



SECTION: Surplus

INDEX NO.: S900-509

TITLE: Application by an Employer for Payment of Surplus from a Wound-up Plan
- PBA ss. 78 and 79, as amended
- Regulation 909 s. 8

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EFFECTIVE DATE: April 2, 2001 [No longer applicable - replaced by S900-510 and S900-511]

REPLACES: S900-508, S900-507

Subsection 78(1) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 (“PBA”), as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (“FSCO Act”), provides that surplus may not be paid to an employer unless the Superintendent of Financial Services (“Superintendent”) consents to the payment. The Superintendent shall not consent to an application to distribute surplus to an employer (“surplus application”) until specific requirements and conditions have been satisfied. Statements and documents supporting the applicant’s assertion that the requirements and conditions have been satisfied should be included in the surplus application to the Superintendent.

This policy replaces S900-508 (“Application by an Employer for Payment of Surplus from a Wound-Up Plan”, PBA ss. 78 and 79 and O. Reg. 909 s. 8”) in respect of surplus applications filed with the Superintendent on or after January 1, 2001. This policy also replaces S900-507 (“Surplus Applications Affecting Members, Former Members, or Other Persons with Employment in a Jurisdiction Other Than Ontario”), the provisions of which have been revised and incorporated herein.

Note: While this policy has been prepared as a guideline, it does not alter any requirements of the FSCO Act, PBA or Regulation 909, R.R.O. 1990 (“Regulation”). Where this policy conflicts with the FSCO Act, PBA or Regulation, the FSCO Act, PBA or Regulation govern. While compliance with this policy is intended to facilitate the application process, the Superintendent has the ultimate authority to decide whether to consent to or reject your application, and the Superintendent is not bound by this policy.

Part I of this policy provides the procedure for bringing a surplus application to the Superintendent on a full wind up pursuant to section 78 of the PBA and section 8 of the Regulation.

Part II of this policy provides the modifications to Part I which apply to a surplus application made to the Superintendent on a partial wind up pursuant to section 78 of the PBA and section 8 of the Regulation.

General

The onus is on the applicant to satisfy the Superintendent that the surplus application meets the requirements of the PBA and the Regulation. The applicant should also demonstrate compliance with all relevant policies, procedures and administrative practices.

Policy S850-200 (“Filing Applications with the Superintendent of Financial Services”) outlines the general procedure for filing those applications, including surplus applications made to the Pension Commission in the first instance before the full proclamation of the FSCO Act.

It is the applicant's responsibility to decide whether plan specific circumstances warrant the inclusion of additional information or documentation to support the surplus application. For example, additional information about members or former members or additional plan documentation may be relevant in the following circumstances:

- ▶ the source of all or a portion of the assets of the pension fund can be traced to the pension fund of another pension plan;
- ▶ all or a portion of the liabilities of a pension plan were converted to liabilities determined on another basis (a plan conversion);
- ▶ there was a partial wind up at any time prior to the date of wind up; or
- ▶ all or a portion of the liabilities of a pension plan relate to members, former members or other persons with employment in a jurisdiction other than Ontario.

If information necessary for the Superintendent to approve a surplus application is missing, the Superintendent will not be able to consent.

The content of this policy is set out as follows:

PART I DISTRIBUTION OF SURPLUS TO AN EMPLOYER ON FULL WIND UP

General Principles	Page 3
Notice of the Surplus Application	Page 3
Written Agreement	Page 5
The Surplus Application	Page 7
Filing the Surplus Application	Page 8
Member Statement	Page 10

PART II DISTRIBUTION OF SURPLUS TO AN EMPLOYER ON PARTIAL WIND UP

Modifications to Part I for Partial Wind ups	Page 11
--	---------

SCHEDULE I

Surplus Application Format and Explanatory Notes Page 12

SCHEDULE II

Certification of Compliance with Surplus Requirements of Other JurisdictionsPage 18

