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Financial Services Regulatory Authority of Ontario (FSRA)
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Subject: Proposed Guidance on Pension Plan Amendments ("Proposed Guidance")

Mercer is pleased to provide feedback on the Proposed Guidance referenced above and published by FSRA on November 14, 2023.

FSRA's Interpretation of an Adverse Amendment

The Proposed Guidance states:

> "FRSA has discretion under section 18 of the PBA to refuse to register an amendment that interferes with an existing benefit or status such that it would constitute a Retroactive Adverse Amendment. […]
>
> Subsection 13(2) of the PBA provides that a pension plan amendment may be made effective as of a date before the date on which it is registered by FSRA. However, this does not mean that an amendment is permitted to have a retroactive adverse effect on the plan's beneficiaries. In FSRA's view, a clear expression of legislative intent is required for legislation to have retroactive effect, particularly where retroactivity would interfere with vested rights (such as pension entitlements granted under the terms of a pension plan). Therefore, it is FSRA's interpretation that subsection 13(2) does not, read alone or with subsection 13(1), express a clear legislative intent that amendments be permitted to have adverse retroactive effects."

As indicated in our September 15, 2022, submission, Subsection 13(2) of the *Pension Benefits Act* ("PBA") is there to ensure that retroactive amendments can be made, provided that these amendments are not, as explicated by Section 14 of the PBA, void amendments which reduce an accrued benefit. Retroactive amendments, including retroactive adverse amendments, are not identified at all in Section 18 of the PBA, the provision that gives the Chief Executive Officer (CEO) the authority to refuse to register or revoke an amendment. The only provision in the PBA that explicitly addresses adverse amendments is Section 26 of the PBA. We, therefore, do not agree with the interpretation FSRA has adopted in respect of these sections.

We are pleased that the Proposed Guidance contemplates that FSRA can only require the administrator to transmit an adverse amendment notice after filing an amendment, if FSRA determines the amendment to be adverse. Per our September 15, 2022, submission, we note that the notice regime established by Section 26 of the PBA is not consistent with the Proposed Guidance's view that retroactive amendments are inherently problematic. The adverse amendment notice regime established by subsections 26(1) and 26(2) of the PBA is backward looking: the CEO makes a determination after the amendment is filed as to whether or not it is adverse. If the CEO determines that this is the case, the CEO directs the administrator to "transmit to such persons as the Chief Executive Officer may specify a written notice containing an

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explanation of the amendment". Nothing in the PBA requires the administrator to take any steps before an amendment is filed. From a pragmatic standpoint, insisting that adverse amendments be filed before their effective date does not afford plan beneficiaries greater protection. In fact, in our experience, most jurisdictions do not have such a requirement.

Examples of Adverse Amendments

We appreciated reading that FSRA will publish in the future, examples of filed amendments that have adverse effect; and also, that FSRA is available to plan administrators to help determine in advance whether an amendment would be considered adverse. However, we note that being able to ask guidance from FSRA ahead of time is often not possible where these types of changes require quick adoption. Moreover, we do not feel plan administrators should be required to file legal advice supporting an adverse amendment filing. In addition, currently the Guidance does not provide sufficient examples of what is considered adverse; and until there have been a number of published examples (based on amendments filed over the years), it will be difficult for plan administrators to determine what FSRA's approach to various amendments will be. This creates a considerable level of uncertainty. We also note that FSRA asking if the amendment is equitable should not be required under the PBA since a plan sponsor adopting an amendment is not acting in a fiduciary capacity.

There are some examples listed in the Guidance we would like to comment on.

1) We note that FSRA has indicated that amendments to reflect corporate reorganization or collectively bargained changes, can be filed after the effective date even if adverse (subject to FSRA's consent). We believe that such amendments should always be registered by FSRA provided all required documentation supporting the application for registration have also been filed (e.g., collective bargaining extracts, purchase and sale agreement extracts etc.). It is not possible for a plan sponsor to amend a pension plan before the collective bargaining process or purchase and sale negotiation has ended.

