

# **PROPOSED POLICY ON ADVANCE PENSION RULINGS**

## **I. Ontario Bar Association Pension and Benefits Section**

The Executive of the Pension and Benefits Section of the Ontario Bar Association is pleased to provide its comments on the Revised Proposed Policy on Advance Pension Rulings (the “Draft APR Policy”).

The Section has approximately 350 members who practice in the pension and benefits area, while the Executive consists of 14 members who practice almost exclusively in the pension area. The clients of Section members include large and small employers, trade unions, pension plan administrators, custodians, investment counsel, executive and salaried employees, deferred vested plan members and retirees.

## **II. Comments on the Draft APR Policy**

### **General**

It is clear that the Draft APR Policy is based on the provisions of Information Circular 70-6R4 under the *Income Tax Act* (ITA) which deals with Advance Tax Rulings. We agree that the Information Circular is a good model and we agree in many places with the variations from that model. However, we question the appropriateness of the application of some of those provisions in some circumstances and the appropriateness of deviation from those provisions in others. Our specific comments on the various paragraphs of the Draft APR Policy are set out below.

However, it is important to recognize that when a ruling is requested as to the interpretation the Canada Customs & Revenue Agency (CCRA) will place on an ITA section, the only party interested in the outcome, other than the government agency, is the Applicant. In contrast, a ruling with respect to the application of the *Pension Benefits Act* (PBA) could have a different impact on plan sponsors, plan members, deferred vested members and retirees. Since members of the Executive represent different constituencies in the pension community, it is not surprising that there are divergent views with respect to key proposals related to confidentiality and notice.

We also note that, while an APR Policy will be useful for parties contemplating specific action, the draft APR Policy should not be viewed as a substitute for general policies. Accordingly, we hope that the implementation of an APR Policy does not prompt FSCO to abandon its implementation of broad-based policies. Our specific comments on the various paragraphs of the Draft of APR Policy are set out below.

### **Purpose of the APR Service and Scope of APRs**

The utility of the APR service to the pension community will be determined by the extent to which it is used by pension industry participants. The extent of the use of the APR will, in turn, be governed by the kinds of circumstances in which an APR will be issued. In this regard, we note that the Draft APR Policy only applies in relation to proposed “transactions”. At its narrowest, a “transaction” could be taken to mean an activity relating to a purchase and sale of a business. We are hopeful that something broader than this is contemplated, otherwise, the APR will have virtually no utility. Even if “transaction” is given a broader interpretation, to encompass for example, a plan merger or a transfer of assets from one plan to another, this will

still give the APR limited application. We submit that an APR should be able to be sought in relation to matters involving the interpretation and application of the Pension Benefits Act (“PBA”) and regulations under the PBA in a variety of areas where the application of the legislation to particular situations is unclear.

We suggest that transactions should be defined as broadly as possible so that any action that would affect a pension plan regulated by the PBA could be considered a transaction, irrespective of whether the action occurred in connection with a corporate merger, acquisition, restructuring or reorganization. A broad interpretation of “transaction” would allow requesters of APRs to receive timely and useful guidance and would enable the Superintendent to articulate interpretations regarding the application of the PBA to specific fact situations for the requester’s purposes and, on a non-binding basis, for the broader pension sector.

### **Confidentiality**

We have a number of concerns about the limited confidentiality afforded by the Draft APR Policy to APR requests. A number of those concerns are also reflected in the notice requirements (which are discussed in more detail below).

Our specific concerns regarding the confidentiality provisions of the Draft APR Policy relate to the following items:

- whether an APR request should be made subject to disclosure under Section 30 of the PBA;
- whether FSCO is equipped to decide whether or not information in an APR request contains information potentially harmful to the pension plan or the pension plan sponsor’s business competitiveness;
- whether APR requests should be subject to requests under the Access to Information Act; and
- the nature of the disclosure of the APR on FSCO’s website.

These items will be addressed in greater detail below.

#### *(a) Disclosure under Section 30 of the PBA*

Section 30 of the PBA requires the disclosure of filed and prescribed documents to the pension plan administrator and to persons listed under Section 29 of the PBA. Regulation 45 (9) then requires the disclosure of correspondence between the administrator and FSCO and the Superintendent.

Some members of the Section Executive were very supportive of the application of these disclosure requirements to all documentation and correspondence related to an APR application and decision. These members felt that broad disclosure promotes an open policy which ultimately leads to more balanced and ultimately more easily enforceable rulings.

Other members of the Section Executive, however, believe that the disclosure provisions of the PBA should not extend to APR-related correspondence. These members were unable to discern a policy reason for requiring the mandatory disclosure of APR requests and related correspondence

to plan members and others. Plan members will be affected by the implementation of the “transaction” referred to in the APR request, not the APR request itself. Indeed, APRs will sometimes be sought by pension plan administrators or sponsors who subsequently do not proceed with the course of action set out in the APR request. These members also felt that the mandatory disclosure of information about proposals that were contemplated but were subsequently not implemented could potentially damage relations between the plan sponsor and plan members, and does not appear to serve any useful purpose in the context of the PBA.

