FSRA
Financial Services Regulatory Authority of Ontario

Guidance

☒ Interpretation ☒ Approach ☐ Information ☐ Decision



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Inactive

FSRA's Consent to SEPP-to-JSPP Asset Transfer Transactions under sections 80.4 and 81.0.1 of the Pension Benefits Act

Purpose

FSRA[1] is changing the process it uses to provide its consent to asset transfers under section 80.4 and SEPP to JSPP conversions under section 81.0.1 ("SEPP-to-JSPP Transaction(s)"). The primary change is that FSRA will generally no longer issue a notice of intended decision ("NOID") or follow the order process when it is providing its consent to a SEPP-to-JSSP Transaction.

[1] Pursuant to the provisions of the PBA, the Chief Executive Officer of FSRA ("CEO") is granted regulatory authority to provide the consent. However, for purposes of this Interpretation Guidance, the reference will be to FSRA providing the consent because this power is exercised on behalf of FSRA and the CEO delegates these powers within FSRA.

This Guidance provides FSRA's Interpretation of Section 89(4) of the PBA and the requirements of procedural fairness where FSRA consents to a SEPP-to-JSPP Transaction.

FSRA has also released its Supervisory Approach to Defined Benefit Asset Transfers under the PBA (the "DB Asset Transfer Guidance"). This Guidance supplements the DB Asset Transfer Guidance.

Scope

This Guidance affects the following entities:

- JSPPs and SEPPs seeking consent for a SEPP-to-JSPP Transaction; and
- Administrators, plan sponsors, present, former and retired plan members, and any applicable trade unions, with respect to plans subject to a SEPP-to-JSPP Transaction.

Rationale and context

As part of its principle-based and outcomes focused approach, FSRA invited input on its consent process for SEPP-to-JSPP Transactions. FSRA received feedback that its process of issuing a NOID may not be effective or efficient in this context.

Principles

In supervising and regulating the pension sector, FSRA must administer and enforce the PBA and its regulations to carry out FSRA's objects to[2]:

- Promote good administration of pension plans
- Protect and safeguard the pensions benefits and rights of pension plan beneficiaries

[2] See Financial Services Regulatory Authority of Ontario Act, 2016, s.3

FSRA's Pension Sector Guiding Principles are foundational to its approach to SEPP-to-JSPP Transactions. These principles and the above objects have guided FSRA in reviewing its consent process for SEPP-to-JSPP Transactions and developing this Interpretation Guidance.

Interpretation and approach

Under section 89(4) where FSRA intends to **refuse** to consent to a SEPP-to-JSPP Transaction or add **terms or conditions** to its consent, a NOID must be served informing the applicant.[3] The NOID must indicate the applicant may apply for a hearing before the FST. If a request for hearing is not made, FSRA may issue an order with respect to its intended decision.[4] If a hearing is requested, the NOID is reviewed by the FST who may direct FSRA to make a different order.[5]

Importantly, section 89(4) speaks only to when FSRA refuses consent, or adds terms or conditions to its consent. It does not expressly refer to circumstances where FSRA is granting consent without terms or conditions. Notably, other parts of section 89 require the use of the NOID process for various specified provisions of the PBA where consent or approval is required. However, Sections 80.4 and 81.0.1 are not included in those enumerated sections.

Previous practice

To date, FSRA has been following the Financial Services Commission of Ontario's (FSCO) practice of using the NOID process to grant consent for SEPP-to-JSPP Transactions. However, in response to feedback from stakeholders, FSRA decided to review whether the NOID process was necessary.

[3] PBA Section 89(4).
[4] PBA section 89(7).
[5] PBA section 89(9).

FSRA's Interpretation of Section 89(4)

FSRA has considered relevant law relating to procedural fairness and section 89(4) of the PBA. FSRA's view, based its analysis set out in Appendix "A", is that there is no legal requirement that FSRA follow the NOID process where it provides consent to a SEPP-to-JSPP Transaction. For example, and as more specifically referenced in Appendix "A", certain case law does suggest Section 89 of the PBA may imply hearing rights in certain circumstances and therefore the use of a NOID or a similar process may be required in some cases. However, FSRA is of the view this reasoning does not apply in the context of the highly prescriptive requirements of Sections 80.4 and 81.01. These requirements significantly limit the scope of FSRA's decision-making where it is providing consent to a SEPP-to-JSPP Transaction to simply determining whether the statutory conditions have been satisfied. That decision is subject to judicial review pursuant the provisions of the Judicial Review Procedure Act.[6]

Particularly, FSRA does not view the NOID as required to protect beneficiary interests where consent is granted. A SEPP to JSPP Transaction is not authorized unless at least two-thirds of active members consent and fewer than one third of former members, retired members and other persons entitled to benefits object to the SEPP-to-JSPP Transaction. In that way, Ontario Regulation 311/15 ensures notice and consent rights for members and trade unions. This provides beneficiaries with the opportunity to raise legitimate concerns or issues with the transaction prior to FSRA granting consent. The purpose of the NOID in the context of a SEPP-to-JSPP Transaction is therefore not intended to protect beneficiaries; it is to allow the applicant to apply for a hearing to move forward with a proposed transfer where consent is refused. Where consent is given, it is FSRA's determination that the NOID process is not necessary to protect beneficiaries and may even delay or detract from good plan administration.

[6] R.S.O. 1990, c. J.1.

