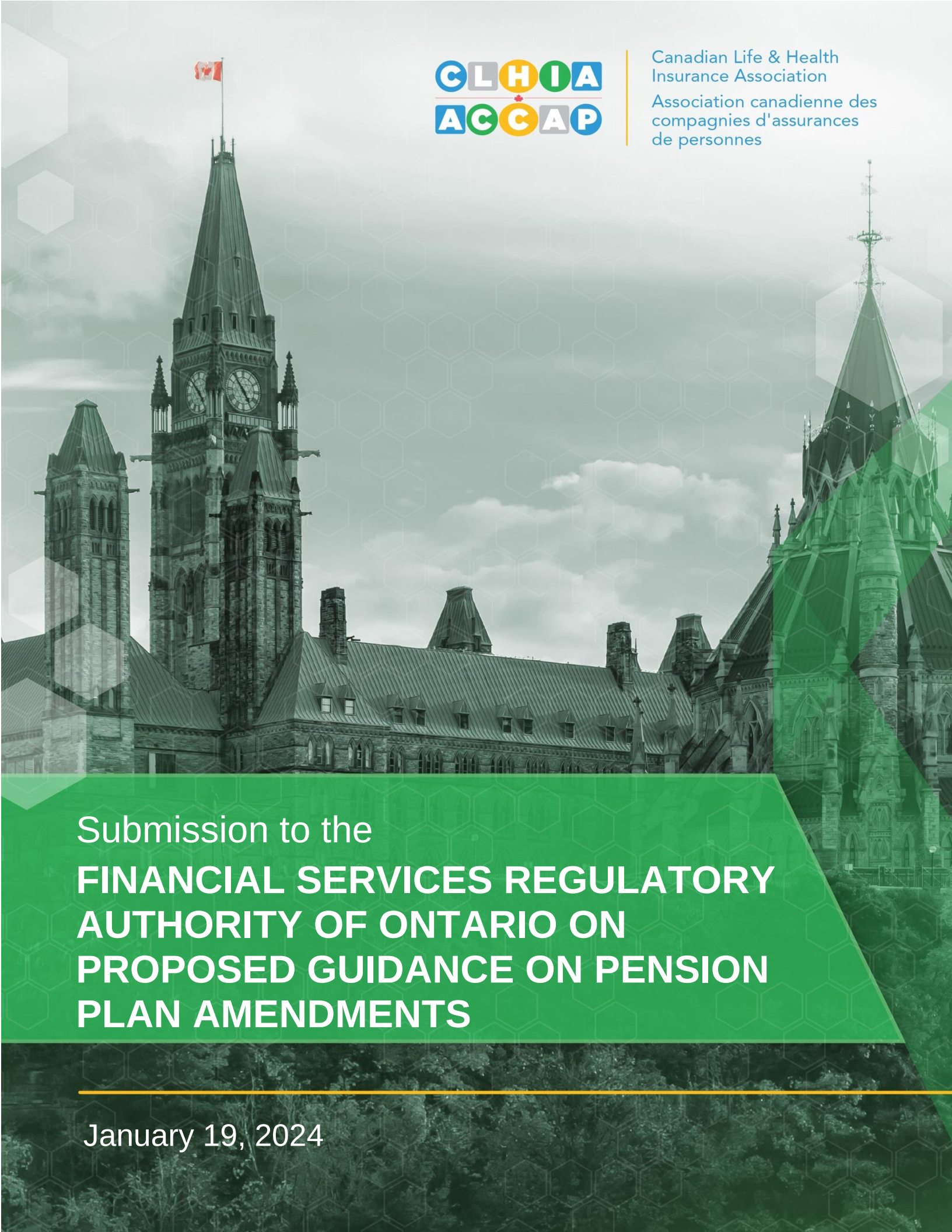

Canadian Life & Health Insurance Association
Association canadienne des compagnies d'assurances de personnes

Submission to the

FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO ON PROPOSED GUIDANCE ON PENSION PLAN AMENDMENTS

January 19, 2024

INTRODUCTION

The Canadian Life and Health Insurance Association (CLHIA) is the national trade association for life and health insurers in Canada. We are writing on behalf of our membership to comment on the consultation paper issued by FSRA on Pension Plan Amendments.

