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SECTION: Refund of Employer Overpayment

INDEX NO.: R350-102

TITLE: Application for Refund of Employer Overpayment  
- PBA ss. 78(1) and (4), as amended

APPROVED BY: Superintendent of Financial Services

PUBLISHED: FSCO Pension Bulletin 9/2 and FSCO website

EFFECTIVE DATE: April 2, 2001[No longer applicable - replaced by R350-103 - July 2011]

REPLACES: R350-101

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This policy replaces R350-101 ("Refund of Employer Overpayment, Application under subsection 78(4), PBA, 1990") as of the effective date of this policy.

*Note: Where this policy conflicts with the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28, as amended ("FSCO Act"), Pension Benefits Act, R.S.O. 1990, c. P.8, as amended ("PBA") or Regulation 909, R.R.O. 1990, as amended ("Regulation"), the FSCO Act, PBA or Regulation govern.*

### **General Principles**

1 Subsection 78(4) of the PBA provides that:

*Subject to section 89 (hearing and appeal), the Superintendent may consent to payment out of a pension fund to an employer of an amount not in excess of the amount of an overpayment by the employer into the pension fund or of an amount paid by the employer that should have been paid out of the pension fund, but shall not consent unless the application is made in the same fiscal year of the pension fund as the fiscal year in which the overpayment or the payment occurred.*

- 2 There are certain situations in which an employer may be considered to have over-contributed to a pension fund for the purposes of subsection 78(4) of the PBA, including but not limited to situations where:
- (a) the employer has contributed on the basis of an actuarial report for which the effective date had passed but when the new report was filed, such contributions exceeded those required by the new report;
  - (b) payments have been made directly by the employer and they should have been made from the pension fund; or

- (c) employer contributions were paid into the pension fund of the wrong pension plan as a result of an administrative error.

In such circumstances, the employer may be considered to have over-contributed notwithstanding that there may be a solvency deficiency or going concern unfunded actuarial liability in the pension plan.

- 3 This policy does not apply to refunds arising from provisions of the *Income Tax Act* (Canada) respecting the refund of contributions to the employer to avoid revocation of registration by the Canada Customs and Revenue Agency (formerly Revenue Canada). Refunds for this purpose must comply with the requirements of subsections 47(15) and (16) of the Regulation, as applicable. Applicants should refer to policy A400-500 (“Reduction of Accrued Benefits and/or Refunds or Payments to Avoid Revocation by Revenue Canada of Registration of a Pension Plan - Exemptions under PBA, R.S.O. 1990, ss. 18(1), s. 26 and s. 47 of O. Reg. 909”).

#### **The Application for Refund of Employer Overpayment**

- 4 The format and content of the application should be consistent with Schedule I to this policy.
- 5 The onus is on the applicant to satisfy the Superintendent that the application complies with the PBA and Regulation. The applicant should also demonstrate compliance with the applicable policies published by FSCO.

#### **Filing the Application**

- 6 (a) The general procedure is outlined in policy S850-200 (“Filing Applications with the Superintendent of Financial Services”).
- (b) The application, including attachments, should be submitted on 8-1/2” x 11” paper (subject to legibility).

- 7 The application is filed with the Superintendent by sending **three (3)** copies to:

Superintendent of Financial Services  
Financial Services Commission of Ontario  
5160 Yonge Street, 17<sup>th</sup> Floor  
Box 85  
North York ON M2N 6L9

- 8 **Three (3)** copies of any information or materials which are supplemental to the initial filing and which are required in order to complete the application should be filed with the Superintendent.
- 9 Upon receipt, the application will be acknowledged.

#### **Extension of Procedural Time Limit on Reasonable Grounds**

- 10 Where the Superintendent is satisfied that there are reasonable grounds for an extension of the time limit under subsection 78(4) of the PBA, an extension may be permitted in accordance with section 105 of the PBA.

#### **Decision or Proposed Decision of the Superintendent**

- 11 The Superintendent will make a decision about the application after the Superintendent receives either:

- (a) a complete application; or
  - (b) a written request from the applicant asking that the application proceed as is, where the applicant has been advised by FSCO staff that the application is incomplete.
- 12 Following a review of the application, the Superintendent will make a decision and will issue either a notice of proposal consenting to the application or a notice of proposal refusing consent.
- 13 The Superintendent will serve the notice of proposal on the applicant as required by subsection 89(3.2) of the PBA. The subsection provides that the Superintendent may require the applicant to transmit a copy of the notice of proposal to such other persons or classes of persons or both as the Superintendent specifies in the notice to the applicant.
- 14 Where the Superintendent requires that the applicant transmit a copy of the notice of proposal to other persons or classes of persons, the applicant must advise the Superintendent as to the last date on which the applicant transmitted the Superintendent's notice.
- 15 A notice of proposal issued under subsection 89(3.2) of the PBA shall state that the person on whom the notice is served is entitled to a hearing by the Financial Services Tribunal ("Tribunal") if the person delivers to the Tribunal, within thirty (30) days after service of the notice of proposal, a written notice requiring a hearing.
- 16 If no notice requiring a hearing is received within the specified time period, the Superintendent may carry out the proposed decision.
- 17 Applicants should refer to policy S850-100 ("Delegation of the Superintendent's Authorities") and policy S850-200 ("Filing Applications with the Superintendent of Financial Services") for additional information on the decision-making process.

