Submission: Proposed Guidance: Pension Plan Administrator Roles and Responsibilities

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Submitted to: Financial Services Regulatory Authority of Ontario

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
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Summary

The Ontario Bar Association ("OBA") appreciates the opportunity to provide this submission to the Financial Services Regulatory Authority of Ontario ("FSRA") on the Proposed Guidance: Pension Plan Administrator Roles and Responsibilities ("Guidance").

- The OBA supports FSRA's mandate to promote good pension plan administration through a principles-based approach to regulation and appreciates the opportunity to provide comments on the Guidance. We believe a principles-based approach must be flexible enough to account for different Plan characteristics, including governance structure and size.

- Similarly, it is our view that a Guidance document should clearly distinguish requirements from "best practices" and take care not to frame recommended practices (particularly those which may be onerous or ill-fitting to certain types of plans) as requirements.

Consistent with the foregoing, the OBA believes it would be helpful for FSRA to consider revising elements of the Guidance, as explained below.

The Ontario Bar Association

The OBA is the largest volunteer lawyer association in Ontario, with approximately 16,000 members, practicing in every area of law in every region of the province. We provide updates and education on every area of the law to combined audiences of 20,000 lawyers annually. The members of our 40 practice sections include leading experts in their field who provide practical advice to government and other decisionmakers to ensure the economy and the justice sector work effectively and efficiently to support access to high-quality justice for Ontarians.

This submission has been prepared by the OBA's Pensions and Benefits Law Section, which represents lawyers who serve as legal counsel to a broad cross-section of stakeholders in the pension and benefits industry, including pension and benefit plan administrators, employers, plan members, bargaining agents, pension and benefit consultants, investment managers, actuarial firms, and other stakeholders. Our members have analyzed and aided decision makers over the years on several important legislative and policy initiatives in the pension field. The submission also has the benefit of input for our Labour and Employment Law Section, which represents counsel who act for unions, employers, and employees.

Comments

Categorization of Guidance and Alignment with Obligations under the PBA

Unlike the prior version of the Guidance, which was categorized as both "Interpretation" and "Information", the current draft is categorized as Interpretation alone. Based on FSRA's Guidance Framework, Interpretation is understood to mean that non-compliance can result in regulatory intervention. However, the Guidance expresses FSRA's views on good or best practices,[1] and matters that are not set out in the *Pension Benefits Act* ("PBA"). The proposed Guidance does not always clearly distinguish what is interpreted as a requirement, and what is a best practice.

Generally, as in the OBA's submission on *Proposed Information Technology ("IT") Risk Management* guidance, where the PBA does not require a specific course of action and FSRA is providing guidance on what it considers a good or best practice, the OBA suggests that this guidance be categorized as "Information". Alternatively, if the intention is to maintain the Interpretation categorization, it is suggested that the Guidance avoid the imposition of incremental obligations on plan administrators. This may be achieved by more closely aligning the Guidance with the explicit requirements of the PBA.

We believe that the duties and principles articulated in the Guidance should also be reframed with appropriate nuance and worded more precisely to align with the administrator's statutory obligations under the PBA. We have elaborated on points that we believe would benefit from greater clarification below.

Who can be the administrator?

- Section 3.2 sets out the authority of the administrator to delegate decision-making to others. The reference to section 22(7) of the PBA, which requires the administrator to carry out such supervision of the agent as is prudent and responsible, makes sense to add. However, the additional wording that the administrator "must ensure that the agent fulfills their delegated responsibilities" should be modified, as it appears to create an obligation where no statutory requirement exists. We would recommend any requirement of the administrator to "ensure," more closely align with the duty of an administrator under s. 19 of the PBA.

[1] See footnote 1 in the Guidance.

Fiduciary Duties

- Section 5.2 includes proposed wording dealing with conflicts of interests and adds a reference to section 22(4) of the PBA in footnote 11. Section 22(4) states that an administrator shall not *knowingly* permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund. The use of the word knowingly contains an important nuance, since there may be situations where the conflict itself is unavoidable, but the duty on the administrator is to appropriately address and manage the conflict. In this regard, the sentence at the end of section 5.2 stating that administrator "must not permit that duty to conflict with the interests of plan beneficiaries" should be rephrased.

Records Retention

- Sections 8.1-8.2 state that administrators ought to maintain records necessary to demonstrate good plan administration and to demonstrate the plan has fulfilled its obligations to beneficiaries. Sections 8.3 – 8.4 go on to state various practices administrators should consider in order to meet and demonstrate adherence to the standard of care. In general, this language suggests these are "best practices" rather than requirements, but the context of the proposed Guidance being classified as Interpretation and not Information creates ambiguity on that point.

- Section 8.2 also adds a concluding statement about possible breach of section 22 of the PBA where the administrator does not maintain relevant records. This statement would have to be supported by the facts in a given case, and as it currently stands, can be misleading. Further, the sentence accompanying footnote 24 and the footnote itself also appear to be misleading and suggest that an administrator may be required to pay a benefit twice if a record cannot be produced demonstrating that the benefit entitlement has already been paid. The way this statement is framed could have the unintended consequence of shifting the burden of proof from the person claiming a benefit entitlement to the administrator. We would suggest that section 8.2 be reframed to state generally the importance of good record keeping, without the conclusionary statement about the breach of section 22 of the PBA and without footnote 24.

