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September 9, 2013

Government of Ontario
Ministry of Finance
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Re: Comments on the Draft Regulation regarding Pension Transfers under sections 80 and 81 of the *Pension Benefits Act* (Ontario)

Advocis appreciates the opportunity to provide comments to the Ontario Ministry of Finance's *Consultation Draft – ONTARIO REGULATION made under the PENSION BENEFITS ACT – ASSET TRANSFERS UNDER SECTIONS 80 AND 81 OF THE ACT* (the "Draft Regulation"). At issue is the long-awaited implementation of sections 80 and 81 of Ontario's *Pension Benefits Act* (R.S.O. 1990) (the "*PBA*"). The analysis and comments offered below are informed by the expertise and policy priorities of Advocis' members and their clients.

EXECUTIVE SUMMARY

On July 2, 2013, the Ontario Minister of Finance finally released for consultation a Draft Regulation which will amend sections 80 and 81 of the *PBA* to make for better regulation of the transfer of assets and liabilities between private sector pension plans in the context of corporate reorganizations. The Draft Regulation has been released in order to finalize changes to the *PBA* governing those asset transfers which were passed in May, 2010 as part of *Bill 236*.

When read in conjunction with the *PBA*, the Draft Regulation represents a major change in the governance of asset transfers and the consolidation of pension benefits when groups of pension plan members are affected by corporate restructurings, including the sale, assignment or disposition of a business to a successor employer.

Overall, the policy direction indicated by the Draft Regulation is a significant step towards codifying the asset transfer process and injecting much-needed certainty into Ontario pension plan administration. The streamlining and clarification of the required steps for the pension transfers pursuant to sections 80 and 81 of the *PBA* will help encourage the maintenance of benefits for a plan's members.

The stated aim of the Draft Regulation is to "facilitate the restructuring of pension plans affected by corporate reorganizations, while protecting benefit security for plan members and pensioners." By "facilitate" the Ministry seems to mean to enable more efficient and timely transactions and in general to simplify the regulatory approval process. Based on our reading, it is clear that the regulation will achieve its stated aim and result in a badly-needed simplification of the regulatory approval process for asset transfers. Upon its implementation, plan members and administrators in Ontario should soon begin to see a reduction in the time it takes to complete an asset transfer. This in turn will help plan members realize the advantages of the consolidation of their pension benefits into a single plan.

As is currently the case, under the new rules all asset transfers will require the formal prior approval of the Superintendent of Financial Services ("the Superintendent"). However, the criteria for obtaining such consent have been substantially revised. In essence, the Draft Regulation and the as-yet unproclaimed sections of *Bill 236* modify the asset transfer regime from one in which the Superintendent exercises significant discretion to a prescriptive regime in which the Superintendent must approve asset transfer applications that meet explicit and detailed requirements.

Of particular note are the following developments under the new rules that will come into effect after proclamation:

- upon the sale of a business, the parties can agree to transfer assets and liabilities from one pension plan to another, provided the commuted value of benefits in the new plan is not less than that under the previous plan;
- Advocis is also pleased to see that for transferred employees, the successor plan need not provide the same benefit for past service accruals as the original plan as long as the commuted value of the benefit under the successor plan is at least equal to the commuted value of the benefit under the original plan;
- another very welcome development that is that the new rules will facilitate transactions by having trust issues set aside for the purposes of regulatory consent;
- finally, Advocis is pleased to note that the solvency tests in the Draft Regulation appear to be more flexible than those in FSCO's current asset transfer policies. This should amplify the ability of plans to execute asset transfers without requiring the contribution of additional amounts of capital to plans; in turn, more Ontarians will be able to enjoy the various advantages afforded by plan consolidation.

In terms of major criticism, we are concerned that certain aspects of the Draft Regulation represent a move away from the commitment to principles-based regulation which informed the drafting of the new provisions of the *PBA* which take effect upon the text of the Draft Regulation being finalized and then issued officially by the Lieutenant Governor.

More particularly, as we read it, the Draft Regulation employs a strong prescriptive approach and in doing so undoes the flexibility originally intended by the legislature in *Bill 236*'s changes to the *PBA*, particularly in sections 80(13)3 and 81(6)1, which indicate that plan administrators are meant to wield significant discretion regarding the amount of assets to be transferred).

In light of this interpretation of the *PBA* and the Draft Regulation, Advocis offers a proposal intended to streamline asset transfers between defined contribution (DC) plans. On its face, our proposal may appear radical, but we believe that it is actually in line with the general shift to a principles-based approach envisioned by the 2008 report of the *Ontario Expert Commission on Pensions*. In this context it should be noted that, at the present time, Ontario has only acted on a handful of the Expert Commission's major recommendations. This is regrettable. We believe as a matter of public policy that employers who are arm's-length companies should be able to transfer assets between DC plans (i.e., into member accounts) without an extended asset transfer application and the need for explicit approval of the Superintendent. Unlike defined benefit (DB) asset transfers, the typical DC-plan-to-DC-plan transfer is a straightforward transaction within which certain regulatory concerns regarding the splitting of assets may be dispensed. In general, when the transfer is between employers who are arm's length companies acting in good faith, there are simply no issues which require regulatory attention. Nor are there issues concerning the acceptance by a plan of a defined contribution asset transfer. Each member's account is, and will remain, separate and apart from each other member's account, before and after the transfer.