**PART I
DISTRIBUTION OF SURPLUS TO AN EMPLOYER ON FULL WIND UP**

GENERAL PRINCIPLES

1. Where an employer wants to be paid surplus on plan wind up, section 78 of the PBA provides that the employer must apply and that no payment may be made without the Superintendent's prior consent. Before the Superintendent can propose to consent to a surplus application, the applicant must satisfy the requirements of subsection 78(2) of the PBA concerning notice and disclosure of all plan provisions relevant to surplus entitlement on wind up. In addition, the requirements of subsections 79(3) and (4) of the PBA must be satisfied, as well as all the requirements of the Regulation.
2. Generally, an employer winding up a pension plan should not file a surplus application until after the payment of basic benefits out of the plan has been approved.
3. Compliance with the requirements of the FSCO Act, PBA, Regulation and conditions identified in any policy, procedure and administrative practice of the former PCO or of FSCO, which affects the surplus application, is the responsibility of the applicant.
4. Applicants are responsible for ensuring that the information contained in the surplus application and any supporting documents is complete and accurate.

NOTICE OF THE SURPLUS APPLICATION

Content

5. The Notice of the surplus application required by subsection 78(2) of the PBA must include the information prescribed under subsection 28(5) of the Regulation.
6. With respect to clause 28(5)(c) of the Regulation (i.e., surplus attributable to employee and employer contributions), the methodology used to determine the surplus attributable to employee and employer contributions should be consistent with policy S900-801("Surplus Attributable to Employer and Employee Contributions on Plan Wind up").
7. With respect to clause 28(5)(e) of the Regulation (i.e., the statement that written submissions may be made to the Superintendent within 30 days of receipt of the notice), the notice must state that written submissions are to be directed to the Superintendent.
8. With respect to clause 28(5)(f) of the Regulation (i.e., authority for surplus reversion), there must be full and complete disclosure of all provisions of the plan and trust documentation from inception that may be relevant in determining entitlement to the payment of surplus on wind up, including provisions in all current and prior plan texts, trust agreements, insurance contracts, employee booklets, employee notices, collective

bargaining agreements, information brochures and any other documents that may be relevant.

The actual wording of all the provisions from the plan and trust documentation from inception that may be relevant to surplus entitlement and to the question of authority to make plan amendments must be cited in the Notice of the surplus application, along with a full analysis of their implications. The Notice of the surplus application must also include a complete historical analysis of all the plan and trust and other documentation that may be relevant to determine whether the plan constitutes a trust. If the plan at any time constituted a trust, the historical analysis must demonstrate that any amendment to the trust that has bearing on surplus entitlement was valid.

Where the plan and trust documentation do not contain explicit provisions addressing surplus entitlement, this fact must also be disclosed in the Notice of the surplus application. It is important to note that if, as of January 1, 1998, the pension plan did not provide for the distribution of surplus on wind up, the applicant must refer to s. 79(4) of the PBA and its consequences for the surplus application.

If a surplus application requires a court order pursuant to subsection 8(2) of the Regulation, the applicant should refer to the procedure under policy S900-600 (“Making Application Under ss. 7a(2)(c)”).

9. The Notice must state that the application and the analysis of the plan documents were prepared by the applicant, and that members, former members or other affected persons may wish to obtain independent legal advice with respect to the application and the proposed surplus distribution agreement before they give any consent.
10. With respect to clause 28(5)(g) of the Regulation (i.e., notice concerning access to copies of the wind-up report), if the office or location where the members were employed is closed, the employer must make and communicate alternative arrangements close to the location(s) where business was conducted for plan beneficiaries to review the wind-up report filed with the Superintendent in support of the surplus request.
11. If the Notice of the surplus application does not satisfy the requirements of the PBA and the Regulation, or the conditions identified in any policy, procedure or administrative practice of the former PCO or FSCO, or if there has not been complete, full and fair disclosure of all information that may be relevant, the Superintendent may give the employer the opportunity to re-transmit a modified Notice. The employer has a very high obligation of good faith to ensure that full and fair disclosure is given.
12. Subsection 28(5.1) of the Regulation requires that the employer file a copy of the Notice of the surplus application with the Superintendent before it is transmitted.

The Notice of the surplus application should be filed with the Superintendent by sending one (1) copy to:

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

13. With respect to paragraph 7 and subparagraph 29(j), a copy of any written representations filed with the Superintendent will be forwarded to the employer.