**SCHEDULE I**

**FORMAT AND CONTENT OF THE APPLICATION TO THE SUPERINTENDENT  
FOR CONSENT TO A REFUND OF EMPLOYER OVERPAYMENT**

- Date:** *Enter the date of the application.*
- Employer:** *Provide the full legal name of the employer making the application.*
- Pension Plan:** *Provide the full legal name of the pension plan and the registration number.*
- Applicant:** *Provide the name, title and business address of the person making the application. This could be the employer or an agent or representative of the employer authorized to make the application on the employer's behalf. (Unless otherwise indicated in the application, all communication from the Superintendent and staff of FSCO will be directed to the agent or representative of the employer who makes the application on the employer's behalf.)*

**Nature of the Application:**

*Provide a full description of what is being asked of the Superintendent with reference to specific section(s) of the PBA and Regulation pursuant to which the application is being made. For example:*

*Application for the Superintendent's consent pursuant to subsection 78(4) of the Pension Benefits Act, R.S.O. 1990, c. P.8, as amended, to a payment of \$ (insert the amount as at the effective date of the refund) representing an overpayment by the employer into the pension fund (or "an amount paid by the employer that should have been paid out of the pension fund") as at (insert the effective date(s) of the overpayment(s)), plus investment earnings thereon to the date of payment.*

**Background:**

*Provide a summary of how the overpayment occurred and any other information which will assist in understanding the application.*

**Subsection 78(4) of the PBA - Conditions:**

*In the following subsections, the applicant must satisfy the Superintendent that the conditions of subsection 78(4) of the PBA have been satisfied.*

**(a) Amount and Proof of Payment:**

*Indicate what documentary evidence of the overpayment, including amount(s) and date(s), has been provided in support of the application. This evidence could be in the form of:*

- *excerpts from the actuarial report(s) which support the applicant's position that an overpayment has been made (if applicable);*
- *a letter or statement from the fund custodian indicating the employer payments were actually remitted to the fund;*
- *evidence that the employer has made payments from its general revenues which should have been paid from the pension fund; or*
- *evidence that the employer contributions were remitted to the wrong pension plan as a result of an administrative error.*

**(b) Timing of the Application:**

*Indicate how the requirement that the application be made in the same fiscal year as the overpayment occurred has been satisfied, or why an extension of the time limit under subsection 78(4) of the PBA should be permitted pursuant to section 105 of the PBA.*

**Plan Provisions:**

*Provide confirmation that the plan permits, or does not prohibit, refunds of employer overpayments.*

**Certification by the Plan Administrator:**

*The application must include as an attachment a completed certification in the form set out in Schedule II to this policy signed by the plan administrator or an agent or representative of the administrator. Indicate where in the application the certification may be found.*

**Signature by the Applicant:**

*The application must be signed by the applicant identified at the beginning of the application. Before the signature, the applicant must state that the application contains all the documents and information material to an application made in accordance with subsection 78(4) of the PBA, and that the information contained in the application is true and accurate.*

**Attachments:**

*Provide an index of all attachments to the application. The attachments should be listed in an order that corresponds to the order of the subject matter under this document and, where applicable, in chronological order. Where an application is bound, the relevant tab numbers and their contents should also be included in the index.*

SCHEDULE II

ADMINISTRATOR'S CERTIFICATION RESPECTING THE EMPLOYER'S APPLICATION UNDER SUBSECTION 78(4) OF THE PENSION BENEFITS ACT

Re: PENSION

PLAN:

(insert full plan name and registration number) (the "Pension Plan")

EMPLOYER:

(insert full legal name of employer) (the "Employer")

I AM: (please mark the appropriate box with an "X")

- the administrator of the Pension Plan (the "Administrator"), or
an agent or representative of the Administrator authorized by the Administrator to provide this certification.

AS PART OF the Employer's application for the Superintendent's consent pursuant to subsection 78(4) of the Pension Benefits Act, R.S.O. 1990, c. P.8, as amended (the "PBA") for a payment of \$ (insert the amount as at the effective date of the refund, as set out in the Employer's application) out of the pension fund of the Pension Plan, I CERTIFY THAT this payment represents: (please mark the appropriate box below with an "X")

- an overpayment by the Employer into the pension fund of the Pension Plan in accordance with subsection 78(4) of the PBA, or
an amount paid by the Employer which should have been paid out of the pension fund of the Pension Plan in accordance with subsection 78(4) of the PBA.

as at (insert the effective date(s) of the overpayment(s), as set out in the Employer's application) plus investment earnings thereon to the date of payment.

DATED this \_\_\_ day of \_\_\_, \_\_\_.

Signature of Administrator or Administrator's Agent or Representative

Name of Administrator or Administrator's Agent or Representative (printed)

Address of Administrator or Administrator's Agent or Representative (printed)

It is an offence under the Criminal Code, R.S.C. 1985, c. C-46, as amended, for anyone to knowingly make a false document with the intent that it be acted on as genuine.