On the whole, we see the Draft Regulation and as-of-yet unproclaimed sections of the *PBA* as key steps in implementing private sector pension reform. Given that for the last decade or so, Ontario's pension regime has made it time-consuming, expensive, and on occasion legally impossible merge pension plans, it is to be expected that the Draft Regulation will be rightly welcomed by a wide range of industry stakeholders.

Therefore, subject to due consideration of our proposal regarding DC plans, and the resolution of the relatively minor and technical concerns raised below, Advocis is very pleased to offer its support to the Draft Regulation and for its timely implementation.

Part I of our submission provides a brief overview of Advocis and of our experience and competencies in Ontario pension plan practice. Part II contains our technical comments, queries and recommendations regarding the Draft Regulation and its interaction with the *PBA*.

INTRODUCTION: BACKGROUND AND CONTEXT

(1). Advocis: who we are

Advocis, The Financial Advisors Association of Canada, is the country's largest and oldest professional membership association of financial advisors and planner. Through its predecessor associations, Advocis proudly continues over a century of uninterrupted history of serving Canadian financial advisors and their clients. Our members are licensed to sell life and health insurance, mutual funds and other securities, and are primarily owners and operators of their own small businesses who create thousands of jobs across Canada.

As a voluntary organization, Advocis' 11,000 members are committed to enhancing the level of professionalism among financial advisors. Advocis members adhere to a published *Code of Professional Conduct*, uphold standards of best practice, participate in ongoing continuing education programs, maintain professional liability insurance, and put their clients' interests first.

(2). Advocis and Ontario pension policy and administration

Advocis strongly supports the promotion of a sound retirement income system in Canada. Pension-related advice is a priority for thousands of businesses and individual Canadians. Our members provide comprehensive retirement planning and investment advice to employees with pension plans, and also establish and administer pension plans for their own businesses and those of their clients. More particularly, our members help Ontario small-and medium-sized businesses establish and administer defined contribution (DC) plans, defined benefit (DB) plans, and capital accumulation plans (CAPs) and provide ongoing advice regarding their administration.

With regard to the specifics of the Draft Regulation at issue here, we would note that a subgroup of Advocis members have become experienced advice providers to plans regarding asset transfers: a typical example is when a client terminates from a DB plan or is in a DB plan when one is wound up. In either case, there is a commuted value (often large) to be transferred and invested. In situations such as these, Advocis members are able to offer significant value-added advice to our clients and plan beneficiaries.

Given the experience and expertise of Advocis' Ontario members who include a pension component in their practice, we would emphasize that the analysis and comments which follow reflect a balanced perspective, one that takes into consideration the views of both pension plan members as well as plan sponsors and administrators.

(3). Background to the Draft Regulation

On May 18, 2010, *Bill 236: Pension Benefits Amendment Act, 2010* received Royal Assent. *Bill 236* amounted to a modernizing overhaul of Ontario's patchwork pension legislation and rules. Its purpose, among other goals, was to provide new and simplified rules in order to make asset transfers between plans and the merger of two or more pension plans both faster and easier in the public and private sectors. A number of changes to the *PBA*, mandated by *Bill 236,* came into effect immediately, while others still await proclamation—including the Draft Regulation and certain unproclaimed sections of the PBA now under review.

At present, the *PBA* requires the consent of the Superintendent of Financial Services ("the Superintendent") for any transfer of assets between pension plans, either upon the sale of a business or upon the adoption of a successor plan. Before *Bill 236*, most of the asset transfer rules were found in policies adopted by the Financial Services Commission of Ontario ("FSCO"), which were frequently challenged, especially if the asset transfer or merger involved a plan which was subject to a trust. When read together as a collective set of rules, *Bill 236*, the *PBA*, and the Draft Regulation provide general requirements for all asset transfers, specific requirements for transfers upon the sale of a business or a merger, and a temporary set of provisions for governing past business or asset sales.

PART I. GENERAL COMMENTS ON THE DRAFT REGULATION

(4). Benefit security: striking the balance between flexibility and protection

The Draft Regulation, if approved, will represent a significant improvement in the regulatory facilitation of pension plans restructuring pursuant to corporate sales or reorganizations, while protecting benefit security for plan members and pensioners. The result will be speedier transactions and a simplified regulatory approval process. This in turn should reduce administrative and compliance costs as well as help plan members to consolidate pension benefits in a single plan. Employers are also permitted to provide employees with the ability to consolidate their benefits in the new plan.

With regard to the completion of an asset transfer under sections 80 or 81 of the *PBA* between an original plan and a new plan, we are pleased to note that the Draft Regulation protects the benefit security for members in both plans. This is done by ensuring that the original plan will not be less funded on a solvency basis after the transfer than it was before the transfer, and by restricting the extent to which the funded status of a successor plan can be affected by an asset transfer. In terms of security, however, the pension benefits of former members, retired members and other beneficiaries cannot be changed in any way.