Transmitting the Notice of the Surplus Application

14. After the employer files its Notice of the surplus application with the Superintendent, the employer is required to transmit the Notice of the surplus application to all persons listed in subsection 78(2) of the PBA. The employer must satisfy the Superintendent that full and fair notice has been given to those persons.
15. Transmittal must be by personal delivery or first class mail in accordance with subsection 112(1) of the PBA (see paragraphs 17 and 18).
16. Where the plan wind up results from an event affecting the employment of the members, such as a plant closure, all members participating in the plan on or after the date notice of the event is given must be included as members for purposes of the wind up, including the surplus distribution. This requirement applies even if a member terminates or is terminated after the notice date but prior to the event actually occurring. Applicants should also refer to policy W100-101 ("Filing Requirements and Procedure").

Public Advertisement

17. The Superintendent may authorize delivery of the Notice of the surplus application by public advertisement or otherwise in accordance with subsection 112(3) of the PBA if the Superintendent is satisfied that it is not reasonable to give individual notice to all persons in accordance with paragraph 14.
18. Where an applicant requests the Superintendent's authorization to deliver the Notice of the surplus application by public advertisement, the information provided in the draft public advertisement submitted with the request to the Superintendent must clearly indicate the following:
 - (a) to whom the notice is addressed (e.g. former members and other persons entitled to payments from the wound-up plan or any applicable predecessor plan(s));
 - (b) the reason that these persons are being contacted (i.e., wind up of the pension plan in a surplus position and the surplus application);
 - (c) where the details of the surplus application will be made available; and
 - (d) information that persons to whom notice has been transmitted may make written representations to the Superintendent with respect to the surplus application within thirty (30) days after receiving the notice.

WRITTEN AGREEMENT (SURPLUS APPLICATIONS PURSUANT TO CLAUSE 8(1)(b) OF THE REGULATION)

Content

19. When considering the surplus application, the Superintendent must be satisfied that the employer has:
 - (a) provided the affected members, former members and other persons with full and fair disclosure in the copy of the Notice of the surplus application and a copy of the proposed surplus distribution agreement, before obtaining the written consent of these persons;
 - (b) provided the affected members, former members and other persons who are not currently represented by independent legal counsel with a reasonable opportunity to obtain independent legal advice with respect to the Notice of the surplus application and the proposed surplus distribution agreement;

- (c) given these persons sufficient time to consider the surplus application, before the employer obtains the written consent of these persons; and
 - (d) obtained the number of written agreements required under the Regulation.
20. The surplus distribution agreement must be in writing and must provide for:
- (a) the name of the individual;
 - (b) the signature of the individual;
 - (c) the date on which it is signed; and
 - (d) the signature of the employer.

Transmitting the Written Agreement

21. In order to obtain the written agreements required under clause 8(1)(b) of the Regulation, a copy of the proposed surplus distribution agreement must be given to all persons listed in subsection 78(2) of the PBA. In accordance with subsection 112(1) of the PBA, transmittal must be by personal delivery or first class mail.

A copy of the proposed surplus distribution agreement should be transmitted along with the Notice of the surplus application.

Written Agreements

22. Normally, to satisfy subclause 8(1)(b)(iii) of the Regulation, an applicant should obtain the written agreement of at least two-thirds of the aggregate of those former members and other persons who are entitled to payments under the pension plan on the date of wind up. This requirement is subject to the Superintendent's discretion following a review of the circumstances of each surplus application.
23. Legal counsel may sign the agreement on behalf of the members they represent at the time the agreement is signed, provided such representation arrangement satisfies the requirements of policy S900-503.
24. The appropriate collective bargaining agent for the purposes of subclause 8(1)(b)(ii) of the Regulation is the collective bargaining agent who represents certain plan members at the date the collective bargaining agent signs the agreement on behalf of those members.
25. A collective bargaining agent may enter into a written agreement only on behalf of those plan members represented by the agent. Therefore, if a pension plan involves more than one bargaining agent, the written agreement of each bargaining agent is required.
26. If a pension plan is provided for both unionized and non-unionized members, in addition to the written agreement of the collective bargaining agent(s), the written agreement of at least two-thirds of those members not represented by the bargaining agent(s) must be obtained.
27. The written agreement of a collective bargaining agent who represents the members of the pension plan must be obtained, even where the collective bargaining agent does not bargain the pension plan.

