FSRA is actively reviewing all FSCO regulatory direction, including but not limited to forms, guidelines and FAQs.

Until FSRA issues new regulatory direction, all existing regulatory direction remains in force.

Asset Transfers (Transamerica v. ING)

On July 8, 2004, the Supreme Court of Canada dismissed ING Canada Inc.'s application for leave to appeal the Ontario Court of Appeal's decision in Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc. ("Transamerica decision"). The Court of Appeal's decision is therefore now final.

In the Transamerica decision the Court of Appeal held that surplus assets derived from a pension plan that was subject to a trust could not be used to fund liabilities derived from another plan that was not subject to that trust. The two plans had been merged for administrative purposes, but the assets and liabilities of each had been maintained separately. Despite this, surplus from the plan that was subject to a trust was applied to fund liabilities and contribution holidays respecting liabilities from the other plan.

The Superintendent, when determining whether to consent to an asset transfer under section 80 or 81 of the Pension Benefits Act (the "Act"), is required to refuse consent where the transfer would not protect the pension benefits and other benefits of the exporting plan members. As a result of the decision, where the Superintendent is asked to approve the transfer of assets in circumstances where one or more of the plans in question is subject to a trust, the Superintendent must be satisfied that the Transamerica decision does not apply.

The criteria used to determine whether a transfer or merger application complies with the Act and regulation are set out in our currently published policies A700-200, A700-226 and A700-251. The criteria described below are in addition to the criteria set out in those policies.
The Superintendent has taken the position that the Transamerica decision does not prevent the consideration of an application for transfer of assets on sale or merger where:
1) The plans that are the subject of the application do not have any defined benefit component, or if they do, the plans are not subject to a trust (with an analysis of all plan documents from the plans' inception).

2) The transfer is being made to a newly established plan (a "spin off") and the following conditions apply:

- the transfer does not breach the terms of the original plan(s) and trust(s);
- in the case of a section 80 transfer (i.e., on a sale), unless the employer clearly owns the surplus in the original plan and that entitlement is demonstrated in the application, a proportionate share of assets, including any surplus, is transferred to the newly established plan (note that in the case of a section 81 transfer, a proportionate share of surplus is required to be transferred in all cases); and
- the surplus entitlement language under the new and original plans is consistent.

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3) The receiving plan, in the case of a transfer or merger, undertakes, within the plan terms, to maintain the transferred assets separate and apart from the other assets of the plan (including an undertaking not to use any transferred assets to fund benefits unrelated to the transferred members), and:

- the terms of the transferring plan(s) and trust(s) do not prohibit a transfer to a successor plan; and
- the surplus entitlement language under the receiving and transferring plan(s) is consistent

4) A court of competent jurisdiction has determined that the transfer of assets is legal and binding and all rights of appeal have been exhausted.
Other applications that can be differentiated from the Transamerica decision will be considered on a case-by-case basis.
Additional circumstances where the Superintendent would consider the benefits of members to be protected may be identified in future web postings or policies.

If you have previously applied for approval of a transfer or merger, please advise us whether and in what way it satisfies the above requirements. If your advice is not received, we will proceed with the review of the application based on the documents on file. New applications should include an explanation of how they can be differentiated from the Transamerica decision.

Please note that until the Superintendent's consent has been obtained all pension plans must continue to be fully administered in accordance with the Act and regulations made under the Act without consideration of any potential transfer of assets or merger.

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