The Draft Regulation also provides for a welcome degree of flexibility: the pension benefits of transferring employees can be different in the new plan, provided that the commuted value of accrued benefits is protected. The commuted value calculation is made on the basis that a member's employment is terminated on the effective date of the transfer, and it includes the value of "grow-in benefits." While innovative, this ability to change past service benefits, subject to the protection of the commuted value, will not amount to a simplification of the asset transfer process, in light of the complexity of the necessary individual calculations required under the new rules. We foresee the risk that many employers will decide that they cannot bear the administrative costs of the transfer calculations. Those plans who can bear the administrative costs will find it a valuable option for their members.

(5). Trusts and transfers between defined benefit pension plans

We are very pleased to note that the new provisions of the *PBA* and the Draft Regulation require the Superintendent to consent to any properly applied-for transfer of assets between pension plans, either upon the sale of a business or upon the adoption of a successor pension plan. Of critical importance to making such consent meaningful is the fact that the new *PBA* and Draft Regulation effectively establish a process in which the Superintendent will not consider trust issues.

Before these new rules were set down in the *PBA* and the Draft Regulation, most of the asset transfer rules were to be found in FSCO policies which were open to challenge. The difficulties connected to asset transfers involving assets subject to a trust were, in large part, due to several trust-related lawsuits. It is no exaggeration to say that, historically speaking, for the past decade or more in Ontario it has been difficult to obtain approval for transfers between DB pension plans subject to a trust, as the treatment of surplus under such plans has been the centre of complex and high-profile litigation, with the most prominent and complicated being the 2004 Ontario Court of Appeal decision in *Aegon Canada Inc. and Transamerica Life Canada vs. ING Canada Inc.* (the "Transamerica" decision).[1]

By removing the myriad complications arising from the *Transamerica* decision and its successor cases, and by providing plan administrators with the ability to alter the plan benefits, provided their value is preserved, the new rules will make asset transfers a much more viable option in many circumstances. The *PBA* and Draft Regulation will mean that, post-transfer, members will have no further claim against the original plan; the transferred assets will cease to be identified as assets of the original plan; and the successor plan will be deemed to be a continuation of the original plan. This clarity and certainty is to be welcomed.

On a cautionary note, let us point out that while the new provisions establish a process in which the Superintendent will not consider trust issues, it should kept in mind that the *PBA* and Draft Regulation do not directly override member or employer rights and obligations that may be created by trust terms. Moreover, given the litigious history of trust-related transfers in Ontario, it would be exceedingly optimistic to expect the new provisions of the *PBA* and the Draft Regulation will finally put to an end to all trust-related litigation connected to section 80 and 81 asset transfers. Accordingly, any guidance from FSCO in this area would be welcome.

[1] The Draft Regulation promises to provide a welcome level of certainty to all stakeholders for asset transfers and mergers involving a plan which subject to a trust. Since the 2004 *Transamerica,* decision, plan administrators have had to conduct exhaustive compliance reviews and often bewildering compliance reviews with regard to the implications of *Transamerica* on their proposed transfers of assets. In December 2004, FSCO posted a notice setting out the circumstances in which the Superintendent would *not* be prevented from considering an application for transfer of assets as a result of *Transamerica*. That posting noted that "additional circumstances where the Superintendent would consider the benefits of members to be protected may be identified in future web postings or policies." Since then, the jurisprudence in Ontario on when FSCO can consent to asset transfer applications, and on the requirement to consider trust issues in relation to asset transfers, has become increasingly byzantine. It is hoped that the new Draft Regulation will permit FSCO to issue more straightforward and definitive guidance in this area.

(6). Looking ahead: section 13 and asset transfers from SEPPs to JSPPs/MEPPs
The Ontario Ministry of Finance's summary of the Draft Regulation states that the new rules do not constitute the government's response to the 2013 Budget's commitment to introducing provisions which will permit assets to be transferred from single employer pension plans (SEPPs) to jointly sponsored pension plans (JSPPs) or multi-employer pension plan (MEPPs).

Since the Ontario government has made numerous statements about the various legal, administrative and operational characteristics of JSPPs and MEPPs, including such distinct features such as joint governance structures and the ability to opt out of providing grow-in benefits to members, we assume as a matter of policy that the government does not want the Draft Regulation to be applicable to asset transfers related to either MEPPs or JSPPs. Indeed, the asset transfer provisions of the Draft Regulation do not account for the uniqueness of such plans—to allow them to apply to JSPPs and MEPPs would be clearly harmful to the best interests of their members.

In regard to preventing the possibility of SEPP/JSPP/MEPP-related asset transfers occurring under the Draft Regulation, section 13 should be reconsidered. It reads as follows:

> RESTRICTIONS ON TRANSFERS
> <u>Restriction re reduction in accrued benefits</u>
>
> s. 13. A transfer of assets under section 80 or 81 of the Act with respect to defined benefits is not authorized if the successor pension plan is permitted, under the Act or under the terms of the pension plan, to reduce accrued pension benefits or accrued ancillary benefits in circumstances in which the original pension plan would not be permitted to reduce them.