(b) *Assessments of Business Interests*

The Draft APR Policy seeks to assuage the confidentiality concerns of plan sponsors by stating that FSCO will withhold any correspondence relating to an APR request that may harm the pension plan or the plan sponsor’s business competitiveness. Once again, members of the Section Executive were divided on this issue. Some members were supportive while others questioned whether it is possible for FSCO staff to accurately assess matters that may harm the pension plan or the pension plan sponsor’s business competitiveness without input from the pension plan sponsor or administrator. Moreover, these members felt that it is not appropriate to place plan sponsors in a position where confidential business information could become publicly available merely because a member of FSCO’s staff has wrongly formed the view that the public release of such information will not harm the plan sponsor’s business competitiveness. For these reasons, these members felt that all confidential business information provided by the applicant and others in the course of an APR request should be kept confidential.

(c) *Freedom of Information Requests*

It is not clear in the draft APR Policy, the extent to which the *Freedom of Information and Protection of Privacy Act* (FIA) will apply. The application of the FIA should be clarified. In regards to freedom of information requests, the Section executive was once again divided. Those that support fuller disclosure welcomed the reference to the FIA. Other members of the Section questioned whether matters that are confidential to the pension plan or that have the potential of harming the pension plan or the pension plan sponsor’s business interests should be made subject to requests under the FIA. These members felt that the disclosure under this legislation can be fairly broad and could compromise the confidentiality of the pension plan sponsor’s business interests. The risk of having confidential information find its way to the hands of third parties would also discourage pension plan sponsors or administrators from seeking APRs from FSCO, further diminishing the utility of APRs.

In this regard, these members noted that Information Circular 70-6R4 provides that all information provided by taxpayers in the course of a request for an advance tax ruling is not subject to an FIA disclosure request. They see no reason why this should not also be the case for APRs.

These members of the Section therefore would urge FSCO to revise the Draft APR Policy to provide that the disclosure of information not be made subject to requests under the FIA. To the extent that legislative action is required in order to exclude APR requests from the FIA, these members would want FSCO to take the steps necessary to ensure that a recommendation is made to the relevant Minister for the appropriate amendments to the FIA. However, not all members of our Section would support such action.

(d) *Disclosure of APR on FSCO Website*

The Draft APR Policy contemplates that all APRs will be made available on FSCO's website with only "personal items" removed. As indicated above, some members of the Section have serious concerns about the apparent lack of confidentiality for applicants. In addition to the measures which these members recommended to address their concerns, noted above, they would also recommend that FSCO actively consult with the applicant regarding the content of the severed APR that will be placed on FSCO's website. To this end, FSCO should give the applicant 60 days notice of the proposed content of the severed APR. The Applicant should then be given the opportunity to suggest additional deletions or modifications to protect the confidential nature of information contained in the APR itself.

**Fees for APR**

The Draft APR Policy does state that the requestor will be given an estimate of the fee to be charged for the request, but there is no guarantee that the actual fee will correspond to the estimated fee. We also note that the fee structure is not specified. In relation to Advance Tax Rulings, the applicable fee is specified in Information Circular 70-6R4. Similarly, the fee structure should be specified in the Draft APR Policy. This will provide assurance that the fees are aimed at cost recovery, not revenue generation. Also, if the fee is calculated based on the number of hours involved, it would be helpful if FSCO established a process whereby applicants were given some idea of estimated time involved as well as a progress report on the time taken. This could be provided by way of a monthly account. This is a common requirement in the business world and should not be unduly burdensome.

**Withdrawal of APR**

We note that in relation to Advance Income Tax Rulings, if the ruling will be unfavourable to the applicant taxpayer, they have the opportunity to withdraw the ruling request. While we note that paragraph 23 of the Draft APR Policy contemplates that APR requests can be withdrawn, there is no positive statement that a person who makes an APR request will be given the opportunity to withdraw their request if the ruling will be unfavourable. We submit that the Draft APR Policy should contain such an express assurance. It also should make clear that if an APR request is withdrawn, all correspondence and documentation relating to the request should be removed from the file for the purposes noted under the confidentiality discussion above.

**Binding Nature**

We note that the following clause, which appeared in the first draft of the Policy, was removed from Paragraph 6:

If the Superintendent decides that not all interested parties have been notified or that the notice is insufficient, a non-binding opinion may still be issued if requested.

