



Reform of Funding Rules for Defined Benefit Plans:  
Description of New Funding Rules  
and  
Regulations Regarding the Provision of Discharge for  
Purchase of Annuities

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## Introduction

The Pensions & Benefits Section (the “**Section**”) of the Ontario Bar Association (the “**OBA**”) appreciates the opportunity to comment on two recent regulatory proposals put forward by the Ministry of Finance. Specifically, these comments relate to a proposal regarding the reform of funding rules for defined benefit plans (17-MOF018), and regulations regarding the provision of discharge for purchase of annuities (17-MOF019).<sup>1</sup> We will address both of these consultations in turn, below.

## The OBA

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 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, bargaining agents, 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.

## Reform of Funding Rules for Defined Benefit Plans: Description of New Funding Rules

The Section is pleased that the Government is proposing next steps to modernize Ontario’s funding framework for certain types of pension plans. The Section believes that regular reviews of, and, when necessary, updates to, these rules can help keep the *Pension Benefits Act* (“**PBA**”) aligned with Ontario’s rapidly changing workplace and market environment. In addition, the Section believes that modernization of the PBA’s funding rules (followed by regular reviews and updates) will mitigate the prevalence of temporary funding relief and other time-limited targeted funding measures. While temporary measures are often both prudent and responsive, the significant number that have been enacted in recent years has added legislative and administrative complexity, while creating some uncertainty for plan stakeholders given their temporary nature.

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<sup>1</sup> A full description of these consultations is available on the Ontario Regulatory Registry, [17-MOF018](#) and [17-MOF019](#).



The Section continues to advocate for the harmonization of funding rules across jurisdictions, as much as possible. Our Section's main comment with respect to the current *Description of New Funding Rules* proposal is to encourage the government, including through the Financial Services Commission of Ontario ("FSCO") and FSCO's involvement in the Canadian Association of Pension Supervisory Authorities ("CAPSA"), to continue to work towards a comprehensive multi-jurisdictional agreement that provides stakeholders with certainty regarding the funding rules for multi-jurisdictional plans (that is, plans with members reporting to work, or having last reported to work, in more than one Canadian jurisdiction). The Section supports the Canadian Bar Association's position set out in its August 2017 submission to CAPSA on the *Proposed Changes to Funding and Asset Allocation Rules for Multi-Jurisdictional Pension Plans* that members of the same plan be treated the same way from a funding perspective regardless of their applicable jurisdiction for purposes of fairness.

The Section is aware that the proposals will need to be followed by draft regulatory text, which the Section strongly encourages the Government to publish for stakeholders to review and provide further comment on in advance of their proposed effective date.

## **Regulations Regarding the Provision of Discharge for Purchase of Annuities**

The summary document titled *Description of Proposed Regulations to Provide Pension Plan Administrators with a Discharge of Liabilities in Respect of the Purchase of Annuities for Former and Retired Members of a SEPP* ("Regulation Summary") provided as part of the consultation, outlines the principles influencing the development of the proposed regulations and proposed requirements under section 43.1 of the PBA. However, it does not provide the draft regulations for public review and comment.

### **The Need for Draft Regulations**

While we appreciate the opportunity to review and comment on the Regulation Summary - it is useful for the Section to understand the approach being taken by the Ministry of Finance with respect to the prescribed requirements under section 43.1 of the PBA - we also need to review the detailed draft regulatory text in order to assess the true impact of the legislation.

We kindly request the opportunity to review and comment on the draft regulatory text in order to provide meaningful input and comments on the proposals set out in the Regulatory Summary.

### **Surplus Entitlement**

Section 43.1 of the PBA provides that former members and retired members retain their entitlement to surplus, in the event there is surplus when the plan is wound-up in the future, if they were entitled to surplus at the time of the annuity purchase (and regardless of whether there was surplus at the time of the annuity purchase).



We would like to note that this statutory requirement diverges from the approaches taken in British Columbia (no express entitlement to surplus retained) and Quebec (entitlement to surplus retained for three years).

While we recognize the benefit of protecting former members and retired members from strategically timed annuity purchases to avoid the distribution of surplus, we would like to highlight the administrative burden that will result from a plan administrator needing to maintain contact information for former and retired members for the sole purpose of a potential surplus distribution on wind-up of the plan when for all other purposes under the PBA the plan administrator has no obligations to these former and retired members. This could increase the number of unlocated beneficiaries at the time of wind-up, which, as the Ministry of Finance is aware, is a significant issue for pension plans.

### **Required Content for a New Annuity Contract**

The Regulatory Summary sets out a list of provisions that must be included in an annuity contract in order to be eligible for the statutory discharge under section 43.1 of the PBA. The list of required provisions contains a number of specific references to the PBA and *Family Law Act* (Ontario) (“FLA”). This list is consistent with the requirements for annuities purchased under section 42 of the PBA.

However, unlike annuities purchased under section 42 (which are purchased for an individual), annuities purchased under section 43 often cover multiple members in a number of different jurisdictions. What we typically see in existing section 43 annuity contracts are general provisions that require compliance with all applicable pension legislation, including the PBA. Given that section 43 annuities often cover members in multiple jurisdictions, less prescriptive and more principle based language would be appropriate.

The Regulatory Summary does not address whether optional commutation options provided under a plan can, or must be, transferred to the annuity contract. As proposed, it appears that this will be left to the administrator’s discretion.

We would recommend that the draft regulatory text is clear on (a) whether general compliance language will be sufficient (or not); (b) how potential future amendments to the PBA and FLA need to be dealt with in the content requirements for the annuity contract; and (c) whether or not optional commutation provisions must be addressed in the annuity contract.

### **Required Content for a Pre-Existing Annuity Contract**

The Regulatory Summary provides that in order for an administrator to be discharged with respect to an annuity purchased before section 43.1 of the PBA takes effect, the annuity must meet (or be adjusted to meet) the content requirements of subsection 43.1(4) of the PBA and the prescribed requirements set out thereunder.



As noted above, the list of required provisions contains a number of specific references to the PBA and the FLA. In our experience (as there are no prescribed requirements for existing section 43 annuity contracts) most pre-existing section 43 annuity contracts contain general language requiring the insurance company to administer the annuity benefits in compliance with the PBA, but do not expressly refer to section references or specific provisions.

If the intention is to provide a meaningful opportunity for plan administrators who have pre-existing section 43 annuities to be able to take advantage of the new statutory discharge, requiring a prescriptive list of statutory references within the annuity contract will be a significant burden and, for contracts that already require general compliance with the PBA, amount to form over substance.

### **Exemption from execution, seizure or attachment**

In reviewing the Regulatory Summary along with section 43.1 of the PBA, we identified that sections 65 and 66 of the PBA have not been updated to refer to section 43.1 of the PBA. As a result, money transferred to purchase a life annuity pursuant to section 43.1 of the PBA is not expressly exempt from void transactions under section 65 or from execution, seizure or attachment under section 66 (although the Regulatory Summary states that the underlying annuity contract will need to provide for such requirements).

Further, the exception to the exemption from execution rule (i.e., for the satisfaction of support orders enforceable in Ontario) is not addressed in the required content for the section 43.1 annuity contract under the Regulatory Summary. We expect these omissions were an oversight and would recommend amending sections 65 and 66 of the PBA, and adding to the forthcoming draft regulations the support order exception as being required content of the annuity contract under a section 43.1 annuity purchase to avoid any ambiguity.

## **Conclusion**

The OBA appreciates the opportunity to comment on these matters. The OBA would welcome the opportunity to discuss these views in more detail, and to provide any other feedback as the process continues. Please do not hesitate to contact us in this regard.