We are satisfied that this wording would prevent asset transfers from SEPPs to MEEPs or JSPPs. However, as we read section 13, nothing in it, nor in the remainder of the Draft Regulation and the *PBA*, explicitly prevents the transfer of assets from a JSPP or a MEPP to another JSPP or MEPP or a SEPP. While the Superintendent may seek to deny approval to such a proposed transfer, a simple amendment to the draft text would dispose of all such proposed asset transfers before the fact, ensure full protection of members of MEPPs and JSPPs, and leave the field of reform clear until the time that the government fulfills its 2013 Budget commitment.

(7). Is the intent of *Bill 236* and the *Arthurs Report* undermined by the Draft Regulation?
The Draft Regulation, when read as a whole effectively—and perhaps unintentionally—removes a degree of flexibility contemplated by *Bill 236*. This is most apparent in two areas: the obligatory consent required of the Superintendent, and the Superintendent's

powers of waiver—specifically, the flexibility contained in the new sections 80(13)(3) and 81(6)(1) of the *PBA,* which will be proclaimed once the Draft Regulation is in force.

(i) "The Superintendent shall consent"

The relevant portions of section 80 to be proclaimed under the Draft Regulation read as follows:

> Transfers upon the sale of a business
>
> Statutory criteria for Superintendent's consent
>
> 80 (13) The Superintendent shall consent to the transfer of assets in accordance with the application and in accordance with the employers' agreement if all of the following criteria, and such other criteria as may be prescribed, are satisfied:
>
> 1. The original employer and the successor employer must have entered into an agreement to transfer the assets, and the applicant must give the Superintendent notice of their agreement.
>
> 2. If the agreement requires the consent of the transferred members, former members and retired members of the original pension plan, their consent must have been given for the transfer, and the applicant must give the Superintendent notice of their consent.
>
> 3. *The administrators of the two pension plans must have agreed upon the manner of determining the amount of the assets to be transferred, and the applicant must give the Superintendent notice of their agreement.*(emphasis added)

The section 81 provision to be proclaimed under the Draft Regulation reads as follows:

> Adoption of new pension plan
>
> Statutory criteria for Superintendent's consent
>
> 81 (6) The Superintendent shall consent to the transfer of assets in accordance with the application if all of the following criteria, and such other criteria as may be prescribed, are satisfied:
>
> 1. *The administrators of the two pension plans must have agreed upon the manner of determining the amount of assets to be transferred, and the applicant must give the Superintendent notice of their agreement*. (emphasis added)

The two sections clearly provide for the pension plan administrators to reach a section 80- or 81-based agreement between themselves as to the best manner of arriving at the amount of assets to be transferred. But these explicit provisions of the *PBA* are seemingly contradicted by the Draft Regulation, which will apparently prevent the automatic granting of consent from the Superintendent if the plan administrators are unable to fulfill even relatively technical provisions, such as notice requirements under sections, 3, 5 and 16 of the Draft Regulation.

(ii) "The Superintendent may waive"

Equally troubling is the fact that, when strictly construed, the Draft Regulation may not enable the Superintendent to waive certain conditions—yet these powers are clearly conferred by, for example, sections 80(15) and 81(7) of the *PBA*. The specific grants to the Superintendent of powers of waiver for section 80 or 81 asset transfers read as follows:

> Waiver of conditions
> 80 (15) The Superintendent may waive one or more of the conditions referred to in subsections 79.2 (5) and (6) in the prescribed circumstances. 2010, c. 9, s. 68.
>
> Waiver of conditions
> 81 (7) The Superintendent may waive one or more of the conditions referred to in subsections 79.2 (5) and (6) in the prescribed circumstances. 2010, c. 9, s. 70 (4).

Section 79.2 (5)–(6), in turn, deal with the funding requirements for all asset transfers in defined benefit and defined contribution plans pursuant to sections 80 and 81:

> Conditions re funding
> 79.2 (5) Every transfer of assets must satisfy such funding requirements as may be prescribed. 2010, c. 9, s. 66 (1).
>
> Same
> 79.2 (6) If either pension plan has going concern unfunded liabilities or solvency deficiencies determined as of the effective date of the transfer, the transfer of assets must satisfy such additional requirements as may be prescribed. 2010, c. 9, s. 66 (1).

So the Superintendent is meant to be able to waive the rules related to funding requests, and in specific going concern unfunded liabilities and solvency deficiencies.

But the flexibility underpinning these and other reforming portions of the *PBA*'s governance of section 80 and 81 asset transfers is, seemingly, ether cancelled or cast into serious doubt by the Draft Regulation's specific requirements regarding:

- deadlines and notice periods in sections 3, 5, 6 and 16;
- solvency funding and calculations in sections 9 and 10,
- the mandated creation of additional special reports in section 12; and
- the treatment of accrued benefits in sections 13 and 14

The conclusion we wish to make here is that *Bill 236* and the as-yet unproclaimed sections of the *PBA* originally intended a higher degree of flexibility than we see at work in portions of the Draft Regulations. As we read it, the Draft Regulation employs a strong prescriptive approach and in doing so undoes the flexibility originally intended by the legislature in *Bill 236*'s changes to the *PBA*, particularly in sections 80(13)3 and 81(6)1, which indicate that plan administrators are meant to wield significant discretion regarding the amount of assets to be transferred).