Therefore, as of the Effective Date, FSRA will no longer routinely issue a NOID where it provides consent a SEPP-to-JSPP Transaction. However, as noted in the DB Asset Transfer Guidance, FSRA may elect to issue a NOID if it has a concern with respect to the SEPP-to-JSPP Transaction which it determines would be better served by using that process.

Concerns raised in the consent process

Though a NOID process is not required for the reasons set out above, it is FSRA's view that beneficiaries must be provided the opportunity to raise legitimate concerns or issues about SEPP-to-JSPP Transactions. These concerns may be raised at any point in the SEPP-to-JSPP Transactions process until FSRA provides consent to the transaction. As such, it is FSRA's expectation that plan administrators provide information in the statutory notice[7] of application provided to beneficiaries. Such notices must include information on how to contact FSRA to outline any concerns or issues.

The DB Asset Transfer Guidance sets out how and when beneficiaries can make representations to FSRA with concerns about compliance with the PBA and Regulations.

Effective date and future review

This Guidance is effective January 28, 2021. A review of the Guidance was completed on February 17, 2026, and it was determined that this document will be inactivated. FSRA's position noted in this guidance is reflected in FSRA's Supervisory Approach to Defined Benefit Asset Transfers under the PBA.

[7] Reference notice of application under section 80.4 and section 81.0.1.

About this guidance

This document is consistent with FSRA's Guidance Framework. As Interpretation guidance, it describes FSRA's view of requirements under its legislative mandate (i.e. legislation, regulations and rules) so that non-compliance can lead to enforcement or supervisory action.

Appendices and reference

References

- See sections 80.4, 81.0.1 and 89 of the PBA

Appendices

- Appendix A

Appendix A

FSRA identified three potential options for procedural fairness where FSRA provides its consent a SEPP-to-JSPP Transaction:

1. A NOID process modelled on the process set out in Section 89 of the PBA which would involve providing a public notice that FSRA intends to consent to a proposed SEPP-to-JSPP Transaction, followed by a thirty (30) day period in which an affected individual may request a hearing before the FST;

2. A less formal notice and comment process which would involve notifying affected individuals that FSRA intends to consent to a proposed SEPP-to-JSPP Transaction, followed by a period (perhaps less than a specific number of days) in which an affected individual may request a hearing before the FST; or

3. A process where there is no advance FSRA notice to individuals affected by a proposed SEPP-to-JSPP Transaction

Procedural fairness is a context-specific legal concept which is intended to ensure respect for the legitimate interest of individuals who might be affected by a regulatory decision-making process. As such, in determining the procedural fairness requirements in the context of SEPP-to-JSPP

Transactions where FSRA is providing its consent, it is necessary to consider the nature of the decision-making process under consideration.

That decision-making process is quite circumscribed and the role of FSRA in providing its consent is a function of the applicant satisfying specific statutory and regulatory requirements. The evaluation of these requirements involves and analysis by FSRA of information provided by the plan administrator. The decision by FSRA to consent to an application for a SEPP-to-JSPP Transaction is purely administrative in nature and is a function of whether or not the applicant has satisfied the statutory and regulatory requirements, something which FSRA is uniquely situated to do as an expert pension regulator. Based on these considerations, FSRA concluded that the NOID process is not required as a matter of procedural fairness where it is providing consent to a SEPP-to-JSPP application.

In reaching the conclusion that the reasoning in certain case law supporting an implied hearing right does not apply in the context of the highly prescriptive requirements of Sections 80.4 and 81.01, FSRA was aware the previous regulator was influenced by the decisions of the Ontario Divisional Court in Baxter v. Ontario (Superintendent of Financial Services)[8] and the FST in Lennon v. Ontario (Superintendent of Financial Services).[9] These decisions stand for the proposition that in certain circumstances, section 89 of the PBA provided for implied hearing rights which necessitated the use of a NOID or a similar process to provide a mechanism for the exercise of hearing rights.

However, FSRA does not view these decisions as determinative with respect to its regulatory approach for providing consent to a SEPP-to-JSPP Transaction. It is FSRA's view that the decision of the Divisional Court in Baxter did not consider the detailed statutory and regulatory

[8] (2004), 192 O.A.C. 293.
[9] 2006 ONFST 1.

requirements of Sections 80.4 or 81.0.1 of the PBA which significantly limit the scope of FSRA's decision-making to confirming whether the statutory conditions for consent are satisfied.

Moreover, administrative law has significantly evolved since the decision of the Court in Baxter, particularly in light of the decision of the Supreme Court of Canada in Canada (Citizenship and Immigration) v Vavilov[10] which supports the proposition that an administrative decision-maker should explain why a different interpretation is preferable where there may be a precedent on a similar issue to that before the administrative decision-maker.

In FSRA's view, unlike the circumstances of where FSRA is providing consent to a SEPP-to-JSPP Transaction, the Court in Baxter was considering the general purpose of the PBA and not the local purpose of specific statutory provisions such as sections 80.4 or 81.0.1 of the PBA. The latter provisions provide for a detailed mechanism for SEPP-to-JSPP Transactions and it is FRSA's view that Section 89(4) of the PBA must be interpreted having regard to that purpose. In this sense, the NOID and order process required in Section 89(4) simply do not work with the highly prescriptive requirements in Sections 80.4 and 81.01 which FSRA must determine to be satisfied before it can grant consent to an application. FSRA therefore does not interpret Section 89(4) as creating an implied right to a hearing it where it has provided consent for a SEPP-to-JSPP Transaction.

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[10] (2019) SCC 65.