THE SURPLUS APPLICATION

28. The format and content of the surplus application should be consistent with Schedule I to this policy.
29. All material required by the PBA and Regulation must be attached to the surplus application, including:
- (a) A list, by class, of the names of members, former members or other persons who are affected by the wind up.
 - (b) A certified copy of the notice referred to in subsection 28(5), pursuant to subsection 28(6) of the Regulation.
 - (c) A statement that the employer has complied with subsection 78(2) of the PBA.
 - (d) A list, by class, of the names of members, former members or any other persons who received the Notice of the surplus application, the date the last Notice was transmitted and the form of delivery of the Notice.
 - (e) Copies of all plan and trust documentation from inception, including all current and prior plan texts, trust agreements, insurance contracts, employee booklets, employee notices, collective bargaining agreements, information brochures and any other documents that may be relevant to surplus entitlement. The applicant should highlight the parts of the plan and trust documentation that the applicant believes may be relevant to surplus entitlement. Full documents should be arranged in chronological order and clearly labelled.
 - (f) Copies of the title page and the balance sheet (or any updated balance sheet) of the wind-up report as of the effective date of the wind up giving rise to the surplus application and the actuary's certification from the wind-up report or any supplemental wind-up report.

A supplement to a wind-up report will be required if it is discovered that the initial report does not reflect the surplus distribution proposals outlined in the surplus application.
 - (g) Information required to be submitted to staff in accordance with policy S900-801 ("Surplus Attributable to Employer and Employee Contributions on Plan Wind up").
 - (h) The approval by the Superintendent of the payment of basic benefits based on the wind-up report and any supplementary report.
 - (i) A copy of the most recent collective agreement(s) if some or all of the affected members are represented by a collective bargaining agent(s).
 - (j) Any written representations objecting to the surplus application received by the applicant directly or through the Superintendent, as well as any response(s) by the applicant.
 - (k) Disclosure as to whether or not the Application affects members, former members or other persons with employment in a jurisdiction other than Ontario:

Where the Application affects members, former members or other persons with employment in a jurisdiction other than Ontario (the "Affected Members"), a table indicating the number of members, former members or other persons in each jurisdiction, including Ontario, affected by the application. In

addition, the Applicant must provide certification in the form set out in Schedule II that the Applicant has complied with the requirements for surplus distribution of those other jurisdictions with respect to the Affected Members.

The Superintendent reserves the right to review the certification and to require additional information or explanation of the contents of the certification before proceeding with the application.

- (l) Any submissions which may be relevant to the surplus application.

Where other materials or information which may be relevant are discovered after the surplus application has been filed, such materials or information must be filed as an addendum to the initial surplus application (see paragraph 31).

- (m) Where the surplus application is made pursuant to clause 8(1)(b) of the Regulation,
- i) a copy of the proposed surplus distribution agreement;
 - ii) a list, by class, of the names of members, former members or other persons who received a copy of the proposed surplus distribution agreement, the last date the agreement was transmitted and the form of delivery of the agreement;
 - iii) a sample copy of the written agreement obtained from a plan member, former member, or other person with respect to the proposed surplus distribution agreement;
 - iv) copies of the written agreement(s) between the employer and any collective bargaining agent(s) that pertain to the surplus distribution agreement; and
 - v) a list of the members, former members or other persons who did not agree to the proposed distribution agreement or did not respond.
- (n) Where the surplus application is made pursuant to subsection 8(2) of the Regulation, the applicant should refer to policy S900-600 ("Making Application Under ss. 7a(2)(c)"). If the applicant has already obtained a court order concerning entitlement to surplus and distribution of funds from surplus, a copy of the court order must be attached to the surplus application.

FILING THE SURPLUS APPLICATION

30. (a) The general procedure is outlined in policy S850-200 ("Filing Applications with the Superintendent of Financial Services").
- (b) The surplus application, including attachments, should be submitted on 8-1/2" x 11" paper (subject to legibility).
31. The surplus application is filed with the Superintendent by sending four (4) copies to:

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

Four (4) copies of any information or materials which are supplemental to the initial filing and which are required in order to complete the surplus application should be filed with the Superintendent.