More generally, the Draft Regulation fails to effect many of the recommendations in the *Arthurs Report*. Perhaps most notable is the

> Recommendation 9-2—Pension policy and legislation ought to facilitate the growth and operation of large-scale pension plans or to enable and encourage cooperation among small- and medium-sized plans.

We do not see how the Draft Regulation fosters the growth and operation of large-scale pension plans or cooperation among small- and medium-sized plans.

We are of the position that any erosion of the spirit of flexibility and principles-based regulation which stands behind the amended sections of the *PBA*, of *Bill 236*, and of the numerous expert reports prepared by various parties in Ontario over last decade represents a lost opportunity for effective regulation and, in certain cases, prejudice to the long-term interests of plan members and employers. This lost opportunity brings us to our one major criticism and suggestion for reform regarding the *PBA* and the Draft Regulation.

(8). Background to possible reform and a proposal for arm's-length DC-to-DC asset transfers

(i). <u>The policy of pension reform in Ontario</u>

The review immediately above regarding the failure to robustly adopt the principles behind *Bill 236*'s proposed *PBA* sections and to instead introduce in the Draft Regulation more prescriptive and even rigid rules brings us to our major criticism of the new regime.

The majority of reforms outlined in *Bill 236* and *Bill 120, Securing Pension Benefits Now and for the Future Act*, (S.O. 2010 C.24), derive from the October 31, 2008 report entitled *A Fine Balance*, *The Report of the Ontario Expert Commission on Pensions* (the "*Arthurs Report*"). The report contained 142 recommendations for pension reform, and the Ontario government claims to have implemented with the passage of the two bills—or will implement upon proclamation—roughly two-thirds of these recommendations.

Since the *Arthurs Report*, as one recent pension expert has noted, "Ontario pension standards have been updated multiple times—but the most significant issues now lie ahead… Without action to address these issues, the whole reform process will fall short of its goals and leave Ontarians with major flaws in their pension system."[2]

There is no doubt that the *PBA* and the Draft Regulation represent a new regime which is much simpler than the old set of rules; however, the Draft Regulation does seem at odds with the rather wide powers of waiver given to the Superintendent under several unproclaimed sections of the *PBA*.

It will be recalled that the general tenor of the Ontario Expert Commission on Pensions, as chaired by Harry Arthurs, was for a less prescriptive and more principle-based approach to pension reform in Ontario. Yet in many respects, and in contrast to the *PBA*, and especially to the still unproclaimed sections which the Draft Regulation is meant to give life to, the asset transfer rules in the Draft Regulation are highly prescriptive, with rigid dates and precise solvency tests which will bind the original and successor plan administrators and employers and—despite the intent of new sections 80(13)(3) and 81(6)(1) of the *PBA*—automatically trump any agreement arrived at by the parties. In essence, then, we conclude that as a whole the Draft Regulation does not properly reflect the deeper policy which underpinned the recommendations of Harry Arthur's Ontario Expert Commission on Pensions.[3]

It is not that any one section of the Draft regulation is badly written, or cannot be justified from a public policy standpoint; in fact, the Draft Regulation on the whole is very well done. Rather, our concern is that many of its provisions are prescriptively rule-based—yet those same provisions are meant to animate the principles-based provisions of the PBA set out in Bill 236—provisions the legislature passed as part of its intention to fulfill the Ontario Expert Commission's specific recommendations on asset transfers.

By expanding in regulation the minutiae entailed in the necessary steps set out in specific sections of the *PBA*, by amplifying or fleshing out every feature and dimension of report generation and notice provision possible in pension asset transfers, the overall result of the Draft Regulation (when read as a whole and in conjunction with the *PBA*) is that the general spirit of pragmatic flexibility has been compromised—and unduly so, in our opinion.

Accordingly, before we move on to the technical review of the Draft Regulation in Parts II and II of this submission, we offer the following background to and justification of a reform proposal regarding arm's-length companies conducting DC-to-DC asset transfers.

[2] C.D. Howe Institute, "Ontario Needs to Gear Up for Major Pension Reform Challenges," August 28, 2013.
[3] H.W. Arthurs*, A Fine Balance, The Report of the Ontario Expert Commission on Pensions*, October 31, 2008.

