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Questions and Answers relating to Surplus - Regulations effective July 1, 2012

Archived Content

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Q1. What are the most significant recent changes to the surplus provisions in Regulation 909 brought about by Regulation 178/12?

A1. The most significant changes to the surplus provisions in Regulation 909 are as follows:

- Information about the surplus attributable to employee and employer contributions no longer needs to be included in the notice of application for the Superintendent's consent for payment of surplus to the employer i.e., the notice required under subsection 78(2).
- When determining the minimum amount of surplus that must be retained in the pension fund of a continuing plan, the calculation of liabilities for the ongoing plan must now be based on the sum of liabilities and the liabilities for benefits other than pension benefits and ancillary benefits payable under qualifying annuity contracts, that were excluded in calculating the solvency liabilities.
- Where the employer's application for payment of surplus is based on a written agreement with members, former members, retired members and other persons entitled to payments under the plan, the notice required under subsection 78(2) no longer needs to identify the contractual authority for surplus reversion. In other words, subsection 78(2) notice does not need to contain a historical plan summary and analysis.
- Where an employer chooses to fund the deficit on wind up through a series of annual special payments and an annual report shows there is no further amount to be funded by the employer, any assets remaining in the fund may be withdrawn by an employer by way of an application to recover an overpayment. -06/12

Q2: What rules apply for payment of surplus to the employer while the pension plan continues in existence?

A2: Under the surplus withdrawal rules that came into force on December 8, 2010, an employer can receive payment of surplus while the plan continues in existence, in one of three ways:

1. if the documents that create and support the pension plan and pension fund provide for the payment of surplus to the employer; or
2. if a written agreement between the employer and at least two-thirds (2/3) of members and an appropriate percentage of former members, retired members and other persons who are entitled to payments under the plan provides for the payment of surplus to the employer; or,
3. if the withdrawal of surplus by the employer while the plan continues in existence is authorized by a court order declaring that the employer is entitled to surplus while the plan

continues.

In addition to being satisfied that payment of surplus to the employer is authorized as provided in the paragraph above, the Superintendent must also be satisfied of the following:

- the pension plan has a surplus, based on the reports provided with the employer's application for payment of surplus;
- where all pension benefits under the plan are guaranteed by an insurance company, the pension fund has retained an amount equal to at least two years of the normal cost of the pension plan, determined in accordance with the regulations as surplus;
- where pension benefits are not guaranteed by an insurance company, the greater of the following amounts has been retained in the pension fund as surplus:

(i) the sum of "A" and "B" where,

- "A" is an amount equal to twice the normal cost of the pension plan, and,
- "B" is an amount equal to 5 per cent of the liabilities of the pension plan, determined in accordance with the regulations, and,

(ii) an amount equal to 25 per cent of the liabilities of the pension plan, determined in accordance with the regulations;

- the employer and the plan comply with all other prescribed requirements regarding surplus payment.

The regulations effective July 1, 2012, provide that for the purpose of determining the minimum amount of surplus that must be retained in the pension fund of a continuing plan, the calculation of liabilities for the ongoing plan must now be based on the sum of solvency liabilities and the liabilities for benefits other than pension benefits and ancillary benefits payable under qualifying annuity contracts, that were excluded in calculating solvency liabilities. -06/12

Q3: What are the rules that apply for payment of surplus to the employer when the pension plan is wound up?

A3: As in the case of a continuing plan, under the surplus withdrawal rules that came into force on December 8, 2010, an employer can receive payment of surplus on the wind-up of a pension plan in one of three ways:

1. if the documents that create and support the pension plan and pension fund provide for the payment of surplus to the employer;
2. if a written agreement between the employer and at least two-thirds (2/3) of members and an appropriate percentage of former members, retired members and other persons entitled to payments under the plan provides for the payment of surplus to the employer; or,
3. if the payment is authorized by a court order declaring that the employer is entitled to surplus when the plan is being wound up.

In addition to being satisfied that payment of surplus to the employer is authorized as provided in the paragraph above, as in the past, the Superintendent must also be satisfied of the following:

- the pension plan has a surplus based on the reports provided with the employer's application for the surplus payment;

- provision has been made for the payment of all of the plan's liabilities as calculated for the purpose of termination of the plan; and,
- the employer and the plan comply with all other prescribed requirements regarding payment of surplus. – 06/12

Q4: How does the employer demonstrate that it is entitled to surplus under the terms of the pension plan?

A4: The employer must demonstrate that it is entitled to the payment of surplus based on the documents that create and support the pension plan and pension fund. Specifically, it must demonstrate that it is entitled to surplus based on plan and funding documents from the plan's inception that may be relevant to surplus entitlement. Where surplus provisions in the plan texts and/or funding documents have been amended or revoked, the employer must demonstrate that it had authority to make such amendments to the plan text(s) and/or funding agreement(s) or to revoke such provisions. The employer does not need to obtain the agreement of plan members or any other affected persons in such circumstances. –06/12

Q5: Who should be a party to a written agreement that provides for payment of surplus to the employer?

A5: Continuing Plan

Where the employer's application for consent to payment of surplus is made while the plan is continuing, a written agreement among the following persons is required for the payment of surplus to the employer based on a written agreement:

- the employer;
- at least two-thirds (2/3) of the plan members (and for this purpose, a trade union that represents members may agree on their behalf); and,
- the number considered appropriate in the circumstances by the Superintendent, of former members, retired members and other persons who are entitled to payments under the pension plan, as of the specified date for payment of the surplus. The specified date must be included in the application.