32. Upon receipt, the surplus application will be acknowledged.
33. The Superintendent will not consider the surplus application unless the Superintendent has approved the payment of basic benefits on the basis of the wind-up report.
34. The applicant must forward a copy of the surplus application to the plan administrator.
35. For surplus applications made pursuant to clause 8(1)(b) of the Regulation, a copy of a sample signed written agreement should be included in each of the four (4) copies submitted to the Superintendent. As well, two full sets of all of the signed written agreements obtained from plan members, former members, and other persons with respect to the disclosed surplus distribution agreement must be filed with the Superintendent. One set should include all the original signed written agreements.

Review Process

36.
 - (a) If staff believe that an application is incomplete, they will advise the applicant in writing. The applicant must submit four (4) copies of the documentation required to complete the application.
 - (b) The review of a surplus application will not proceed until the earlier of the date when:
 - i) staff receive all of the information requested;
 - ii) the applicant submits a written request asking that the surplus application proceed as is (i.e., without submitting the additional information that staff have requested); or
 - iii) the time period for a response, as set out in the letter from staff, expires.
37. Staff will then review the surplus application and all other filed materials for compliance with the FSCO Act, PBA, Regulation and relevant policies, procedures and administrative practices. If any compliance concerns are identified, staff will send a letter outlining their concerns to the applicant, the collective bargaining agent(s) of the members (if applicable), and any person who has made written representations under section 78(3) of the PBA.
38. Staff's letter will specify the time period in which the applicant, the collective bargaining agent(s) of the members (if applicable) or any person who has made written representations under section 78(3) of the PBA must provide a written response to the compliance concerns, if they wish to have the response considered in the decision-making.

Four (4) copies of the written response must be submitted to the Superintendent.
39. The Superintendent's proposed decision will be served on the applicant and on any person who has made written representations under s. 78(3) of the PBA, by way of a notice of proposal with written reasons.
40. A person on whom the notice of proposal is served is entitled to a hearing before the Financial Services Tribunal ("Tribunal") under s. 89(6) of the PBA if the person delivers to the Tribunal written notice requiring a hearing within thirty (30) days after being served with the notice of proposal.

41. If no notice requiring a hearing is received within the specified time frame, the Superintendent may carry out the proposed decision.

42. Applicants should refer to policy S850-100 (“Delegation of the Superintendent’s Authorities”) for additional information on the decision-making process.

MEMBER STATEMENT

43. On March 3, 2000, the Regulation was amended to include a new section 28.1, which provides that if there is surplus on the wind up of a plan, in whole or in part, the administrator shall provide, within the prescribed period, a statement containing the prescribed information about surplus to affected members. These statements are to be provided after the Superintendent has approved the wind up report, including the disposition of surplus. Applicants should ensure that the requirements of this section have been satisfied.

PART II
DISTRIBUTION OF SURPLUS TO AN EMPLOYER ON PARTIAL WIND UP

Part I procedures will apply with respect to partial wind ups subject to the following:

1. For the purpose of a surplus application under Part II of this policy, any reference to "full wind up" or "wind up" under Part I of this paper should be read as "partial wind up".
2. Those persons listed in subsection 78(2) of the PBA must receive the Notice of the surplus application by personal delivery or first class mail in accordance with subsection 112(1) of the PBA.
3. The following persons must also receive a copy of the proposed surplus distribution agreement:
 - (a) all persons who are affected by the partial wind up (i.e., those persons who are entitled to receive payment from the pension plan as a result of the event which gave rise to the partial wind up),
 - (b) all persons who ceased to be employed as a result of the event which gave rise to the partial wind up, and
 - (c) each collective bargaining agent that represents any members under the plan at the date of partial wind up.

The applicant must satisfy the Superintendent that full and fair notice has been given.

4. For the purposes of obtaining written agreement in accordance with subclause 8(1)(b)(ii) of the Regulation, the appropriate collective bargaining agent is the collective bargaining agent who represents certain plan members at the date the collective bargaining agent signs the agreement on behalf of those members.