Our members account for 99 per cent of Canada's life and health insurance business. The industry provides a wide range of financial security products such as life insurance, annuities, and supplementary health insurance. Life and health insurers are significant contributors to Ontario and its economy. In 2022 they provided financial security to 11 million Ontarians and made nearly $50 billion in benefit payments (of which 90 per cent goes to living policyholders as annuity, disability, supplementary health or other benefits). In addition, life and health insurers have more than $350 billion invested in Ontario's economy. A large majority of life and health insurance providers are licensed to operate in Ontario, with sixty-two headquartered in the province.

We encourage FSRA to consider that the decision to create or maintain a registered pension plan will be influenced by the perceived administrative burden. The Proposed Guidance on Pension Plan Amendments (the "Proposed Guidance") represents a significant departure from existing practice, which will impose new legal and procedural requirements on plan administrators wishing to register a plan amendment. To the extent that plan sponsors and administrators perceive the new rules as overly burdensome and choose to refrain from offering pension plans to their employees, this will have a negative impact on Ontario workers and could also impose a strain on the public safety net should such individuals have insufficient savings during retirement. As a matter of law, we also submit that the expanded requirements created in the Proposed Guidance should be authorized in law, either through an amendment to the Pension Benefits Act or regulations but should not be introduced through administrative fiat in the form of a guidance document.

We appreciate the collaborative approach taken by FSRA in providing the opportunity for input on the Proposed Guidance. We are pleased to provide the following specific comments on the Guidance:

1. The Proposed Guidance Exceeds FSRA's Authority

Appendix A of the Proposed Guidance sets out FSRA's statutory interpretation relating to retroactive adverse amendments under the Act. Put succinctly, we do not agree with the interpretation put forth in the document, nor do we think that a court would give deference to an administrative body when the interpretation of legislation is incorrect and unreasonable.

The approach to interpretation described in the Appendix represents an overreach which cannot be supported by the plain language of the statute. Section 14 of the *Pension Benefits Act, R.S.O. 1990, c.*

P.8 (the "Act") is entitled "**Reduction of benefits**" and sets out three instances where an amendment to a pension plan is void. All three relate to a reduction in value of an accrued pension benefit, including a reduction of a benefit which accrued before the effective date of the amendment. In short, a void amendment is an adverse amendment, but an adverse amendment is not necessarily void.

Section 13(2) allows for the registration of a plan amendment which takes effect before the date on which it is registered. Section 26(1) requires the plan administrator to provide advance notice explaining the amendment to its members when benefits will be reduced after the effective date with a copy submitted to the CEO of FSRA. Section 18 gives discretion to the CEO of FSRA to refuse to register an amendment or revoke the registration of an amendment that does not comply with the Act and regulations, or which is void.

The Proposed Guidance seeks to develop a new category of plan amendments, "Retroactive Adverse Amendments", which FSRA interprets as impermissible under the Act. These are defined as amendments which "may negatively impact members' or beneficiaries' rights and/or benefits and which purport to be effective on a date before the amendment is filed with FSRA".

Were it the intent of the legislature to allow FSRA to reject any Retroactive Adverse Amendments, section 18 would have given FSRA such powers, perhaps by expanding section 14 to include all adverse amendments, not just the limited set of amendments defined as void in that section. Section 13(2) could also have been written to clarify that adverse amendments may not be given retroactive effect.

Instead, FSRA may only reject amendments which are void or do not comply with the Act. The Act allows for retroactive amendments as well as adverse amendments, so long as the adverse amendments are not void under section 14 of the Act and advance notice is provided. The only discretion afforded to FSRA is to determine whether a proposed plan amendment contravenes the Act or regulations or is void. In fact, the language in section 18 is permissive, stating that the CEO may exercise their discretion to refuse to register or revoke the registration of an amendment, but this discretionary power does not limit the general permissibility of an amendment to be made effective as of a date before the amendment is registered in accordance with section 13(2).