If this paragraph was intended to allow a plan sponsor to seek and obtain a non-binding opinion akin to a technical interpretation under the *Income Tax Act*, we welcome this flexibility and suggest that the clause be re-inserted.. We submit, however, that the Draft APR Policy should be

amended to clarify the ability to obtain non-binding opinions. The availability of such an option would address a number of concerns raised in relation to the notice requirements. In particular the Superintendent should not be bound if he has not been given an opportunity to receive submissions for all interested parties. Further, we suggest that if the Superintendent is of the opinion that parties who he considers “interested” have not been given sufficient notice, the Superintendent should notify the requester of his position and provide the requester the opportunity to address and rectify the deficiency.

### **Notice Requirements**

As a matter of general principle, we believe that persons requesting an APR should be given the option either to provide appropriate notice to all interested parties, or due to confidentiality concerns, to not provide such notice. We also believe that in circumstances where notice has not been provided, the opinion rendered by the Superintendent should only be binding on individuals who received notice. If interested persons have not been provided with an opportunity to make submissions to the Superintendent, the ruling should not be binding on that person or the Superintendent. Further, if, due to confidentiality concerns, the Applicant has not provided any notice of its APR request, then the opinion should be non-binding.

However, where persons have been provided notice and given an opportunity to make submissions, any APR rendered by the Superintendent should be binding not only on the Superintendent but also on such persons, subject, of course, to any right of appeal (see below). This is so as to avoid granting persons essentially “two kicks at the can”.

Nevertheless, some members are concerned that if complex notice requirements mean that most applications will ultimately result in “non-binding rulings” then APR applications will be infrequent.

Some members also believe that any APR rendered should be subject to appeal by either the applicant or any individual who received notice and made submissions to the Superintendent. The purpose of the APR is to afford stakeholders with greater certainty before actions are taken. This ultimately avoids unnecessary cost and delay. However, these members believe that if the APR is not subject to immediate appeal to the Tribunal, this could negate any positive aspect of the APR process.

They believe if a direct appeal of an APR were possible then a final determination could be made before any action has been taken. All interested persons could then act with greater certainty and less disruption.

Other members believe there should not be a right of an appeal from an APR. There is currently no right of appeal from Advance Tax Rulings.

### **Exclusions – refusal to rule**

This provision gives the Superintendent discretion respecting whether or not he wished to rule on a particular transaction, rather than mandating the circumstances under which he must refuse to issue a ruling. We assume, therefore, that there may be circumstances where the Superintendent will choose to rule even though one of the items listed in Section 15 is applicable.

Respecting the specific items listed under section 15, we have the following comments:

- 15(d) – This is based on a corresponding provision in Information Circular 70-6R4. While appropriate in the context of Advance Income Tax Rulings, it is not appropriate in the context of APRs. Perhaps one of the greatest potential utilities of the APR is to obtain a ruling on a question of interpretation where no specific “transaction“ is contemplated. Accordingly, this item should be removed from the list of exclusions.
- 15(e) - When a particular transaction contains alternative courses of action, it would seem most efficient if the separate courses of action were included in the same request and considered at the same time as opposed to submitting separate ruling requests for each alternative. Since the fee received by FSCO will, we assume, be based on the time spent in reviewing the request, there seems no disadvantage to FSCO in considering multiple options in a single request. If separate requests are made by one applicant, relating to alternative courses of action for the same transaction, the requests should be considered at the same time by the same individual at FSCO. It would be more efficient and practical for the same person to review all alternatives relating to a single request.
- 15(i) – Any transaction that involves a multi-jurisdictional pension plan may involve aspects that require the legislation of other jurisdictions to be interpreted. As FSCO and the Superintendent have undertaken to exercise the statutory functions and powers of certain other regulatory authorities in accordance with the Memorandum of Reciprocal Agreement among the Canadian jurisdictions, it would appear relevant to the parties to a transaction to receive information respecting how the Superintendent intends to interpret and apply the provisions of the legislation of the other jurisdictions.

### **Process**

- Section 16(j) – We question the need to include section 16(j) in the Policy. The wording of this section appears to be taken from Information Circular on Advanced Income Tax Rulings. This portion of Policy 70-6 R4 relates to cases requiring an interpretation of the *Income Tax Act's* General Anti-Avoidance Rule (GAAR). While this wording is appropriate in the context of a GAAR ruling request, it has no application to the field of pensions and should be removed.
- Section 16(m) – This section of the Policy does not indicate whether the Superintendent can refuse a request for the deletion of additional information from an APR before it is posted on FSCO's website. If the Superintendent is able to issue such a refusal, we request clarification

regarding upon what basis such a refusal can be made, and the applicant's rights and remedies following such a refusal.

### **Meetings**

Section 21 of the Draft APR Policy suggests that a meeting may be arranged between FSCO's staff and the party requesting the APR. As a matter of administrative law, it would not be appropriate for FSCO's staff to meet with only the applicant and not extend the same privilege to any interested parties who have received notice of the APR request. Therefore, to the extent that FSCO's staff do meet with the applicant, such invitations to meet should also be extended to all parties that received notice of the request.