No written agreement is required from a collective bargaining agent who, at the date of partial wind up, does not represent members affected by the partial wind up.
5. Where written agreement is required pursuant to subclause 8(1)(b)(ii) of the Regulation, and there is no collective bargaining agent who represents the members who are affected by the partial wind up, written agreement must be obtained from at least two-thirds of the members who are affected by the partial wind up.
6. For the purposes of subclause 8(1)(b)(iii) of the Regulation, the written agreement of at least two-thirds of the aggregate of the former members and other persons who are directly affected by the partial wind up should be obtained. This requirement is subject to the Superintendent's discretion following a review of the circumstances which are applicable to each individual surplus application.
7. The applicant must satisfy the Superintendent that the requirements of the PBA and Regulation have been met.

SCHEDULE I

**FORMAT AND CONTENT OF THE APPLICATION TO THE SUPERINTENDENT
FOR CONSENT TO THE REFUND OF SURPLUS TO AN EMPLOYER**

Date: *Enter the date of the surplus application.*

Employer: *Provide the correct legal name of the employer making the surplus application.*

Pension Plan: *Provide the full registered name of the pension plan and the registration number.*

Applicant: *Provide the name, title and business address of the corporate officer authorized to act on the employer's behalf. (Unless otherwise indicated in the surplus application, all communication from the Superintendent and staff of FSCO will be directed to the agent or counsel who files the surplus application on the applicant's behalf.)*

Nature of the Surplus Application:

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

Application for the Superintendent's consent pursuant to subsection 78(1) of the Pension Benefits Act, R.S.O. 1990, c. P. 8, as amended, and clause 8(1)(b) of Regulation 909, R.R.O. 1990, as amended, to a payment of surplus to (provide full legal name of the employer) in the amount of \$ (show the amount sought at the effective date of wind up) as at (show the effective date of wind up) plus investment earnings thereon to the date of payment (add reference if employer is seeking any other adjustment in its request for the surplus refund).

This application includes a surplus distribution agreement whereby (x) per cent of the surplus as of the effective date of wind up will be distributed to the members, former members and other persons entitled to benefits as of the effective date of wind up in the form of indexed benefits.

Appropriate modifications will be required for surplus applications based on a court order pursuant to subsection 8(2) of the Regulation.

Actuary/Counsel/Agent:

Provide the name of any person acting as the agent or counsel for the employer making the surplus application, or acting on behalf of the members, former members or other persons. If there are no such persons, please indicate "None".

Actuary for the Applicant (and name of firm):

Counsel for the Applicant (and name of firm):

Actuary for the Members/former members/union/etc. (and name of firm):

Counsel for the Members/former members/union/etc. (and name of firm):

Plan Administrator:

Provide the name and address of the person designated to act as plan administrator, if different from the corporate officer acting for the applicant employer.

Collective Bargaining Agent:

Provide the name of the Collective Bargaining Agent(s) who represent any members or former members of the pension plan.

Background:

Provide a brief summary of the background of the plan leading up to the surplus application including:

- ▶ *the effective date of the plan;*
- ▶ *the classes of members covered by the plan;*
- ▶ *the basic benefit structure (e.g. “non-contributory”, “flat benefit plan”);*
- ▶ *a brief chronology of the plan and prior versions thereof, including any pension plan from which assets of the wound-up pension plan can be traced (include references to asset transfers to or from the pension fund of another pension plan, plan conversions, and partial wind ups that may have occurred prior to the date of wind up);*
- ▶ *the corporate history relevant to the plan and any predecessor plans, including the background to any changes in the name of the employer associated with the pension plan;*
- ▶ *the effective date and reasons for the wind up of the pension plan; and*
- ▶ *any other information which will assist in understanding the surplus application.*

Subsection 78(2) of the PBA - Notice Requirements

The applicant must satisfy the Superintendent that the persons listed in subsection 78(2) have received full and fair notice and that the requirements of the PBA and Regulation have been satisfied.