In creating the category of Retroactive Adverse Amendments which it will not permit, FSRA is, in effect, amending legislation through guidance and is fettering the discretion it has been given under the Act, both of which are beyond its authority.

The Proposed Guidance should expressly reflect that adverse amendments are permissible under the PBA, provided that the requisite advance notice is provided in accordance with subsections 26(1) and (2). Without this clarification, the invention of the new regulatory concept of "Retroactive Adverse Amendment" risks creating further confusion as to what is or is not permitted under the PBA.

2. The Proposed Guidance Creates Additional Burden for Plan Administrators and Sponsors

The Proposed Guidance states that "FSRA does not have authority under the PBA to rectify drafting errors by registering a Retroactive Adverse Amendment. Rectification of a pension plan's terms is within the jurisdiction of the Ontario Superior Court of Justice." As noted above, subsection 13(2) allows for the registration of a plan amendment which takes effect before the date on which it is registered and so, in the absence of the Proposed Guidance, the plan administrator may amend a plan retroactively to correct for a drafting error, provided such amendment is not void, without need to expend time and resources to seek court approval. A plan member may be fully aware of the approach taken by a plan administrator, often because current practice is reflected in the plan booklet. In those cases, there is no prejudice to the plan member, and requiring the administrator to go to court will impose unnecessary costs on the plan, costs which ultimately will be borne by members. Increasing complexity in this way may also result in unintended consequences by creating a disincentive for sponsors to continue offering registered pension plans.

By way of example, plan administrators have experienced situations where a union negotiated an increase in contributions (by members and employers alike), which was communicated to members and was positively received. The employer neglected to advise the administrator and the amendment was filed one year late. We submit that there would be no prejudice to plan members—indeed, there would be a benefit—from allowing such an amendment to be registered with retroactive effect.

Another example where an amendment could be deemed to be adverse occurred (in another province) where a few members were not contributing a mandatory 9% of earnings. To ensure that those members did not suffer adverse effects, the plan was retroactively amended to allow for contributions between 1 and 9% (i.e., a lower contribution rate).

The Proposed Guidance seems to suggest on page 12 that an amendment that FSRA later determines is "adverse" could trigger a notice requirement to members or others and that penalties may be imposed. It is unfair that an administrator who has, in good faith, made an assessment that an amendment is not adverse could, subsequent to the amendment being registered by FSRA, be subject to penalties. We also question whether FSRA can require notification to members of a plan amendment that has already been registered.

The Proposed Guidance also establishes a new process for administrators applying for registration of an adverse amendment. Administrators would be required to make submissions identifying that the amendment has retroactive negative impacts, and that the amendment is not a Retroactive Adverse Amendment. As already discussed, we do not believe there is authority for FSRA to create new categories of impermissible amendments, and a requirement for filing formal submissions will add complexity and burden to a system that works well today.

Subsection 26(2) of the Act provides that FSRA shall not register an adverse amendment until 45 days after the administrator has given notice of the adverse amendment, but it may do so after the 45 days has passed. The timeline of 45 days should be referenced in the Proposed Guidance for the notice of adverse amendments including what the notice should contain to comply with providing FSRA with the necessary details (i.e., the classes of persons who received notice, the date the last notice was distributed and that the notice was provided) as required under section 3(3) of the General regulations R.R.O. 1990, Reg. 909.

. We would also appreciate clarity on how long after the 45 days an amendment will be registered. Any uncertainty as to whether FSRA will accept an amendment for registration will likely also have a negative impact on plan member experience.

CONCLUSION

The CLHIA appreciates the opportunity to provide comments on the Proposed Guidance. We urge FSRA to re-examine the document to ensure it does not exceed the authority of FSRA. Our concern is that the law would be amended through guidance and that FSRA's discretion has been unduly fettered. We also remain concerned that new requirements will degrade member experience, will increase administrative costs, and could lead plan sponsors to stop offering pension plans to their employees.

Canadian Life & Health Insurance Association
Association canadienne des compagnies d'assurances de personnes

79 Wellington St. West, Suite 2300
P.O. Box 99, TD South Tower
Toronto, Ontario M5K 1G8
416.777.2221
info@clhia.ca