



Proposed Amendments to Ontario Regulation 909:
Administrative Penalties and Special Orders

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Introduction

The Ontario Bar Association (the “OBA”) Pensions and Benefits Law section appreciates the opportunity to comment on two current regulatory proposals. The first regulatory proposal relates to *Pension Benefits Act*¹ provisions on administrative penalties.² The second regulatory proposal relates to special orders by the Superintendent of Financial Services (the Superintendent) under subsection 87(6) of the PBA.³

The OBA

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,500 lawyers, judges, law professors and students. The Pensions and Benefits Law Section represents approximately 300 lawyers who serve as legal counsel to virtually every stakeholder in the pension sector. Our members have analyzed and provided assistance to the Ontario government over the years on virtually every legislative and policy initiative in the pension field.

Proposed Amendments to Regulation 909: Administrative Penalties

The OBA has previously provided comments on the use of administrative monetary penalties in the Ontario justice system.⁴ As we have stated previously, we continue to support reforms that would keep justice costs proportionate, avoid legal procedures that are unduly cumbersome or complex, uphold the principles of fairness and natural justice, and improve access to justice. However, we have a number of concerns to raise with respect to the administrative penalties proposed in this consultation.

Amount of Administrative Penalties

Under the Draft Regulation, the Superintendent would have the discretion to determine the amount of a general administrative penalty, subject to the current maximum amounts of \$10,000 for an individual and \$25,000 for an entity.

¹ R.S.O. 1990, c. P.8, the “PBA”.

² See Description of Proposed Amendments to Regulation 909: Administrative Penalties, Proposal Number: [17-MOF006](#).

³ See Proposed Amendment to Ontario Regulation 909: Special Orders by the Superintendent, Proposal Number: [17-MOF005](#).

⁴ See, for example, [OBA letter to Ministry of the Attorney General POA-AMP Consultation](#), May 2, 2015.



The Superintendent would have the ability to levy summary administrative penalties ranging from \$100 or \$200 per day, subject to the same \$10,000 and \$25,000 maximums.

We would express concern with the proposed amounts for summary administrative penalties. The proposed regulations would create the potential for onerous administrative penalties to be levied on plan administrators and others involved in plan regulation. The potential for summary administrative penalties to accrue at \$100 or \$200 per day could result in rapidly increasing fines being levied that would exceed the amounts likely to be levied for a provincial offence or a general administrative penalty. While some summary administrative penalties may reflect serious offences, one would generally expect that general administrative penalties would reflect more serious non-compliance with the legislation and would therefore be seen as more serious matters.

In particular, we are unclear as to whether the amounts reflect the relative importance of event giving rise to the administrative penalty. While some events could be considered significant, such as late filing of a regular actuarial valuation report, others may be less important, such as the filing of a reciprocal transfer agreement and the issuance of an asset distribution notice on plan wind-up.

It is also unclear why penalties relating to provision of information on marriage breakdown are considered summary penalties while other notices and statements are considered general penalties.

As a result, we would suggest that the distinction between general and summary administrative penalties is not useful, and that all penalties should be subject to the same overall limits. Administrative penalties for individual offences and categories of offence could be developed and revised by the Superintendent at his or her discretion, taking into account the principles of risk-based financial regulation and the ongoing experience of the Superintendent in pension regulation.

We note that imposing administrative penalties on a daily basis is onerous, considering that weekends and holidays would be included. We would recommend that, if summary administrative penalties are retained, then ranges of suggested dates and penalties be provided, as opposed to providing for daily accrual. For an example of such ranges, refer to page 2 of the *Non-Compliant Filings Administrative Penalty Guideline – June 2016* from the British Columbia Financial Institutions Commission.⁵

⁵ See: <http://www.fic.gov.bc.ca/pdf/Pensions/guidelines/NFAPGuideline.pdf>



Factors to be Considered

The Superintendent would be required to consider the following criteria when imposing an administrative penalty:

- The degree to which the contravention or failure to comply was intentional, reckless or negligent;
- The extent of the harm or potential harm to others resulting from the contravention or failure to comply;
- The extent to which the person tried to mitigate any loss or to take other remedial action;
- The extent to which the person derived or reasonably might have expected to derive, directly or indirectly, any economic benefit from the contravention or failure to comply; and
- Any other contraventions of or failures to comply with a requirement established under the PBA or with any other financial services legislation of Ontario or of any jurisdiction during the preceding five years by the person.

We question to what extent the proposed summary administrative penalties reflect the factors to be considered by the Superintendent, and to what extent the Superintendent would be permitted to vary the summary administrative penalties.

