

September 15, 2022

Financial Services Regulatory Authority of Ontario
25 Sheppard Avenue West, Suite 100
Toronto, ON
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Re: Consultation on Proposed Guidance on Actions to Avoid Deregistration of a Pension Plan Under the Federal Income Tax Act

We are writing in response to the Consultation paper related to Actions to Avoid Deregistration of a Pension Plan Under the Federal Income Tax Act (ITA). We thank FSRA for the opportunity to comment on aspects of the Guidance.

With almost 320 employees, working from six offices in Canada, Eckler Ltd. is the country's largest independent actuarial consulting firm. Our roots trace back to 1927, making us one of the oldest firms in the industry. We are currently the actuary of record for 85 registered pension plans in Ontario (including 27 MEPPs), and have unparalleled expertise with the operation, funding, valuation, governance and sustainability of MEPPs. While our response will incorporate some general comments regarding FSRA's Guidance, we will specifically address issues on proposed changes set out in the Guidance we feel may need further clarification or consultation.

Member Communication – Fiduciary Duty versus Regulatory Requirements

We acknowledge the importance of member communication, especially in instances where plan amendments or changes in contributions would adversely impact some members. However, we note that there are potential scenarios for specified multi-employer plans (SMEPs) in which notifying members of corrections to contributions received would create unnecessary administrative work, potentially cause confusion to members and would not, in fact, be fulfilling any fiduciary duty.

For example, as noted in the draft Guidance background (Section 3), in the past contributions for a working retiree or plan member over the age of 71 could have been received by the pension plan, even though those individuals would not be earning a benefit with respect to those contributions. Pursuant to the referenced changes to the Income Tax Act and Regulations, such contributions are now not allowed to be received by the pension plan. However, this could still happen currently simply due to administrative error, where the contribution was supposed to be remitted and received somewhere other than the pension plan (e.g., paid to the individual or remitted to another trust per a collective agreement), but is incorrectly remitted to the pension plan by an employer. In this scenario, the mistake is quickly identified and the contributions should be correctly sent to the appropriate recipient. The individual retiree/member, for whom the contribution was incorrectly remitted, is not directly impacted in any way. We do not know how plan administrators would describe the effect to the retiree's/member's pension in this scenario. There is, in fact, no effect on the retiree's/member's pension and, as a result, there is no fiduciary duty to notify the retiree/member. In our opinion, notifying individual

retirees/members of such administrative corrections (which would be non-events from the retirees'/members' perspectives) provides nothing for the administrator in the way of discharging a fiduciary duty, and would result in unnecessary administrative complexity for plan administrators and unnecessary costs (which all members of such pension plans ultimately bear).

The draft Guidance also anticipates that there could be situations where the pension plan is amended in relation to proposing or acting on an exemption under subsections 47(11), (13) or (15) of Regulation 909 and includes the following text:

In situations where subsection(s) 47(11) and/or (13) and/or (15) are relied upon, administrators, as fiduciaries, should provide, in advance of acting on an intended exemption, a detailed explanation to any member impacted by the exempted activity, describing the effect of:

- ii. an amendment that reduces an accrued benefit or the value of an accrued benefit*
- ii. a refund or payment of money to or with respect to the member*
 - if an amendment is filed in connection with the proposed exemption, then notices under 26(1) and 26(3)[6] of the PBA may be required if the amendment is adverse as per section 26(1) and notices may be required as discussed in FSRA's Interpretation Guidance #PE0301INT on "Pension Plan Amendments"*

We note that, similar to the above example, there could be situations where an amendment to the pension plan is needed to effect the refund or payment out of the pension plan of non-permissible contributions, and such contributions would not have not resulted in a benefit being earned by an individual had they occurred in the past, and could not have that result currently or in the future. In this situation there is, in fact, no effect on a retiree's/member's pension and, as a result, the amendment is not adverse as per section 26(1) and there is no regulatory or fiduciary duty to notify the retiree/member.

In summary, we would suggest that the Guidance should acknowledge that there may be situations where the correction that is required in relation to the exemption under subsections 47(11), (13) or (15) of Regulation 909 does not result in a requirement for the administrator to notify members. Otherwise, administrators may be under the impression that all such corrections require member communications.

Special Approach for MEPPs

We thank you for acknowledging the unique circumstances facing administrators of Multi-Employer Pension Plans in this draft Guidance but would suggest clarification on two statements in the Guidance.

In section 4.3.2, it is stated: *For clarification, money cannot be paid out or refunded unless and until the offending contribution has actually been received by the pension plan.*

We are unsure of the concern here and would suggest adding some description or clarification regarding the scenario in which the above noted scenario could occur.

In Section 4.3.3, it is stated: "Where an estimate of future refunds or payments are included, the administrator must inform FSRA as soon as the information is available in the next calendar year, of the total amount that was in fact refunded or paid during the previous year and the actual number of members affected in that previous calendar year."

We suggest adding clarification of the reporting that FSRA anticipates from administrators in relation to this section. Our reading of this section is that FSRA is suggesting plan administrators provide annual estimates of future amounts that may be received in error and that there could be an initial estimated reporting and a further final confirmation of any amounts. We are unclear as to the value for FSRA, the plan administrator or the members of this implied process; administrators cannot make estimates of amounts received incorrectly, since all of these events at issue (retirees in receipt of a pension returning to work, members working beyond age 71 or administrative errors being made) cannot be predicted with any accuracy. In addition, a multi-step process for reporting of future contribution errors would impose an unnecessary administrative burden on the plan administrator and cost on the plan's membership.

We thank you again for the opportunity to provide our comments on the proposed Guidance, Actions to Avoid Deregistration of a Pension Plan Under the Federal Income Tax Act. Should you have any questions on the topics discussed above or wish to discuss any other aspect of the Guidance, please feel free to contact Domenic Barbiero at dbarbiero@eckler.ca or 416-696-4003 or Mark Davis at mdavis@eckler.ca or 416-696-4948.

Regards,



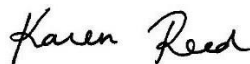
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