- We are pleased that section 8.4 of the Guidance acknowledges that administrators may adopt records retention frameworks that balance a variety of factors. However, the third bullet appears to detract from the foregoing by suggesting that electronic record retention is the appropriate default. The standard of care does not prescribe any particular form of records to be maintained and, in our view, the Guidance does not address the fact that an administrator acting reasonably

may not maintain the entirety of a member's record after settlement of benefits for reasons such as physical/electronic storage costs for the plan and privacy/cyber risk considerations.

Service Providers

- Footnote 19 indicates that an administrator ought to consider, as it relates to its own standard of care, the implications of a service provider seeking to impose limitation on its liability. Given that an administrator is responsible for supervising any agents it employs, and commercial realities relating to contractual terms (including, for example, the relative bargaining power of certain service providers in comparison to smaller plans), it is suggested that this reference be clarified or deleted.

Complaints and Inquiries

- Section 9.2 indicates policies should adhere to principles of natural justice and ensure that a beneficiary feels treated with respect. In our view, it would be more appropriate to remove reference to how a beneficiary "feels" and specify that a beneficiary should be treated fairly and with respect, and to omit references to administrative law principles that are outside of FSRA's regulatory expertise.

- In the last bullet point in section 9.3, we believe that FSRA intends for the administrator, where it is appropriate to do so, to direct the beneficiary to contact FSRA if they wish rather than for the administrator to send the complaint to FSRA where it is not resolved to the beneficiary's satisfaction. However, this wording is not clear and appears to create an obligation that does not exist in the PBA. We would suggest that this statement be removed or, alternatively, reframed to avoid creating the impression that, where a beneficiary is not satisfied with the administrator's response, that a complaint should necessarily proceed to FSRA.

Providing Information to Beneficiaries

- Section 10.1 indicates that to demonstrate compliance with the standard of care, administrators are required to provide "appropriate information to beneficiaries" including the communication of "plan terms and legislative requirements in a clear manner". The PBA has a detailed regime for the provision of information to members (e.g., member statements). In our experience, pension plan administrators seek to comply with their duties to make available and/or provide information and documents - and typically succeed in complying - by aligning their communications with plan beneficiaries with the applicable provisions of the PBA and its regulations and, in the case of

many defined contribution pension plans, disclosing fee and expense information, in accordance with applicable recommendations in the Guidelines for Capital Accumulation Plans (CAPSA Guideline No. 3). Suggesting that an administrator is required to provide additional content, in order to demonstrate compliance with the PBA's standard of care, is a potentially confusing and onerous interpretation.

- In section 10.2, we would also note that an inadvertent communication error is not in and of itself a breach of the standard of care. We would suggest that the Guidance provide appropriate nuance in this regard.

Policies

- The Guidance includes references to an administrator maintaining written expense policies, records retention policies and communication policies (among others). It is noted that these policies, unlike statements of investment policies and procedures, are not explicitly prescribed by the PBA. It is therefore suggested if these references are included, that the Guidance specify that the adopting of such policies is a best practice and consider whether it might be applicable as part of a general governance framework.

Attention to Different Plan Characteristics and Capabilities

The OBA is pleased to see the Guidance acknowledge that the content of policies described therein may vary based on the size and complexity of the plan, and the role of service providers. In our view, these statements reflect a principles-based approach.

Nevertheless, FSRA may wish to consider that establishing and maintaining policies that meet the requirements described in the Guidance may be burdensome for some plan administrators, particularly administrators of smaller plans. Therefore, while OBA supports a recommendation from FSRA that plan administrators implement prudent governance practices (and have a framework supporting such practices), to the extent the final Guidance is classified solely as "interpretation", we urge FSRA to minimize the degree to which the Guidance prescribes the contents of such policies/frameworks so as to allow plan administrators to implement them in a manner that is best suited to their pension plan and promotes effective and realistic compliance within their organization.

Additionally, FSRA may wish to consider including more nuance with respect to plan type in some sections, given the different pension plan governance structures that exist as between and among single employer-sponsored plans, MEPPs and JSPPs.

- For example, Section 2.3 of the Guidance describes the responsibilities of a plan sponsor as including, "designing, establishing, amending and terminating the pension plan"; however, we note that for pension plans with shared governance structures such as multi-employer pension plans ("MEPPs") and jointly-sponsored pension plans ("JSPPs"), the body that serves as plan administrator may also play a role or have responsibilities related to plan design and plan amendments.

- Similarly, the commentary with respect to expenses paid out of the pension fund (in footnote 23) cites the decision in *OMERS Sponsors Corporation v OMERS Administration Corporation*, 2008 CanLII 3970 (ON SC) ("OMERS Case"). Given the unique nature of the plan sponsor and plan administrator in the OMERS Case, this reference may not be helpful or applicable to most pension plans.

The OBA would be pleased be of additional assistance including meeting to further discuss our comments and reviewing additional drafts and revisions of the Guidance.