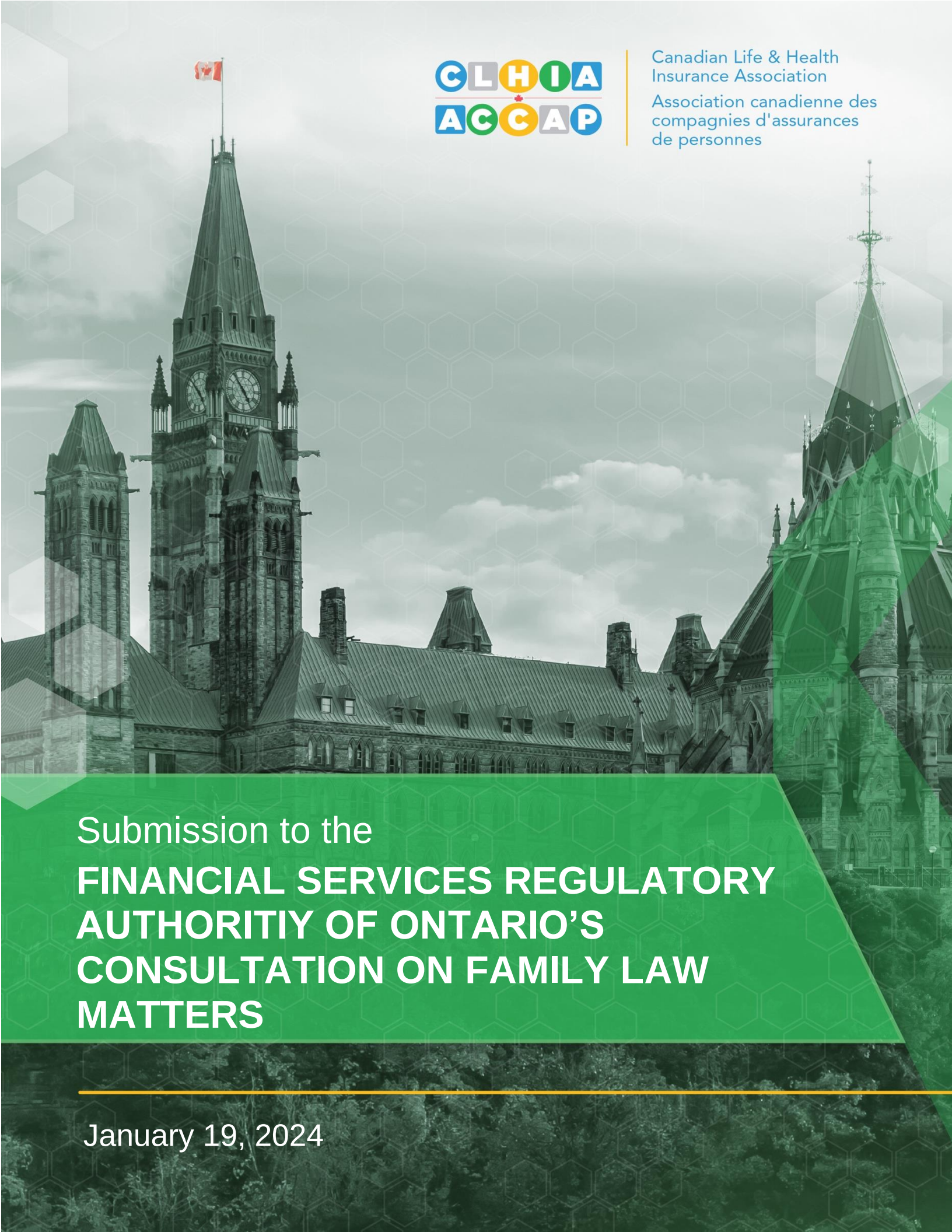

Canadian Life & Health Insurance Association
Association canadienne des compagnies d'assurances de personnes

Submission to the

FINANCIAL SERVICES REGULATORY AUTHORITIY OF ONTARIO'S CONSULTATION ON FAMILY LAW MATTERS

January 19, 2024

INTRODUCTION

The Canadian Life and Health Insurance Association (CLHIA) is writing on behalf of its membership to comment on the consultation paper issued by FSRA on Family Law matters. The CLHIA is the national trade association for life and health insurers in Canada. Our members account for 99 per cent of Canada's life and health insurance business. The industry provides a wide range of financial security products such as life insurance, annuities, and supplementary health insurance.

Our members are significant contributors to Ontario and its economy. In 2022 they provided financial security to 11 million Ontarians and made nearly $50 billion in benefit payments (of which 90 per cent goes to living policyholders as annuity, disability, supplementary health or other benefits). In addition, life and health insurers have more than $350 billion invested in Ontario's economy. A large majority of life and health insurance providers are licensed to operate in Ontario, with sixty-two headquartered in the province.

We are pleased to provide below responses to specific questions raised in the consultation paper on Family Law matters.

