January 31, 2024

Financial Services Regulatory Authority of Ontario
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contactcentre@fsrao.ca

Dear Sir or Madam,

Re: WTW Submission on Proposed Guidance on Pension Plan Amendments (No. PE0301INT)

WTW welcomes the opportunity to comment on the updated proposed Guidance on Pension Plan Amendments (Guidance).

WTW designs and delivers solutions that manage risk, optimize benefits, cultivate talent and expand the power of capital to protect and strengthen institutions and individuals. WTW employs 45,000 colleagues worldwide, with approximately 450 engaged in providing services to sponsors of Canadian pension plans. The undersigned have prepared our response with input from others in the company.

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While we appreciate the clarifications under the updated Guidance, we still have several issues with the Guidance as currently drafted. One overall comment is that we believe that the Guidance will be difficult for plan administrators and other stakeholders to follow.

Amendments with retroactive adverse effects

The Guidance states that Retroactive Adverse Amendments (RAAs) are generally not permissible and whether an amendment qualifies as a RAA is determined by whether the amendment truly has an "adverse effect". It provides some examples of types of amendments which FSRA determines have adverse effects and would therefore not be permitted under the Pension Benefits Act as a RAA. It further provides that there are situations in which an amendment will not be considered adverse and as such not a RAA. Specifically, when:

- The negative retroactive impact is non-material

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- The negative retroactive impact is offset by considerations of “transparency, reasonableness and equity”

It is not clear whether both these criteria must be satisfied or only one.

Furthermore, the Guidance gives three examples where an amendment with a negative retroactive impact will not be considered adverse:

- The amendment supports changes negotiated as part of a collective agreement
- The amendment is like the amendment set out in *Nolan v. Kerry* but limited to the specific, or equivalent fact situation
- The amendment is part of a corporate re-organization where, for example, the changes were clearly communicated and the delay in filing is reasonable

Setting out these examples is useful and we are pleased to see the inclusion of the first example but we recommend that the second and third examples be clarified.

For the exception under *Nolan v. Kerry*, the Guidance states that it “is limited to the specific, or equivalent, fact situation in that case”. The Guidance summarizes the fact situation in footnote 14: (1) the employer’s intention to implement the effect of the amendment was known from the beginning and (2) it was the subject of litigation. In our view, the second condition is not necessary. The important principle is that the parties to the plan are aware of the intended amendment from the date when it is to be effective. This is similar to the exception for union negotiations. That is, they both involve situations in which employees or their representatives know from the beginning how the amendment will affect pension benefits. This exception would be clearer if set out in the body of the text, not by reference to *Nolan v. Kerry* in a footnote.

For the third example, we recommend that a more detailed description of a scenario where a corporate re-organization would support the position such as a case where members transfer employment to another employer which does not participate in the plan in question.

We suggest that FSRA clearly indicate that this list is not exhaustive. It is also not clear why the amendments listed in the examples of RAAs could not be considered to be non-adverse based on FSRA’s criteria.

Retroactive amendments purporting to rectify drafting errors in the plan terms

This section appears to suggest that amendments rectifying drafting errors are considered RAAs. We would recommend that it be clear that not all such amendments are RAAs and that the criteria for exceptions apply equally to these types of amendments.

Our view is that retroactive amendments to rectify drafting errors could already be covered under one of the exceptions discussed above. We don't see any reason to differentiate a retroactive amendment to rectify a drafting error from other retroactive amendments. They should all be assessed using the same criteria. That is, FSRA could allow an amendment to fix a drafting error if the amendment is non-material or the amendment's impact is offset by considerations of transparency, reasonableness, and equity, in particular if an administrative practice has clearly been communicated to members. As well, if the practice has been consistently applied, even if the plan text is inconsistent with that practice, the amendment could be considered not adverse because there is no change in how the plan is administered.

While we agree that administrators can seek an order for rectification from the courts to address these issues, it is a far more lengthy and expensive way to amend errors. Allowing retroactive amendments to fix drafting errors is a more pragmatic way to address the errors in pension plan drafting while protecting members' accrued benefits. Therefore, we recommend that the Guidance allow retroactive amendments to fix drafting errors under the exceptions noted above.

Replacing a variable indexation formula with a fixed indexation rate (accrued benefits)

We recommend that this section be modified to allow a fixed indexation rate to replace a variable indexation formula in specific circumstances. As we noted in our previous submission, not allowing such an amendment would make it difficult to purchase annuities. Annuities with variable indexation based on CPI are expensive in relation to the expected present value of the indexed pension payments since insurers charge a significant premium in exchange for the inflation risk they assume. Furthermore, it is not even possible to purchase annuities with variable indexation based on fund rate of return since the pension fund would no longer be relevant for providing the measurement of that rate of return. Given this, plans may not try to manage pension risk through annuity purchases, defeating the policy objectives of section 43.1 of the PBA.

As well, for plans being wound up, a prohibition against replacing a variable indexation formula with a fixed indexation rate would interfere with the requirement to settle benefits through annuity purchases. This is particularly the case if the formula was based on the fund rate of return.

The proposed Guidance states that amendments that replace a variable indexation formula with a fixed indexation rate "are generally considered by FSRA to be void under section 14" because they could reduce the amount or commuted value of accrued benefits. The Guidance notes, however, that there are situations where an amendment to an indexation formula would not be void. The example it cites is where a variable rate is maintained as a minimum, but this does not address the issues that we have raised.

However, footnote 16 cites the FST's decision in *McGrath v. Ontario*, a case we referenced in our previous submission. The footnote states that the "crucial question is whether a proposed amendment reduces the amount or commuted value of the plan member's pension as measured at the time the amendment is

adopted". The FST, in *McGrath*, determined that the amendment to the indexing formula in that case did neither. That is:

- The pension amount was not reduced because the benefit under the fixed rate was the actuarial equivalent of the benefit under the formula and would, over time, produce the same level of protection, and
- The commuted value determined on the date that the amendment was made was the same for both the fixed rate and the indexing formula

We recommend that the Guidance clarify when a plan can amend an indexing formula by articulating the nature of the exception in *McGrath* in the body of the text, not in a footnote. Specifically, the Guidance should allow an amendment that replaces a variable indexation formula with a fixed indexation rate if the variable formula and fixed rate are actuarially equivalent and the commuted value of both is the same as of the date the amendment is made. The statement in the Guidance that amendments that change variable indexation to a fixed rate are generally considered to be void because they "have the potential to reduce the amount or commuted value of accrued benefits" is more restrictive than the McGrath decision requires.

Notice requirements for prospective adverse amendments

We reiterate the recommendations on notice requirements we made in our submission for the previous draft Guidance. First, no adverse amendment notice should be required if an administrator amends the plan to comply with legislation or FSRA rules. Since FSRA requires this amendment, any member objections would not affect whether FSRA registers it. Therefore, there is no practical reason to give members notice prior to registration. While this situation could be addressed through FSRA's discretion, as noted in the Guidance, to dispense with notice, we recommend that this particular situation be expressly set out.

Second, with respect to a situation where FSRA later determines that an amendment was adverse and requires the administrator to send notice, we recommend that the administrator not be required to send the notice to former members for the practical reason that they may be difficult to locate and, under section 26(3) of the PBA, they would have received a notice and written explanation of the amendment at the time it was made.

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We greatly appreciate the opportunity to comment on the proposed Guidance and would be pleased to answer any questions you may have on this submission.

Sincerely,

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