



September 8, 2017

Claire Woodcock, Manager
Pension Benefits Standards, Pension Policy Branch
Ministry of Finance
5th Floor, Frost Building South
7 Queen's Park Crescent East
Toronto, ON
M7A 1Y7

Dear Ms. Woodcock:

**Re: Superintendent's Ability to Defer Approval for Annuity Purchases
17-MOF011**

The Ontario Bar Association ("OBA") Pension and Benefits Law Section appreciates the opportunity to provide a submission to the Ministry of Finance on issues raised relating to the proposed amendments to Regulation 909¹, and Superintendent consent for annuity purchases on wind-up & extended allocation of payments from the Pension Benefits Guarantee Fund ("Guarantee Fund").

The OBA generally supports principles-based legislation that balances certainty for plan members, administrators, employers and bargaining agents with flexibility for the Superintendent of Financial Services ("Superintendent"). In particular, the OBA supports providing the Superintendent with discretion to tailor approvals and solutions to the particular plan and situation in issue. In addition, the OBA recognizes the Superintendent's dual role to act in the best interests of plan members on the one hand and to protect the Guarantee Fund on the other. Proposed subsection 34(2.1) of the Regulation, which provides the Superintendent with discretion to determine the timing and manner of allocating and paying amounts from the Guarantee Fund on wind up of a plan, reflects this balance.

This letter contains comments on two other proposed new subsections of Regulation 909: subsections 28(4.2) and 29(10).

The Ontario Bar Association

Established in 1907, the OBA is the largest legal advocacy organization in the province, representing more than 16,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 39 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government

¹ General, RRO 1990, [Reg 909](#), retrieved on 2017-08-30

and other decision-makers with several legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

The Pensions and Benefits Law Section represents approximately 200 lawyers who serve as legal counsel to virtually every stakeholder in the pension and benefits industry, including pension and benefit plan administrators, employers, plan members, pension and benefit consultants, investment managers, actuarial firms and other stakeholders. 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.

New Subsection 28(4.2)

There are practical considerations that the OBA believes will often preclude administrators from being able to comply with the deadlines in proposed subsection 28(4.2). The provision would require payment to persons affected by a deferred annuity purchase within 60 days after the later of the Superintendent's approval or the member's election. As a logistical matter, negotiating a large, complex annuity purchase may take longer than 60 days in order to facilitate appropriate pricing or even to find insurers who are willing or able to issue the required annuities (e.g., to provide annuities with indexation provisions). In order to provide flexibility for coordinating the logistics of a potentially large annuity purchase, we would recommend revising proposed subsection 28(4.2) to provide that the payment be made within 60 days or such other length of time approved by the Superintendent.

New Subsection 29(10)

Proposed new subsection 29(10) sets out a 10-year deadline within which the Superintendent shall approve the purchase of life annuities after approving the wind up report in respect of a pension plan. The OBA believes that a hard 10-year deadline places a somewhat arbitrary constraint on the Superintendent's discretion.

If a plan wind-up occurs in the context of a multi-year insolvency proceeding, there is a risk that the Superintendent could defer approval of an annuity purchase early in the proceeding, based on the facts and information then available, but be placed in the position of having to approve an annuity purchase on much less favorable terms on the eve of the 10-year deadline. By imposing a hard deadline, subsection 29(10) could force the Superintendent to approve an annuity purchase at the 10-year mark that is less than ideal for members, the administrator or the Guarantee Fund. It may also put the Superintendent in the position of having to speculate about the future, namely, that an annuity purchase will be more favorable for members and/or the Guarantee Fund at a future date rather than today. However, as with anything to do with the future, no one, including the Superintendent, can ever be sure.

One solution to this problem would be to amend proposed subsection 29(10) to provide that the Superintendent has a 10-year period to approve the annuity purchase or such other period of time as the Superintendent reasonably determines to be appropriate. The Regulation could prescribe

criteria that would need to be considered in order for the Superintendent to defer approval beyond the 10-year mark, including the funded status of the plan, interest rates and the prevailing annuities market.

Alternately, proposed subsection 29(10) could be revised to specify that the 10-year period applies only where the plan is not subject to a proceeding under the Companies' Creditors Arrangement Act ("CCAA") or the Bankruptcy and Insolvency Act ("BIA"). In our experience, it is generally as part of larger, court-supervised restructurings that the Superintendent will want more flexibility to approve annuity purchases in a manner that safeguards the Guarantee Fund. In particular, in many CCAA and BIA proceedings, the extent of the annuity purchase and the potential impact to the Guarantee Fund will depend on the amounts that the administrator can recover from the bankrupt or insolvent estate. However, at the same time, these proceedings involve parties besides the Superintendent and the appointed administrator, including other creditors (domestic and international), monitors and, crucially, the courts. The Superintendent and appointed administrator cannot control the court-supervised process or prevent delays caused by jurisdictional issues, appeals and the claims of other creditors. Removing the hard 10-year deadline in the CCAA and BIA context recognizes that delays may occur in these processes that would not occur in other wind-up situations.

If the 10-year period remains, we agree with the proposed regulation that the period be measured from the date of the approval of the wind-up report. In our view, this is the best way to ensure fairness. However, whether or not the government keeps the proposed 10-year period, we recommend that the Regulation prescribe factors that the Superintendent must consider, both vis-a-vis the particular plan and vis-a-vis the Guarantee Fund, when deciding to defer approval of an annuity purchase (as above, these could include the funded status of the plan, interest rates and the prevailing annuities market). Setting these factors out in the Regulation would provide the Superintendent a basis to justify a particular decision to defer approval and provide the Superintendent with support if his or her original decision to defer is questioned years later with the benefit of hindsight.

Conclusion

Once again, we would like to thank the Ministry for considering these comments. We ask the Ministry to carefully consider the issues raised in this letter, and would be pleased to answer any questions that may arise.

Yours truly,

A handwritten signature in blue ink, appearing to read 'Mark Firman', with a long horizontal line extending to the left.

Mark Firman, Chair
OBA Pension and Benefits Law Section Executive