VIA EMAIL

January 19, 2024

Andrew Fung
A/Executive Vice President, Pensions
Financial Services Regulatory Authority of Ontario
25 Sheppard Avenue West, Suite 100
Toronto, ON M2N 6S6

Re: Consultation on Proposed Guidance: Pension Plan Amendments No. PE0301INT v2 (the "Proposed Guidance")

Dear Mr. Fung:

We are writing to you on behalf of the Pensions and Benefits departments of the undersigned law firms to again express our disagreement with certain aspects of the revised Proposed Guidance. In particular, we believe version 2 of the Proposed Guidance released for comment in November 2023 still reflects an incorrect interpretation of the *Pension Benefits Act* (the "PBA") regarding the effective date of plan amendments and the CEO's power to refuse to register *non-void amendments that have an effective date prior to the filing date* (referred to herein as "retroactive amendments").

Key Points of Disagreement with FRSA's Interpretation

1. In our view, the PBA sets out a complete code for amending pension plans subject to the PBA.

2. Subsection 13(2) permits an amendment with an effective date before its date of registration if it is not void. As subsection 13(2) expressly permits such a "retroactive" amendment, we do not agree with FSRA that subsection 19(3) is read so as to override subsection 13(2). There is no provision of the PBA that gives the CEO the power or discretion to refuse to register a retroactive amendment that may be adverse, but that is not void within the meaning of section 14.

3. As noted in our first submission, under section 26 of the PBA, "adverse amendments" are non-void amendments that "would result in a reduction of pension benefits accruing subsequent to the effective date of the amendment or that would otherwise adversely affect the rights or obligations of a member, former member or of any other person entitled to payment from the pension fund". Adverse amendments are subject to a specific notice regime under section 26, but are otherwise governed by sections 12 and 13 of the PBA, meaning that an adverse amendment may be retroactive with an effective date prior to its registration date.

4. In the Proposed Guidance, FSRA makes the following statement regarding retroactive effective dates of adverse amendments under subsection 13(2) of the PBA:

> "Subsection 13(2) of the PBA provides that a pension plan amendment may be made effective as of a date before the date on which it is registered by FSRA. However, this does not mean that an amendment is permitted to have a retroactive adverse effect on the plan's beneficiaries.

> **In FSRA's view, a clear expression of legislative intent is required for legislation to have retroactive effect, particularly where retroactivity would interfere with vested rights (such as pension entitlements granted under the terms of a pension plan)**. Therefore, it is FSRA's interpretation that subsection 13(2) does not, read alone or with subsection 13(1), express a clear legislative intent that amendments be permitted to have adverse retroactive effects." [emphasis added]

In our view, the above interpretation is incorrect. Paragraphs 18(1)(d) and (f) **only** permit the CEO to refuse to register an amendment, in whole or in part, in circumstances where (i) the amendment is void and (ii) the plan as amended ceases to comply with the PBA or its regulations. Neither section 18 nor any other provision of the PBA gives the CEO the power or discretion to refuse to register a non-void, adverse amendment that has an effective date prior to the filing or registration date.

Contrary to FSRA's interpretation of PBA subsection 13(2) above, in our view, for the CEO to have the power to refuse to register a non-void amendment, the PBA would have to expressly provide for it. While we understand that the *Ontario Financial Services Regulatory Authority Act* (the "FSRA Act") includes the object of protecting and safeguarding the pension benefits and rights of pension plan beneficiaries, we think that FSRA's interpretation of the CEO's power and discretion relating to the refusal to register non-void amendments included in the Proposed Guidance amounts to the CEO effectively creating a new category of void amendment that does not currently exist under the PBA. It is an *expansion* rather than the protection of existing pension benefits and rights, and in our view, it is not within FSRA's current authority under either the PBA or FSRA Act, when taken individually or together.

We also disagree with the assertion in footnote 10 of the Guidance that the Ontario Court of Appeal decision in *Brewers Retail Inc. v. Campbell*[1] ("*Brewers*" at para. 75) supports FSRA's "discretion under section 18 of the PBA to refuse to register an amendment that interferes with an existing benefit or status such that it would constitute a Retroactive Adverse Amendment" by stating that "the Court of Appeal noted that FSRA has authority to refuse to register an amendment which it had determined to be adverse and the plan administrator would only be able to address that through seeking a hearing before the Financial Services Tribunal." We disagree with this interpretation of the *Brewers* decision. Nowhere in paragraph 75[2] or elsewhere in the decision did the Court of Appeal opine on FSRA's or the CEO's authority to refuse to register a retroactive adverse amendment. Instead, in paragraph 75, the

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[1] *Brewers Retail Inc. v. Campbell*, 2023 ONCA 534.

