



October 26, 2017

The Hon. Charles Sousa
Minister of Finance
Ministry of Finance
7th Floor, Frost Building South
7 Queen's Park Crescent
Toronto, ON M7A 1Y7

Dear Minister Sousa:

Re: Feedback on the Implementation of the Financial Services Regulatory Authority

The Pensions & Benefits Section (the “**Section**”) of the Ontario Bar Association (the “**OBA**”) welcomed its meeting with the Board of Directors of the Financial Services Regulatory Authority (the “**FSRA**”) and the Financial Services Regulation Modernization Secretariat of the Ministry of Finance on September 18, 2017. We believe that these outreach efforts are extraordinarily helpful for everyone. Thank you again.

We mean for this letter to build on that positive meeting and continue the dialogue. As you know, the OBA is the largest legal advocacy organization in the province, representing more than 16,000 lawyers, judges, law professors and students. The Section represents approximately 300 lawyers who serve as legal counsel to virtually every stakeholder in the pension industry. The OBA has made two previous submissions¹ on the Review of the Mandates of the Financial Services Commission of Ontario (“**FSCO**”), Financial Services Tribunal and the Deposit Insurance Corporation of Ontario, the final report of which was released on March 31, 2016 (the “**Expert Panel Final Report**”).²

The Section views three areas as critical priorities for the pension sector, especially with respect to next steps and any imminent legislation building out FSRA's framework: (1) a balanced, statutory pension-specific mandate; (2) distinct pension expertise through a separate pension division within FSRA; and (3) a stepped implementation process.

We appreciate that FSRA's Board of Directors and the Ministry of Finance are not necessarily bound by each of the recommendations set out in the Expert Panel Final Report;

¹ See OBA [Submission of June 1, 2015](#) and our [Letter of November 8, 2016](#).

² Expert Panel Final Report, [online](#).

however, we wish to highlight some of those recommendations that, in our view, continue to be necessary for establishing a strong and successful pension regulator.

A balanced, pension-specific mandate set out in legislation

We have previously stated that, if the Government wishes to increase the financial security of Ontarians, it should encourage growth in their pension coverage. While the promotion and expansion of private pension coverage was part of the former Pension Commission of Ontario's mandate, FSCO's mandate is to provide regulatory services that protect the public interest and enhance public confidence in Ontario's regulated financial sectors through registration, licensing, monitoring and enforcement.

We believe that the shift in focus towards regulation and enforcement has discouraged the creation of new pension plans and, in some cases, may have accelerated the move by some employers away from pension plans entirely. In some cases, these pension plans have been replaced by less costly group savings arrangements. In other cases, they have not been replaced at all. In the Section's view, these changes are to the detriment of Ontario workers and the economy as a whole.

We continue to believe in a principles-based approach to legislation and regulation that is focused on outcomes. Principles-based approaches provide greater flexibility to deal with new circumstances, new challenges and new products while providing member protection and an effective and efficient means of regulating pension plans.

In line with *effective* principles-based regulation, we also strongly believe in a pension-specific mandate set out within FSRA's governing legislation. Without a pension-specific mandate, the "unique and specialized" nature of the pension sector recognized by the Expert Advisory Panel is likely to become lost among FSRA's many regulated sectors. Given the diversity of stakeholders and the primarily voluntary and not-for-profit nature of the pension industry, a purely consumer protection mandate is not appropriate and may ultimately be harmful to the vibrancy of the sector. A pension-specific mandate is required to respond to pension-specific issues and objectives, including the promotion and growth of pension coverage in Ontario.

To this end, the OBA strongly supports Recommendation 4b by the Expert Advisory Panel.³ In particular, with respect to the pension sector, the Expert Advisory Panel noted:

³ See Appendix setting out key recommendations from the Expert Panel Final Report.

With regard to pension oversight, the regulator should strike a balance between protecting the interests of plan beneficiaries and promoting a strong and sustainable pension system that operates in an efficient and fair manner.⁴

A separate pension division within FSRA

The Expert Advisory Panel recognized the unique and specialized nature of pension regulation through its recommendation to create a new Superintendent of Pensions role along with the establishment of a separate pensions regulation division within FSRA.⁵ To this end, the Expert Panel Final Report concluded:

We therefore encourage a modified “twin-peaks” – or “triple-peaks” – regulatory approach. As noted above, there should be separate market Conduct, Prudential Oversight and Pension Divisions (or peaks), each led by its own Superintendent.⁶

We strongly believe that this is a recommendation that must be fulfilled in order for FSRA to hold the confidence of the pension sector. While many sectors understandably claim to be unique, the need for a separate pension division was explicitly recognized by the Expert Advisory Panel:

While some of the organizations and individuals that responded to our Preliminary Position Paper questioned why pensions would require a separate division, many within the pension sector emphasized that the regulation of pensions needs to reflect the unique character and policy concerns of that sector. Unlike other financial services, pensions do not fall neatly into a twin-peaks regulatory framework, as there is a significant overlap between prudential and market conduct concerns. Pension oversight must balance the interests and needs of plan administrators, sponsors and beneficiaries, and these interests require a coordinated approach by a single section of the regulator.⁷

A separate pension division within FSRA that is staffed with individuals possessing technical pension expertise is imperative for FSRA to be a strong and respected pension regulator.

⁴ Expert Panel Final Report, page 15.

⁵ See Recommendation 2 of the Expert Panel, set out in the Appendix.

⁶ Expert Panel Final Report, page 14.

⁷ Expert Panel Final Report, page 14.

Stepped implementation process

The final area in respect of which we would like to emphasize our agreement with the Expert Advisory Panel is the implementation process. More specifically, the Expert Advisory Panel commented as follows:

We present these recommendations with an important caveat dealing with their implementation: governance, accountability and structural recommendations should be adopted first, with the rest of the changes to follow once the proposed agencies have been established.⁸

To this end, we strongly encourage the Government to put in place a statutory pension mandate, as discussed above, before turning its attention to other important aspects of the FSRA, such as rule making authority. A statutory mandate will ensure that FSRA has sufficient guidance on how to exercise its substantive powers and be able to tailor those powers as appropriate for the pension sector.

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

Sincerely,



Mark Firman, Chair
OBA Pensions & Benefits Law Section

cc: Bryan Davies, Board Chair, Financial Services Regulatory Authority of Ontario
Sandy Roberts, Director, Financial Services Regulation Modernization Secretariat

⁸ Expert Panel Final Report, page 11.

Appendix: Key Recommendations of the Expert Advisory Panel

Recommendation 2: FSRA should operate as an integrated regulator of financial services with responsibility for regulation of market conduct, pension plans, and prudential matters; with each division dealing with its particular subject matter but operating in a coordinated and consistent manner.

Recommendation 4: The enabling statute should ensure clarity and flexibility, and assign to FSRA comprehensive authority and accountability for all matters within its jurisdiction. The statute should include a specific statement of principles, a specific statement of purpose, and the statutory authorities required to fulfill the agency's regulatory mandate. FSRA's mandate should reflect a balance of interests and desired outcomes for all sectors overseen:

- a. In the context of financial services, FSRA should be directed to provide strong and effective consumer protection while fostering a strong, innovative, vibrant and competitive financial services sector.
- b. In the context of pensions, FSRA should be directed to protect beneficiaries while promoting a strong and sustainable pension system that would operate in an efficient and fair manner, balancing the interests of all parties.