Potential FSRA Rule on Family Law Matters

Topic #1: Lift and shift

1. **Would creating a new rule and moving some, but not all, provisions currently in the Regulation into a rule via the "lift and shift" approach achieve the desired outcome of reducing uncertainty and improving efficiency? Please provide feedback as to whether FSRA should adopt a "lift and shift" approach with respect to all areas over which it has rule-making authority, subject to government decision-making, or whether a potential FSRA rule should only include requirements in areas where policy changes are being considered.**

   We don't believe that creating a new FSRA rule and moving some family law provisions that are currently in the Regulation via the "lift and shift" approach would reduce uncertainty and improve efficiency.

   As pension plan service providers, we are constantly confronted with the lack of understanding of the members, the spouses and even some family lawyers, of the Ontario pension division process in the event of a relationship breakdown. Thus, we believe that moving some provisions that are currently in the Regulation elsewhere would add to that complexity.

   We understand the reasoning behind the proposition and agree that FSRA would be in a better position to drive future policy changes on areas of family law covered by FSRA's rulemaking. However, considering that FSRA does not have rule-making authority over all family law requirements under the *Pension Benefits Act* (PBA), the new rule could only address certain points regarding the Ontario pension division process and requirements, while the others would remain in the PBA and in the *Regulation 287/11*.

Therefore, pension division requirements would be divided between the PBA, the Regulation, the Administration of Pension Benefits upon Marriage Breakdown Guidance (the "Guidance") and that new rule, hence, adding an additional source of requirements to consult in that process. In addition, the Regulation will still have precedence over the new rule, which may be confusing.

We believe that the pension division upon relationship breakdown rules and requirements should be contained in as few different resources as possible, to ensure a better understanding and more fluidity in that process for all parties involved, and, above all, to ensure that nothing is overlooked.

FSRA should also continue summarizing and translating the legal provisions into a simpler and clearer language in the existing Guidance instead of adding another source to consult.

Topic #2: Fees that plan administrators may charge for a DB Statement of Imputed Value

2. **Are the existing maximum fees currently set out in regulations under the PBA sufficient to recover the costs incurred in preparing statements? If not, what should the new maximum fees be? Please provide any details relating to cost experience (e.g., administrative and professional service costs associated with the statements) which may be relevant to support your responses.**

   We believe the maximum fee should be increased as the current fee was set back in 2012 and it has not been adjusted since, despite inflation and other specific increase in costs. Administrative and professional service costs, whether incurred internally or where external consultants are retained to assist with preparing statements of imputed value, for example in the case of immediate and deferred annuities, these costs are invariably not recovered. As such, additional administrative work related to these requests (i.e. analyse and review documents, prepare correspondence, adjudication process, records updates, process manual payments, accounting entries, etc.) are not being fully compensated. For that reason, an adjustment that reflects overall increase in costs, including inflation would be appropriate.

   We recommend FSRA work with external consultants, such as Mercers and AON, to establish what would be a reasonable increase in maximum fees to ensure that plan administrators are fully compensated.

3. **Should special consideration be made for low-income applicants (e.g., a fee waiver), in order to mitigate the impact of the revised maximum fees?**

   Although the idea in theory may warrant consideration, in practice, it would be a difficult proposition for pension plan administrators. Administering any rule about special consideration necessitates an assessment process/guideline to determine eligibility and avoid dispute resolution mechanisms adding to the burden of pension plan administration. As such, we do not believe special consideration for low-income applicants should be made.

From the plan administrators' perspective, real costs are being incurred and there must be a process to recover these costs. The decision to waive the fee payment therefore should be left to the discretion of the plan administrator.

An alternative being followed in other provinces is to split the fees in equal parts between the member and the spouse. Instead of requesting the spouse to provide the pension administrator with a payment pursuant to Form D1, the administrator should also be able to deduct the fees from the share of the benefits payable to each spouse instead of collecting them up-front from the parties.

Topic #3: Payment of arrears – division and revaluation of a retired member's pension

4. **Do you agree that uncertainty exists with respect to the division and revaluation of a retired member's pension where spouses have made arrangements outside of the pension plan to share pension amounts prior to its actual division?**

   The CLHIA members are unclear as to what is meant by "where spouses have made arrangements outside of the pension plans to share amounts prior to its actual division". It is our understanding this determination or division of property is done in accordance with Family Law rules as it applies in the case of divorce or separation.

   We have assumed here the question is simply to address the expectations of members and former spouses in respect of the adjustments required to take into consideration the passage of time between the original valuation date and the date of division. While some may anticipate receiving retro-active payments since the valuation date, others expect to have the underlying adjustments to be made prospectively on the remaining provisions of the life annuity contract. As such, we agree uncertainty does exist.

5. **If so, should FSRA make a rule to prescribe how this must be done or expand on its Guidance to address the uncertainty?**

   As lack of guidance may result in varied practices from one plan administrator to another, it would be worthwhile for FSRA to addresses the uncertainty by either providing a clear rule or at least some principles in its Guidance.