[2] Paragraph 75 of the Brewers decision reads as follows:

> [75] I hasten to add that I do not intend my analysis to suggest that the FST will never have exclusive jurisdiction in any pension dispute. One example will demonstrate this. For the purpose of this example, assume that Brewers was concerned about its interpretation and administration of the Plan based on the Indexing provisions and the sole step it took to address those concerns was to file Plan Amendment No. 9. Just to be clear, in this example remove the true history to this proceeding and leave the sole background to be as described in the prior sentence. Imagine that the CEO responded by issuing a NOID advising Brewers that it was refusing to register Plan Amendment No. 9. If, instead of seeking a hearing before the FST, Brewers attempted to have the validity of Plan Amendment No. 9 decided by the court, on reasoning similar to that in Lomas, arguably the court could be found to be without jurisdiction because of the statutory scheme governing the CEO's powers together with those given to the FST under s. 8 of FSRA.

Court simply commented on the jurisdiction of the courts versus the Financial Services Tribunal to adjudicate an appeal of a NOID issued by the CEO relating to its refusal to register such an amendment.

5. As noted in our earlier submission, the Supreme Court of Canada ("SCC") in *Nolan v Kerry (Canada) Inc.*[3] ("Nolan") explicitly characterized amendments authorized by subsection 13(2) of the PBA as "retroactive" and permitted a retroactive amendment notwithstanding the pension plan terms before the amendment. Contrary to FSRA's position in the Proposed Guidance, the SCC did not find that subsection 19(3) in any way limited the ability to make and register a retroactive amendment.

6. We also disagree with FSRA's interpretation of the *Nolan* decision in footnote 14 essentially limiting its application to its specific facts. In *Nolan*, the Financial Services Tribunal found that (i) the pension plan did not provide for the application of actuarial surplus from the defined benefit (DB) component of a plan to the employer's funding obligations under the defined contribution (DC) component of the same plan, but (ii) this issue of non-compliance with the plan terms (relating to the funding of the plan) could be cured by retroactively amending the plan to make members of the DC component beneficiaries of the trust for the DB component.[4] The ability to amend the plan retroactively to change the employer funding obligation, and cure any non-compliance, was upheld by the both the Ontario Court of Appeal and the SCC[5]. In upholding the ability to make a retroactive amendment, the SCC repeatedly stated that retroactive amendments are permissible under the PBA and specifically cited subsection 13(2) of the PBA as authority[6]. There is no support in that decision for FSRA's view that only amendments like the one in *Nolan* are an exception to FSRA's general view that the CEO may refuse to register retroactive adverse amendments.

7. With respect to the Proposed Guidance itself, we note a fundamental inconsistency in the way FSRA views its authority to approve or refuse to approve a retroactive adverse non-void amendment. The notion that FSRA has the authority to approve a retroactive adverse non-void amendment in some circumstances (i.e., where amendments are bargained) but not others (e.g., where the reason for the amendment is to correct a drafting error) represents flawed logic. With respect, the reason an amendment is made should be irrelevant to whether the amendment is registerable. A clarifying or correcting amendment that is retroactive and non-void is no less registrable under FSRA's view of its own authority than any other retroactive non-void amendment. If FSRA is opposed to registering such amendments within the framework established by FSRA (which for greater certainty, we do not think is in accordance with the PBA), that is a policy choice and not a question of authority.

8. Prospective adverse amendments are permitted under the PBA and are registrable by FSRA following the notice period set out in subsection 26(1). The actual wording of subsection 26(1) requires the CEO to specify to whom notice must be given, however, as the Proposed Guidance currently reads, it merely states FSRA's expectations regarding compliance with the section. We think that it would be within the CEO's authority for the CEO to specify, through guidance, to whom notice must be given. We

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[3] *Nolan v Kerry (Canada) Inc.*, 2009 SCC 39 [Nolan SCC] affirming 2007 ONCA 416, reversing 2006 CanLII 7513 (Div Ct), at para 82 and 85.

[4] It was the Financial Services Tribunal that prescribed the retroactive amendment to remedy the non-compliance issue.

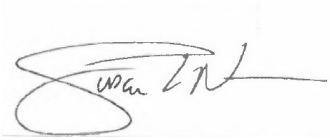
[5] *Nolan v Kerry (Canada) Inc.*, 2009 SCC 39 [Nolan SCC] affirming 2007 ONCA 416, reversing 2006 CanLII 7513 (Div Ct).

[6] Ibid, Nolan SCC, see paras 82, 85, 100 and 106. See also *Gay Lea Foods Co-operative Ltd. v Ontario (Superintendent of Financial Services)*, 2010 ONFST 10 at para 105, where the Financial Services Tribunal also acknowledged that section 13(2) of the PBA expressly contemplates that plan amendments may be given effect retroactive to their date of registration.

suggest that FSRA re-cast the guidance regarding section 26 to better accord with the actual wording of the section.

Thank you for the opportunity to comment on the revised Proposed Guidance. Should you wish to discuss the foregoing, please feel free to contact any of the undersigned.

Osler, Hoskin & Harcourt LLP



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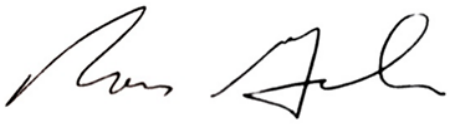

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