(a) **Subsections 28(5) and 28(5.1) of the Regulation:**

Provide information indicating how the applicant has complied with

- ▶ *subsection 28(5) and any related policies, procedures or administrative practices setting out the minimum content to be included in the Notice of the surplus application required under subsection 78(2) of the PBA. This minimum content does not alter the applicant’s obligation to ensure that full and fair notice is given.*
- ▶ *subsection 28(5.1) which requires that a copy of the Notice of the surplus application be filed with the Superintendent prior to transmittal to the members, former members and other persons.*

(b) **Subsection 28(6) of the Regulation:**

Provide information demonstrating compliance with subsection 28(6) of the Regulation which requires that the surplus application be accompanied by a certified copy of the Notice of the surplus application signed by the corporate officer authorized to act for the applicant, a statement signed by that corporate officer that subsection 78(2) of the PBA has been complied with, the date the last Notice of the surplus application was distributed and details as to the classes of persons who received notice. Include reference to the attachment or tab at which the certified copy of the notice may be found.

Subsection 112(3) of the PBA - Alternate Service:

If, in lieu of individual notice, the Notice of the surplus application is transmitted by public advertisement, indicate the classes or groups who were served by the public advertisement, the dates and newspapers in which the advertisement ran and provide a copy of the advertisement.

If, in lieu of individual notice, the Notice of the surplus application is transmitted by an alternative form of notice other than public advertisement, indicate the classes or groups who were served by the alternative form of notice, the dates and method by which the alternative form of notice was served and provide a copy of the alternative form of notice.

Refer to the attachment or tab in the surplus application where a copy of the public advertisement or alternative form of notice and the Superintendent's authorization for alternative service are found.

Subsection 79(3) of the PBA - Conditions Precedent to a Proposal to Consent

In the following sections, the applicant must satisfy the Superintendent that all the conditions in the PBA and Regulation have been met.

(a) **Clause 79(3)(a) - The Plan has a Surplus:**

The applicant must demonstrate that the plan has a surplus.

Provide the date of the letter from the Superintendent approving the distribution of the members' and former members' basic benefits. Refer to the attachment or tab at which extracts of the wind-up report and supplemental report and a copy of the Superintendent's letter may be found. Include in the surplus application a brief summary of the balance sheet for the plan as at the effective date of wind up along with an updated balance sheet if there has been any significant change in the figures. For example:

Balance Sheet	As at effective date of wind up	As of (current date)
Market value of assets	\$.00	\$.00
Liabilities		
Basic benefit entitlements	\$.00	\$.00
Liabilities for enhancements	\$.00	\$.00

Expenses	<u>\$.00</u>	<u>\$.00</u>
Surplus	\$.00	\$.00

Surplus distribution agreement as of (date):

To employees	\$.00 (%)
To employers	\$.00 (%)

(b) **Clause 79(3)(b) of the PBA - The Plan Provides for the Payment of Surplus to the Employer on the Wind up of the Pension Plan:**

The applicant employer must satisfy the Superintendent that the plan provides for the payment of surplus to the employer on wind up. Therefore, the surplus application must establish that the employer is legally entitled to the payment of surplus on wind up. The employer must provide a complete chronological history of the plan, and any predecessor or prior plans that may be relevant, and copies of all plan and trust documentation since inception, including all current and prior plan texts, trust agreements, insurance contracts, employee booklets, employee notices, collective bargaining agreements, information brochures and any other documents that may be relevant to the Superintendent's determination of whether a plan provides for the payment of surplus to the employer. The employer must also provide a full analysis showing how it reaches the conclusion that it, and not the plan beneficiaries, is entitled to the surplus.

Where there are prior pension plans from which the current plan assets can be traced, or that that may otherwise be relevant, the history must take into account the prior plan texts, trust agreements, insurance contracts, employee booklets, employee notices, collective bargaining agreements, information brochures and any other documents that may be relevant to the Superintendent's determination of whether a plan provides for the payment of surplus to the employer.

Where any plan or trust documentation that may be relevant has been amended since its inception, the history must spell out the authority under the plan or trust to amend the provision or document. The history must also refer to all provisions or documents that do not support the surplus application.

*The applicant should highlight the portions of the documents that may be relevant to the Superintendent's decision on surplus entitlement, including those provisions that do **not** support the applicant's claim to surplus. Complete documents must be included as attachment(s) to the surplus application and must be clearly labelled.*

All documents must be complete, arranged in chronological order and clearly labelled. All portions of the documents that may be relevant, whether or not they support the applicant's claim to surplus, must be highlighted.

As of January 1, 1998, if the pension plan did not provide for the distribution of surplus on wind up, the applicant must refer to subsection 79(4) of the PBA and its consequences for the surplus application.