Topic #4: Payment of interest on lump sum transfers

6. **Is there uncertainty as to when interest should be added on a lump sum transfer to a member's spouse as a result of *Heringer*?**

   No. Section 8.3, of the Guidance "Interest on payments to the spouse" is very clear and well understood.

7. **If so, could this uncertainty be adequately addressed by revisions to the Administration of Pension Benefits Upon Marriage Breakdown Guidance or new FSRA Interpretation Guidance?**

In our opinion, the Guidance is clear enough on that matter. A new rule or guidance is not necessary.

8. **If not, should FSRA propose a rule that sets out the treatment of interest as described in the *Heringer* decision such that: (a) Interest is to be applied where the amount to be transferred is expressed as a percentage of the imputed value, and (b) Interest is not to be applied where the amount to be transferred is expressed as a specified amount unless the settlement instrument expressly requires that interest be added.**

   As we mentioned in Topic #1, we believe that relationship breakdown rules and requirements should be contained in as few different resources as possible.

   However, since this has been established by common law ever since *Heringer* in 2011, we don't think it would be useful to create a separate new rule in which the treatment of interest as described in *Heringer* is set out. However, an interpretation that reflects and sets out the case law would be welcome.

9. **If you disagree that FSRA should propose a rule that sets out the same treatment of interest as the *Heringer* decision, as described above, should FSRA propose a rule that provides for an alternative treatment of interest? If so, what should that treatment be?**

   As we noted above, the *Heringer* decision is clear and well understood, the CLHIA does not support FSRA proposing an alternative treatment for interest. In any event, any alternative would require a change to relevant laws and regulations, which is outside of FSRA's mandate.

   As an aside, if we compare to what is done in other provinces in regard to the treatment of interest, it is our opinion that interest should always be added to the spouse's share, regardless of how it is expressed in the court order, as a percentage or as a specified dollar amount, unless the court order explicitly states that interest is not to be added to that amount.

   However, in case where the spouse deliberately delays the process (e.g., the spouse does not provide his/her payment option even after many follow ups), the plan administrator should be allowed to stop the interest calculation after a certain period where the additional delays is not caused by the plan member. In such situation, the plan member should not be penalized. This is already provided for under Quebec pension legislation.

   We don't think the treatment of interest should be different depending on how the parties choose to express the amount of the spouse's share in the court order, as they may not even be aware of the impact it has. We agree that interest may be applied consistently as a default (except where otherwise specified in the order).

   The reason behind our position that interest should always be applied (unless specified otherwise in the court order) is that the spouse should be the one to profit from the interest made on their share, instead of the member. More precisely, the spouse becomes entitled to their share of the

imputed value as of the date of the relationship breakdown, but the transfer of that share usually occurs much later. Therefore, the amount that became theirs as of the date of relationship breakdown will keep generating interest in the member's account until the date of the transfer.

For that reason, we believe that spouses should always be allowed to receive the interest made on their share from the relationship breakdown until the date of the transfer (unless specified otherwise in the court order), and that, regardless of whether the spouse's share is expressed in percentage or a specific amount.

Topic #5: Form

10. **Should FSRA allow for greater flexibility with respect forms used by stakeholders. If so, what should be the scope of that expanded flexibility?**

    As we mentioned in Topic #1, the pension division process upon relationship breakdown can be quite complex for the members and their spouses and is often misunderstood by them.

    By having all plan administrators use the same prescribed forms for that process, we ensure uniformity and a smoother process for the members.

    The pension division process in Ontario is already much simpler and smoother than some other provinces, precisely because of the prescribed forms and the content of these forms. By using prescribed forms, there is less place for interpretation, which ensures that every member's pension division is processed the same.

    Also, considering that the pension division process upon relationship breakdown is different in every province, having prescribed forms lightens greatly the administrators' workload when they have to manage relationship breakdowns in several different provinces.

    However, we would welcome some flexibility , for example, by providing a field where general information related to the benefits could be added when they are not covered by the template.

11. **If expanded flexibility is desired, please share any views as to whether that would be better achieved through the use of existing CEO discretion or through the development of a FSRA rule.**

    This would be better achieved through a FSRA rule instead of CEO discretion.

Topic #6: Variable benefits

12. **Should FSRA develop a rule relating to family law matters in the area of variable benefits? Why or why not and what considerations should FSRA take into account?**

    The CLHIA members believe that harmonization with current RRIF and LIF rules should be the focus with some adaptation where necessary. Therefore, we do not see the need for new rules to be developed with respect to variable benefits. Rules already applicable to DC pension plans should apply to the variable benefit account, to provide harmonization and a level playing field and avoid uncertainty.

13. **Should FSRA adopt a similar approach to rulemaking for plans that offer variable benefits as for plans that do not offer variable benefits? Are there reasons why variable benefits should be treated differently for family law purposes?**

    As noted above in question 12 above, harmonizing family law matters for pensions plans in Ontario with current RRIF/LIF rules should be the focus.

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