   FSRA has indicated that in corporate reorganizations, the registration of the adverse amendment filed after the effective date may be conditional on advance employee notice. We assume that FSRA is not seeking to obtain a copy of this employment law notice which is separate and apart from the adverse amendment notice (the latter is typically sent at a later date) i.e. FSRA is only requiring confirmation from the plan administrator that employees have been duly notified of the transaction.

2) The Supreme Court of Canada clearly indicated in *Nolan v. Kerry* ([2009] 2 SCR 678) that retroactively amending a pension plan to be able to use defined benefit surplus for defined contribution employer contributions, was permissible and not limited to specific facts as is suggested in the Guidance.[1]

3) While certain amendments may appear adverse when solely looking at the pension plan in silo, when looking at the other arrangements that are part of the design, they are not adverse. It would be helpful if the Proposed Guidance referenced this. For instance, FSRA has, in the past, challenged amendments that were properly communicated to members and upon which members relied to make contribution decisions about other retirement vehicles such as RRSPs, but which were not filed in advance of the effective date for various reasons. Consider for example a design change that allowed members to direct their own and the employer contributions to either the pension plan or to other vehicles. Although there is no overall reduction in compensation, employees who choose to shift their savings to another vehicle – and make reportable contributions on that basis – may find that the design change is subject to challenge.

[1] "The fact that DB and DC funds will be held by different custodians does not prevent them from belonging to the same trust. The Plan, after the **retroactive amendments**, would consist of DB and DC components. Members of both parts of the Plan therefore would be beneficiaries of the Trust and use of funds in the Trust to benefit either part would be allowed because the Trust explicitly provides that the funds can be used for the benefit of the beneficiaries."

In addition, FSRA has, in the past, determined that amendments that cease accrual in one pension plan and immediately commence to accrue in another plan are adverse, even if the successor plan provides the same pension benefit or a better pension benefit.

4) Another example of an adverse amendment provided by FSRA is an amendment that "prevents new employees from becoming members of the plan when they would have otherwise been entitled to". Our position is that if the new employee did not receive specific communication that they were eligible to join the pension plan, then given they are not yet a member of the Plan, such an amendment does not adversely affect their rights **as a member**. Often these amendments are filed shortly after their effective date.

5) FSRA's Guidance says that amendments that replace a variable indexation formula with a fixed indexation rate (for benefits accrued), is void. There are cases where it would be virtually impossible that the fixed rate would be lower than the variable indexation and removing that fixed rate should not, under the PBA, be adverse. In addition, this will significantly affect the ability of a plan sponsor to properly purchase annuities such as in the case of a wind up.

Rectification

The Proposed Guidance states that "[…] FSRA does not have authority under the PBA to rectify drafting errors by registering a Retroactive Adverse Amendment. Rectification of a pension plan's terms is within the jurisdiction of the Ontario Superior Court of Justice. FSRA may, in its discretion, support a court application by an employer or plan administrator for rectification."

Leaving aside that the PBA does not explicitly support the above, we note that the Canada Revenue Agency often requires a retroactive plan amendment to cure prior non-compliance.

The Proposed Guidance indicates in a separate section that subject to a plan administrator's submission, FSRA may register an amendment filed after the effective date if the impact is non-material on members' benefits. Often, these amendments are cases of correcting errors (akin to rectification) even if they may not be identified as such, and on that basis FSRA should clarify that certain cases of "rectification" may be permissible.

In cases where the error has a more significant impact on members' benefits, if the intent is clear from various documents supporting the plan (e.g., employee booklets, collective agreements), that the plan has been administered consistently for years, and the union or a significant group of members is not contesting the change (unlike, the facts in the *Kraft Canada Inc. v Pitsadiotis* decision [2009] canlii 07-CL-7126), then a plan amendment to fix the matter should not require a court application.

In the above cases, plan sponsors should not have to incur the very high court costs.

In an effort to identify drafting errors in the Guidance, we noticed a small typo on page 8: "retoactvity".

As always, thank you for your efforts to engage stakeholders in matters related to the administration of the PBA. Please let us know if you would like to discuss these matters further.

Sincerely,

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