementioned Administrator Agreement Provisions in the Act take precedence over the erroneous formula, or that the issue be dealt with in the Approach, the Q&A or in a policy.

- The requirement that a Section 80 transfer/merger must be effective as of the date of the purchase and sale should be eliminated – there are situations where no asset transfer could be carried out, solely because the parties missed the effective date; this results in members

having split benefits which is confusing to them and is administratively complex. An example may be illustrative:

  - Transaction 1 – purchase and asset sale involving an entity A by Original Vendor. Purchaser 1 sponsored a plan but no asset transfer occurred
  - Transaction 2- second purchase and sale of entity A. Purchaser 2 also sponsors a pension plan.
  - Section 80 precludes a transfer of assets from Original Vendor to the Purchaser 2 because too much time has passed, even in cases where Purchaser 2 would be prepared to accept a transfer from both Purchaser 1 and the Original Vendor.

- It is not clear which of Sections 80 and 81 apply to the transfer in the case when the shares of a subsidiary participating employer are sold. It would be helpful if the Approach clarified that Section 81 applies (to avoid the Section 80 effective date issue raised above).
- Defined contribution to defined contribution asset transfers pose no risk to members benefit security and should be approved with minimal review.
- Section 6 of the Ontario Regulation 310/13 requires that a cost certificate under Section 7.1 of the General Regulation be filed with FSRA as a final disclosure to indicate that the previously approved asset transfer has occurred. Unfortunately, Section 7.1 is inappropriate for this purpose, being designed to support contribution holidays. Once the asset transfer has occurred, this final filing has no meaningful impact. Accordingly, we suggest that FSRA expend little effort in monitoring this final disclosure. We do note that sometimes the cost certificate supports a change in contribution rates; in this case the cost certificate should be subject to the same review as any other interim cost certificate that changes contribution rates (that is, it should not form part of the asset transfer regulatory framework).

In closing, we thank FSRA for undertaking this Consultation and for its commitment to predictability and transparency in how FSRA will exercise its regulatory discretion. We would be happy to discuss our submission further, should you have any questions.

Sincerely,

Rob Corkum, FSA, FCIA
Principal

Luc Girard, FSA, FCIA
Partner

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