We also note that the list of factors does not include the size of the plan and its liabilities. The impact of an administrative penalty on a small employer or pension plan would be much greater than the impact on a larger employer or pension plan. We also note that individual pension plans and designated pension plans mainly affect executives and other insiders, and suggest that administrative penalties should be reduced for such plans in line with FSCO's move towards risk-based regulation. We would recommend adding this as a factor to be considered in levying administrative penalties.

Finally, we note that administrative penalties could be a disincentive to administrators to file amendments to funding arrangements or other supporting documents that may not have been filed correctly in the first instance. Therefore, another relevant factor should be whether the event was voluntarily brought to the attention of the Superintendent and whether it was voluntarily corrected by the plan administrator.

Extension of Deadlines for Notices and Statements

The application of administrative penalties to notice and statement requirements is also problematic. It is unclear as to whether such penalties would be imposed if the



administrator finds it impossible to meet the deadline, for example due to a postal strike or the requirement to obtain more information. The PBA does not give the Superintendent the authority to extend deadlines for notices and statements to members.

Therefore, we recommend that the Superintendent be given the power to extend any deadline applicable to a pension plan, including notices and statements to members. We note that this power exists in British Columbia, for example, where administrative penalties are also permitted.

Content of Notices and Statements

Requirements respecting notices and statements are among the lengthy list of violations upon which administrative penalties could be imposed. The various notices and statements include numerous specific requirements, many of which can be subject to interpretation by plan administrators. It would be relatively easy for administrators to omit one required feature out of a lengthy list of requirements, particularly in multi-jurisdictional pension plans.

We would recommend that administrative penalties should be imposed only for failures to issue required notices and statements within the legislated time limits. Any omissions or errors within the notices and statements should not be subject to administrative penalty.

Standard of Care

The standard of care towards plan members (section 22 of the PBA) is among the offences to which administrative penalties would be imposed. We note that the standard of care is a matter of interpretation, and would express concern that administrative penalties could be imposed for non-compliance with regulatory guidance and recommendations on plan administration that are not found in legislation. We believe this could give excessive power to the regulator to oversee and manage plan administration, and to impose new requirements that have not been adopted by statute or regulation. We recommend removing section 22 violations from the list of offences for which administrative penalties could be imposed.

Jointly-Sponsored Pension Plans (JSPPs) and Multi-Employer Pension Plans (MEPPs)

Section 108.1(4) provides that the payment of an administrative penalty cannot be made from a pension fund. Although this could be relatively easily applied in the single-employer pension plan context, we would express concern that this is not as easily applicable in the JSPP and MEPP context.



In the JSPP and the MEPP context, there are a number of potential issues of having the administrative penalties not being paid from the pension fund, including:

- where there are fixed contribution amounts for a participating employer of a MEPP, the imposition of an administrative penalty would be contrary to such agreement, may be contrary to the terms of any funding agreement, and practically could be administratively difficult to collect the full or pro-rata amounts from each participating employer, and
- where contributions are made by both the employer(s) and member(s), the imposition of an administrative penalty could encounter the same challenges as MEPPs as well as increasing the obligations of the plan sponsor in an unintended manner.

We recommend that this issue be considered further and for the regulation to provide plan sponsor and administrators with guidance on how this administrative penalty regime applies to JSPPs and MEPPs. A potential solution is providing for a partial or full exemption from the legislative prohibition of payment an administrative penalty from a pension fund for JSPPs and MEPPs.

Proposed Amendments to Regulation 909: Special Orders

We recognize that the Government is also undertaking a consultation with respect to the proposed addition of section 16.3 to Regulation 909 of the Revised Regulations of Ontario, 1990. The proposal sets out the various circumstances that are prescribed for the purposes of subsection 87(6) of the PBA.

Subsection 87(6)(b) of the PBA gives the Superintendent the power to order an administrator to file a new report if there are reasonable and probable grounds to believe there has been a “significant change” in the circumstances of the pension plan, however, three categories of proposed section 16.3 only require that there be: (i) a decline in the number of members; (ii) a decrease in total contributions, or (iii) a decrease in plan assets.

A variety of circumstances could lead to any one (or more) of items (i), (ii) or (iii) being triggered, including but not limited to normal course retirements, fluctuations in market conditions, and contribution holidays. We recommend that, consistent with terms of the PBA (including with respect to pension plan wind-ups), it would be appropriate to qualify proposed subsections 16.3(1)(i, ii and iii) by revising same to read “significant decline” or “significant decrease”, as applicable.



Conclusion

Once again, we thank you for considering these comments and would be pleased to answer any questions that may arise.