(c) **Clause 79(3)(c) of the PBA - Provision has been made for the Payment of All Liabilities of the Pension Plan:**

Outline the status of the distributions of basic benefits and surplus to members, former members and any other persons entitled to payments. If the Superintendent is not satisfied that adequate provision has been made for the payment of all liabilities of the pension plan, the Superintendent may propose to refuse the surplus application.

Clause 8(1)(b) of the Regulation - Written Agreement

Provide a summary of the notices issued and signed surplus distribution agreements provided. For example:

	Total Number	Notices Issued	Written Consents	(%)
Employer	_____	_____	_____	_____
Collective Bargaining Agent(s)	_____	_____	_____	_____
Members	_____	_____	_____	_____
Former Members/ Other Persons	_____	_____	_____	_____

Subsection 8(2) of the Regulation - The Court Order

(a) **Clause 8(2)(b) of the Regulation- Eligibility as a "Grandfathered Plan":**

Provide information supporting the applicant's position that the surplus application is eligible to proceed under subsection 8(2), the "grandfathering provision".

The applicant may make application pursuant to clause 7a(2)(c) of O. Reg. 708/87 as that section read immediately before December 18, 1991 as *(enter the reason why the plan is a "grandfathered plan", i.e., "the notice of proposal to wind up was filed prior to December 18, 1991" - enter the date the notice of proposal to wind up the plan was given to the Superintendent).*

(b) **Clause 8(2)(a) of the Regulation - The Status of the Application to Court:**

Provide information concerning the status of the application to the court. Refer to the attachment which indicates the applicant's intention or where the copy of the order is located.

The applicant has applied to the court for an order pursuant to clause 7a(2)(c) of O. Reg. 708/87 as that section read immediately before December 18, 1991 *(enter "and has obtained" or "and is to obtain")* an order for payment of the surplus assets to the applicant on termination of the Plan.

Other Jurisdictions

The applicant must disclose whether or not the plan has members, former members or other persons with benefits resulting from employment in a jurisdiction other than Ontario. Applicants should refer to paragraph 29(k) under "The Surplus Application", of this policy and complete the attached certification ("Schedule II").

Representations

The employer must specify whether or not it received any objections or representations and attach to the surplus application copies of those objections or representations and any response(s) by the employer.

Attachments

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

Signature

The application must be signed by the applicant, or the authorized officer or agent of the applicant. The person signing the application should print their name below their signature and should indicate the capacity in which they have signed the application (ie, applicant or agent or authorized signing officer of the applicant).

SCHEDULE II

CERTIFICATION OF COMPLIANCE WITH SURPLUS REQUIREMENTS OF OTHER JURISDICTIONS

- Date:** *Enter the date of the surplus application.*
- Employer:** *Provide the correct legal name of the employer making the surplus application.*
- Pension Plan:** *Provide the full registered name of the pension plan and the registration number.*
- Applicant:** *Provide the name, title and business address of the corporate officer authorized to act on the employer's behalf. (Unless otherwise indicated in the surplus application, all communication from the Superintendent and staff of FSCO will be directed to the agent or counsel who files the surplus application on the applicant's behalf.)*

I CERTIFY TO THE SUPERINTENDENT OF FINANCIAL SERVICES THAT:

- (a) I, the individual making this certification, am the applicant or the agent or authorized officer of the applicant;
- (b) The application affects members, former members or other persons with employment in a jurisdiction other than Ontario (the "Affected Members");
- (c) I am aware of, or have consulted with professionals who have advised me of, the requirements of the laws applicable to surplus distribution of the jurisdictions of the Affected Members, and I have reviewed the application in order to determine whether it complies with such laws;
- (d) I certify that, to the best of my knowledge and belief, based on the information and advice provided me, including that referred to herein, this application complies with the requirements for surplus distribution of those jurisdictions outside of Ontario with respect to Affected Members.

DATED this _____ day of _____, _____.
(day) (month) (year)

Signature of Applicant or Applicant's Agent or Authorized Signing Officer

Name of Applicant or Applicant's Agent or Authorized Signing Officer (Printed)

Address of Applicant or Applicant's Agent or Authorized Signing Officer (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.