Wind Up of the Plan

Where the employer's application for consent to payment of surplus is made on the wind up of the plan, a written agreement among the following persons is required for the payment of surplus to the employer based on a written agreement:

- the employer;
- at least two-thirds (2/3) of the plan members (and, a trade union that represents/represented members on the date of the wind up may agree on their behalf); and,
- the number, that the Superintendent considers appropriate in the circumstances; of former members, retired members and other persons who are entitled to payments under the plan, as of the date of the wind up. – 06/12

Q6. What number does the Superintendent consider appropriate of former members, retired members or other persons who are entitled to payments under the pension plan where the employer's application is based on a written agreement?

A6. Where the employer's application for consent to payment of surplus is based on a written agreement, the number that the Superintendent generally considers "appropriate" is: two-thirds of the total number of former members, retired members and other persons who are entitled to payments under the pension plan as of:

- the specified date - where the employer is applying for consent to payment of surplus out of a continuing pension plan and;
- as of the date of the wind-up - where the employer is applying for consent to payment of surplus from a plan that is being wound up. -06/12

Q7. I am a member of a pension plan. Does my employer need my written consent for a refund of surplus?

A7. The basis for the application for the payment of surplus to the employer will determine if your consent is required.

Your employer does not need your written consent if:

- your employer can demonstrate it is entitled to surplus under the terms of the documents that create and support the pension plan and the pension fund; or,
- your employer has obtained a court order declaring that it is entitled to the surplus:
 - while the plan continues -if the employer is applying for consent to payment of surplus out of a continuing pension plan; or,
 - when the plan is being wound up- if the employer is applying for consent to payment of surplus from a plan that is being wound up in whole).

If your employer's application for consent to payment of surplus is based on a written agreement, the employer must obtain written agreement from at least two-thirds (2/3) of members, and an appropriate percentage of former members, retired members and other persons entitled to payments under the plan. Your employer may not need your written consent if it has already obtained the required number of consents. -06/12

Q8. If a written agreement is obtained from two-thirds of members and two-thirds of former members, retired members and other persons entitled to payments under the plan, is the employer required to demonstrate that it is entitled to surplus under the terms of the pension plan?

A8. No. When the employer's application for consent to the payment of surplus is based on a written agreement between the employer and members, former members, retired members and other persons who are entitled to payments under the plan, the employer is not required to demonstrate that it is entitled to surplus under the terms of the pension plan. -06/12

Q9. Now that partial wind ups are no longer permitted, can an employer still make an application to withdraw surplus from a pension plan with a partial wind-up date prior to July 1, 2012?

A9. Yes. A pension plan may still be partially wound up if the effective date of the partial wind up is before July 1, 2012. Therefore, an application for consent to the payment of surplus to the employer on a partial wind up of a pension plan with an effective date before July 1, 2012, may be made by the employer. This includes a partial wind up declared after July 1, 2012, with an effective date before July 1, 2012. -06/12

Q10. If an employer has obtained a court order, is the employer still required to demonstrate entitlement to surplus under the terms of the pension plan, or obtain a written agreement from affected persons?

A10. No. If the payment of surplus to the employer is authorized by a court order declaring that the employer is entitled to the surplus either while the plan is continuing (where the employer's application for consent to payment of surplus relates to a continuing plan) or when the plan is being wound up (where the employer's application for consent to payment of surplus relates to a plan that is being wound up), the employer is not required to demonstrate entitlement to the surplus or obtain a written agreement from affected persons. However, the subsection 78(2) notice to affected persons should include a copy of the court order that the employer is relying on, in support of its application. -06/12

Q11. Is the notice of the application of the payment of surplus required to include information about the surplus attributable to the employee and employer contributions?

A11. No. As of July 1, 2012, Regulation 178/12 eliminates the need for the employer to provide information on the surplus attributable to employee and employer contributions in the notice required under subsection 78(2) of the PBA. This is the case both where the employer has applied for payment of surplus in a continuing/ongoing plan or on the wind up of the plan. -06/12

Q12. I have applied to the Superintendent for consent to the payment of surplus. However, I have not received the consent of the Superintendent to date. Will the changes to Regulation 909 have any impact on my application?

A12. The changes to Regulation 909 may affect your application for payment of surplus. FSCO will review all existing applications in light of the changes and will contact you if your application is affected in any way. If you have any questions or wish to discuss this further, please contact the pension officer responsible for your plan. If you do not know who the pension officer is, you can call FSCO at (416) 250-7250 or toll-free in Ontario and Quebec at 1-800-668-0128 or get this information through the pension plan access link on FSCO's website. -06/12

Q13. How have the rules for payment of surplus changed?

A13. The PBA's provisions have changed to clarify the rules regarding payment of surplus to an employer in three circumstances:

- the plan continues to exist;
- the plan is fully wound up; and
- the plan is partially wound up.

The FAQs below explain the rules for each of these circumstances. - 12/10

Q14. When does a written agreement prevail?

A14. A written agreement prevails over:

- any document that creates and supports the pension plan and pension fund;
- certain requirements of the PBA that apply when the terms of the plan do not address the payment of surplus; and
- any trust that may exist in favour of any person. - 12/10

Q15. Will FSCO update its current policy on the payment of surplus to reflect the new rules? If I want to apply now, how do I proceed?

A15. FSCO is currently developing an updated policy to reflect the recent changes to the rules for surplus applications. In situations where a current policy conflicts with the PBA or regulations, the PBA or regulations govern. Until the new policy is issued, applicants should continue using the existing policy and make whatever modifications are necessary, in light of the new requirements. - 12/10

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