(ii). The impact of delayed asset transfers

The *Arthurs Report* was unstinting in its criticism of the impact of delayed asset transfers upon sales or mergers:

> Over the last five years the median times required by … FSCO to complete processing of restructuring-related transactions were: 231 days for wind-ups, 481 days for partial wind-ups, 928 days for mergers and 1,165 days for asset transfers. Such delays are unacceptable. They interfere with corporate transactions necessary for the transformation of Ontario's economy. They prejudice the interests of employers, active members and retirees. They consume FSCO's resources and divert its energies from other regulatory tasks. And—given that it takes four times as long to merge plans, and five times as long to transfer assets as it does to wind them up—these delays provide corporate deal-makers with a plausible rationale for simply terminating plans altogether.[4]

In terms of asset transfers upon a sale or merger, the *Arthurs Report* was unambiguous in its call for the regulator to facilitate them:

> When a sponsor sells or divests part of a business and the purchaser hires some of the employees and wishes to maintain continuity in their pension coverage, a pension plan may be split. When a sponsor buys another business and wishes to integrate its pension plan with that of the new business, the two plans may be merged. And when a sponsor sells or buys a part of a business and wishes to arrange that pension assets should follow the active plan members who migrate from one of those businesses to the other, the sponsor may arrange for an asset transfer between the two plans. *It is important to facilitate these transactions so long as they are* bona fide *attempts to maintain a plan and continue benefit security.* Doing so will help to maintain a favourable environment for DB plans . . . one of the principles informing this report.[5]

(iii). Principles-based regulation

What we propose represents a blending of rules and principles, so that DC-to-DC plans between arm's length parties will be granted automatic approval from the Superintendent on an expedited basis. We believe that such an approach—limited to these cases—would be justified under recourse to a strong version of principles-based regulation, as discussed in the *Arthurs Report*. Moreover, the blending of both a rules-based approach and a principles-based one was clearly endorsed by the *Arthurs Report* in the following recommendation:

> Recommendation 7-3 — Revisions to the *Pension Benefits Act* should be drafted to provide both rules-based and principles-based approaches, as appropriate. In

[4] *Ibid.*, pp. 88-89.
[5] *Ibid.*, p. 103.

> particular, minimum standards with respect to benefits should generally be rules-based; some aspects of investment, plan governance and innovation are more appropriately regulated by a principles-based approach; and funding requirements should likely involve a mixture of the two.[6]

As the *Arthurs Report* characterized it, principles-based regulation

> typically involves the articulation of standards at a fairly high level of generality or abstraction. For example, the fiduciary duty imposed on administrators of pension plans to "exercise the care, due diligence and skill in the administration and investment of a pension fund that a person of ordinary prudence would in dealing with the property of another person" is an example of such a principle. This approach to the framing of regulatory norms requires regulators to focus on the quality of outcomes rather than on compliance with specific procedural requirements. And it requires sponsors, service providers and plan administrators to accept greater responsibility for the substantive judgments they make concerning compliance with the law. Proponents of a principles-based approach argue that open-textured statutory language can better deal with the changing circumstances mentioned in the introduction to this chapter, and can promote an approach by all actors that contributes to the overall health of the regulated field.[7]

In making its recommendation for the use of a principles-based approach, the *Arthurs Report* noted that "[w]hatever balance is struck, it should be one that facilitates a guiding principle of this report: that of open, fair, effective and adaptable regulation" and that the precise balance struck between rules and principles will heavily influence the optimal design, powers and staffing requirements of the pension regulator."[8]

(iv). <u>Arm's length DC-to-DC plan asset transfers</u>

We would submit that the regulator can optimize the allocation of its staff, funds, and other resources to more pressing areas of pension regulation by implementing our proposal for DC to DC plans for whose employers are arm's-length companies.

> The powers should relate only to transactions between non-arm's-length corporations, which are particularly vulnerable to attempts to isolate the pension plan from corporate assets, and should be carefully designed so as to interfere as little as possible with what have been, up to now, matters wholly within the sponsor's discretion.[9]

The *Arthurs Report* commented on the need to regulate non-arm's length companies which are transferring assets, arguing correctly that the regulator should be positioned to prevent and detect an intentional compromise to the financial advantage of the

[6] *Ibid.*, p. 130.
[7] *Ibid.*, p. 129.
[8] *Ibid.*
[9] *Ibid.*, p. 109.

sponsor or the members of its corporate family of the security of a pension plan in the course of a sale or merger:

> 5.4. Pension transactions involving closely related corporate entities Some stakeholders have expressed concerns that corporate transactions resulting in the reconfiguration of pension plans and the use of plan assets may be motivated by a desire to siphon off plan assets. *Such concerns are no doubt heightened when the corporations involved are closely-related-subsidiaries of a common parent company, for example—or corporations that own each others' shares or have common directors or management personnel. And they are heightened still more when those corporate entities do not enjoy comparable financial health.* (emphasis added)[10]

However, the report also noted that

> Corporations have many legitimate reasons for carrying on their business through a number of different entities, and for coordinating the activities of these entities through a web of common shareholdings, directors and managers. Indeed, this is a commonplace corporate strategy in Ontario and other advanced economies. If public policy is to accept and support the transactions that execute this strategy, however, it is important that public confidence in the integrity of the transactions be maintained.[11]

This is the theoretical and practical backdrop against which we propose the following revision for asset transfers.

(v). Advocis' recommendation

The foregoing subsections have set out the concerns of delayed asset transfers, the efficacy of principles-based regulation, the comparatively low regulatory concerns associated with arm's-length companies reaching agreement on a DC-to-DC plan asset transfer, and the relatively straightforward execution by the parties of such transfer agreements. Given all of this, we would submit that allowing such asset transfers to be given automatic approval without their having to wind their way through the full approvals process before receiving the consent of the Superintendent.

