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About Pensions

Actuarial

Consultations

Family Law

Treatment of Excess Contributions

*Revised to reflect the amendments to Regulation 909 set out in **Reg. 105/19***

Note: Where this document conflicts with the Financial Services Regulatory Authority of Ontario Act, 2016 (FSRA Act), Pension Benefits Act, R.S.O. 1990, c. P.8 (PBA) or any regulation made under the PBA (Regulations), the FSRA Act, PBA or Regulations govern.

In response to the Ontario funding rules for pension plans that provide defined benefits which came into effect on May 1, 2018, the Financial Services Commission of Ontario (FSCO) developed and published a communication setting out its positions on the treatment of contributions that have been made by an employer in excess of the required minimum contribution amount set out in the latest filed actuarial valuation report (Communication).

On May 21, 2019, the government amended various provisions of the funding rules in Regulation 909 (Regulation) to come into immediate effect. These include the introduction of a definition of "specified period" under subsection 4(0.1) of the Regulation, as well as new subsections 4(3.2), 4(3.3), 4(3.4), 5(16.3) and section 6.3 of the Regulation. In addition, effective May 29, 2019, section 55.1 of the Pension Benefits Act (PBA) was also amended to add subsection 55.1(4.1). The Financial Services Regulatory Authority of Ontario (FSRA) has updated the Communication to reflect these changes.

"Excess contributions" herein refers to a) any amount paid in excess of the minimum contribution requirements set out in the last filed valuation report, or b) contributions remitted in accordance with the minimum contribution requirement of an expired valuation report until a new valuation report is filed as required by subsection 4(5) of the Regulation that are in excess of the minimum contribution requirements for that period under the new report when filed. In the past, excess contributions have been treated in one or more of the following ways:

1. They formed part of the assets of the fund that get reflected the next time fund assets are measured for actuarial filings, such as valuation reports or cost certificates;
2. They were used to establish a prior year credit balance (PYCB), or increase a PYCB if previously in place, in the next full valuation report;
3. They were used to reduce any contributions otherwise required during the remaining months of the fiscal year in which the new valuation report is filed; or
4. They were returned to the employer pursuant to an application for a refund of an overpayment

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pursuant to section 62.1(1)(b) of the PBA, provided that the Superintendent of Financial Services so consented.

FSRA's current positions with respect to "excess contributions" are set out below:

Options	FSRA's Position	Rationale
1) Excess contributions form part of the assets of the fund that get reflected the next time fund assets are measured for actuarial filings, such as valuation reports or cost certificates.	• **This option continues to be available**	• Any excess contributions not applied via options 2 and 3 below remain in the plan fund and then form part of the fund's assets. • The amendments in Reg. 105/19 do not change FSRA's position.
2) Excess contributions are used to establish a PYCB, or increase PYCB if it was previously in place, in the next required actuarial filings.	• **This option continues to be available**. **For listed JSPPs and for plans for which the valuation date is before December 31, 2017 or filed before May 1, 2018:** • From May 1, 2018 to May 20, 2019, a PYCB can be used to reduce contributions for special payments only. Contributions for normal cost (NC) may only be reduced or suspended through the application of available actuarial surplus (AAS). • From May 21, 2019 on, a PYCB can be used to reduce contributions for NC and special payments. **For non-listed JSPPs and plans for which the valuation**	• Section 4(3) of the Regulation permits the employer to apply a PYCB to reduce contributions for NC, PfAD in respect of NC and special payments. However, effective May 1, 2018, section 55.1 of the PBA only permitted a reduction or suspension in the contributions for NC and PfAD in respect of NC from AAS. • Effective May 21, 2019, section 6.3 of the Regulation exempts listed JSPPs and plans that filed valuation reports under the old funding rules from the application of section 55.1 of the PBA. • Section 4(3) of the Regulation permits the employer to apply

		date is on/after December 31, 2017 and filed on/after May 1, 2018: • From May 1, 2018 to May 28, 2019, a PYCB can be used to reduce contributions for special payments only. The NC and provision for adverse deviations (PfAD) in respect of NC can only be reduced or suspended through the application of available actuarial surplus (AAS). • Effective May 29, 2019, a PYCB can be used to reduce contributions for NC, PfAD in respect of NC and special payments. • PYCB can be established in a full valuation report under section 14 of the Regulation, a cost certificate as per section 7.1 of the Regulation or a report required under section 3 of the Regulation. • A cost certificate cannot be filed for the sole purpose of establishing or updating a PYCB.	a PYCB to reduce contributions for NC, PfAD in respect of NC and special payments. However, effective May 1, 2018, section 55.1 of the PBA only permitted a reduction or suspension in the contributions for NC and PfAD in respect of NC from AAS. • Effective May 29, 2019, new subsection 55.1(4.1) of the PBA permits applying a PYCB to also reduce contributions for NC and PfAD in respect of NC, whether or not the plan has an AAS.
	3) Excess contributions are used to reduce any contributions otherwise required during the remaining months of the first fiscal year in which the report is filed.	• **This option continues to be available subject to new subsections 4(3.2) and 4(3.3) of the Regulation**.	• New subsection 4(3.2) confirms that excess contributions that were made in respect of the specified period (as defined in subsection 4(0.1) of the Regulation) can be applied to reduce payments otherwise required for the period

			beginning on the day the report is filed and ending on the earlier of a) the last day of the fiscal year in which the report is filed and b) the filing date of the subsequent report. • It should be noted that in accordance with subsection 4(3.3), subsection 4(3.2) does not apply if the report is filed more than 12 months after the valuation date of the report, even in situations where a filing extension has been granted.
	4) Excess contributions are returned to the employer pursuant to an application for a refund of an overpayment pursuant to section 62.1(1)(b) of the PBA provided that the Chief Executive Officer consents.	• **This option *is not* available**. • *We note that when FSCO Policy R350-103 was last revised (July 2011), the example of getting a refund in this situation was specifically removed from the policy. In its next iteration, the policy will clearly state that such a situation does not qualify for obtaining a refund under that section.*	• Section 62.1(1)(b) of the PBA addresses refund of an "overpayment"; however, this term is not defined in the PBA or Regulations. • Any so-called "excess contributions" that arise retroactively when a new valuation report is filed, were not actually "excess" at the time they were made, as section 4(5) of the Regulation specifically required those contribution amounts to be made in accordance with report most recently filed at that time. As a result, they are not considered an "overpayment" under section 62.1. • Section 62.1(1)(b) is intended

		to address payment errors and does not apply to contributions required by section 4(5) of the Regulation or contributions resulting from the decision of an employer or administrator. • The amendments in Reg. 105/19 do not change FSRA's position.