> **Advocis' Recommendation—Creation of an Exemption to ss. 80-81 of the *Pensions and Benefits Act* (Ontario)**—Section 80 or 81 asset transfers, which (1) are between arm's length entities, (2) are purely of a DC-plan-to-DC-plan character, and (3) whose assets are not subjected to a trust, should be exempted the requirement to seek Superintendent's consent. In the event of apparent fraud or other malfeasance (such as an action or omission by a party to the agreement

[10] *Ibid.*, p. 108.
[11] *Ibid.*, p. 109.

which has impaired the fund's solvency), then a party to the impugned transaction could make an application to the Superintendent to request a review of the effects of the asset transfer in order to ensure that neither the original nor the successor plan's financial prospects have been compromised by the use of this exemption. For this exemption, the regulator's powers should be exercised in accordance with specified criteria, and should include the power to (a) require a plan to be brought up to its previous funding level, or 105% of full funding, whichever is the lesser, (b) require the previous sponsor to provide guarantees that the new sponsor will meet its obligations to the plan, and, in rare cases, (c) rescind the transaction. Under this exemption defined notice periods could be replaced by dates set by the plan administrators.

While on its face this proposal may appear to be radical, we believe that it is actually in line with the general shift to a principles-based approach envisioned by *Arthurs Report*. At the present time, Ontario has only acted on a handful of the Expert Commission's recommendations. This is regrettable. We believe as a matter of public policy that plan sponsors should be able to transfer assets between DC plans (i.e., between member accounts) without an asset transfer submission and the need for the approval of the Superintendent. Unlike DB asset transfers, the typical DC-plan-to-DC-plan transfer between arms-length employers is a straightforward transaction within which certain regulatory concerns regarding the splitting of assets may be dispensed. As a matter of practice, of in the field experience, are no issues for this type of transfer. Nor are there issues concerning the acceptance by a plan of a defined contribution asset transfer. Each member's account is, and will remain, separate and apart from each other member's account, before and after the transfer.

PART II. SPECIFIC COMMENTS ON THE DRAFT REGULATION

This part of the submission deals with the more technical aspects of the Draft Regulation, its schedules, and its interaction with the *PBA*.

A. APPLICATION AND INTERPRETATION OF THE NEW RULES

(9). Section 5 of the Draft Regulation: filing the application with the Superintendent for consent

Section 5(3) of the Draft Regulation deals with the consent application and reads as follows:

> Applying for Superintendent's consent to transfer of assets
> 5. (1) An application under subsection 80 (11) of the Act for the Superintendent's consent to a transfer of assets under section 80 of the Act must include the information required by Schedule 1.

> (2) An application under subsection 81 (5) of the Act for the Superintendent's consent to a transfer of assets under section 81 of the Act must include the information required by Schedule 2.
> (3) The application must be filed within 180 days after the effective date of the transfer.

We are concerned that the requirement that the section 80 application be filed with FSCO within 180 days of the effective date of transfer will present some applicants with a timeline that will prove difficult to meet. A corporate reorganization requiring the creation and registration of a new pension plan into which the assets at issue will be received is one such case where the 180-day period may prove too short. In order to lessen the impact of the 180-day window on the regulator, employers and plan members, we would suggest that the Superintendent be given a degree of flexibility to extend the time period in regard to certain prescribed cases, such as in the case described above. Such flexibility should be set out in an official policy document.

(10). Schedule 1 of the Draft Regulation: the meaning of "employer"

Schedule 1 of the Draft Regulation governs the filing of the employers' agreement and reads as follows:

> SCHEDULE 1 – APPLICATION FOR SUPERINTENDENT'S CONSENT TO TRANSFER UNDER SECTION 80 OF THE ACT
>
> DEFINED BENEFITS
> 1. (1) The following information must, under section 5 of this Regulation, be included in an application for the Superintendent's consent to a transfer of assets under section 80 of the Act with respect to defined benefits provided under the original pension plan:
>
> 1. The employers' agreement and any amendments to it.

It should be noted that "employer" is a defined term in the *PBA*, and its characteristic feature is that the employer is the person or organization from whom the member receives the benefit:

> "employer" means, in relation to a member, former member or retired member of a pension plan, the person or persons from whom or the organization from which the member, former member or retired member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning; ("employeur", "employé", "emploi").

Given this wording, it is immediately clear that there will be cases in which reference to an "employers' agreement" will be, strictly speaking, wrong. An example which comes readily to mind is the situation where two parent corporations agree to cause their subsidiary corporations (the "employers" in the *PBA* definition) to take certain steps toward a plan merger and pursuant asset transfer. In such a case, given that the employer (the linked party which supplies the benefit to the plan members) is not the party who has entered into the agreement contemplated in section 80.1(1)1, it would be inaccurate to describe that agreement as the "employers' agreement." Section 80 would be clearer if it simply referred to the "transfer agreement".

(11). Schedule 1 of the Draft Regulation: an application must include a report on the successor plan

Section 5 of Schedule 1 requires that a report concerning the successor plan be included in an application:

> 5. A report about the successor pension plan, prepared as of the effective date of the transfer of assets, containing the information that would be required in a report filed under section 14 of the General Regulation as well as the following information:
>
> > i. The portion of the going concern liabilities and the solvency liabilities that relate to the pension benefits and ancillary benefits for which the successor employer will assume responsibility after the proposed transfer.
> > ii. The amount of the going concern liabilities, going concern assets, solvency liabilities, solvency assets, solvency ratio and the transfer ratio of the successor pension plan before and after the proposed transfer.
> > iii. The amount of the required contributions to the successor pension plan before and after the proposed transfer.
> > iv. The amount of the assets to be transferred from the original pension plan to the successor pension plan.
>
> The report must be prepared by a person who would be authorized under section 15 of the General Regulation to prepare a report under section 14 of the General Regulation about the pension plan.

We would note that such a report will undoubtedly contain material information which the successor plan's administrator may not want shared with the applicant. Moreover, we query whether an applicant plan administrator should be obliged to prepare and fund the filing of such a detailed and comprehensive report on a pension plan with which it has no relationship, other than the proposed sale. The possible costs associated with the discovery of information and its interpretation suggest to us that the applicant is not the proper party to prepare the report. Accordingly, we would suggest that the section be amended to require the successor plan's administrator to prepare and file the report.

More generally, in terms of reports mandated by the asset transfer process and the Draft Regulation, we understand that the process under the *PBA* requires a copy of the purchase agreement (with any amendments thereto), certified copies of notices to the union and to transferred members, and an actuarial report. But the Draft Regulation also asks for two additional reports (one for the original plan and one for the successor plan), separate notices (in most cases) from both the original and successor plans to trade unions and advisory committees, to transferred members, and to former or retired members and other beneficiaries, and, finally, statements from both the original plan's and the successor plan's administrators, plus all amendments to the original and successor plans. We would submit that the spirit of the *Arthurs* Report is getting lost in the amount of mandated paperwork, and would ask the Ministry to consider ways to reduce it.

(12). Section 8 of the Draft Regulation and the application of Part II

We note that section 8 is not drafted to take into account the possibility of blended plans having both DB and DC components being involved in a merger or sale. Accordingly, we suggest that section 8 be amended to accommodate the presence of pension plans that have both DB and DC components and to make explicit that Part II of the Draft Regulation applies *only* to the DB component.

> TRANSFER OF DEFINED BENEFITS—APPLICATION
> <u>Application of Part</u>
> 8. This Part applies with respect to a transfer of assets under section 80 or 81 of the Act if both the original pension plan and the successor pension plan provide defined benefits and if the transfer of assets is in respect of defined benefits.

We offer the following text by way of revision:

> 8. This Part applies with respect to a transfer of assets under section 80 or 81 of the Act if both the original pension plan and the successor pension plan provide defined benefits and if the transfer of assets is in respect of defined benefits. This Part also applies with respect to a transfer of assets under section 80 or 81 of the Act if both the original pension plan and the successor pension plan provide both defined benefits and defined contributions and the transfer of assets is in respect of defined benefits only.

(13). Discharge under the Draft Regulation and the *Pensions and Benefits Act*

We raise the issue of discharge as it relates to a transfer of assets after reviewing the interaction of the *PBA* and the Draft Regulation.

Consider, for example, a sale-of-the-business transaction under section 80 of the *PBA*. At issue are defined benefits provided under an original pension plan where the employers' agreement provides for the consent of any transferred member, former member, retired member or any other person to the transfer of assets in respect of his or her pension benefits and ancillary benefits. Suppose the plan administrator will have the option to make the asset transfer subject to individual plan members' consent. In cases where this option is exercised, the notice to plan members must provide the information they will need to properly compare and evaluate their choices. When the asset transfer is made with individual member's consent, and the prescribed requirements are met, the original plan's plan administrator is now specifically entitled to a discharge on completion of the asset transfer.

Upon reviewing the totality of the *PBA* and the Draft Regulation, we are uncertain if this discharge entitlement is meant to represent anything beyond the general provision that after an asset transfer, the plan's members have no further claim against the original plan. Accordingly, we would ask for clarification on this point.

(14). Effective date, proclamation of the new rules, and pending applications

After the Draft Regulation is finalized, the amendments to sections 80 and 81 can be proclaimed into force. The Draft Regulation clearly defines the effective date of an asset transfer as the date of sale or the effective date of the original plan/successor plan amendments, as applicable. In terms of its scope of application, the Draft Regulation merely states that it applies to every transfer of assets under sections 80 and 81. Unfortunately, the Draft Regulation and related documentation published on the FSCO Website do not contain a specific calendar date upon which the amended *PBA* and Draft Regulation will come into force. This drafting opens the long-anticipated introduction of the new rules to a further—and unneeded—degree of uncertainty. If the Ontario Ministry of Finance follows the process used for other recent *PBA* amendments, it is safe to say that the effective date will be no earlier than January 1, 2014 and very likely not until July 1, 2014. Given the high number of asset transfer applications now on hold pending the introduction of the new rules, we would urge the Ministry to proceed with all haste.

(15). Sections 3 and 4: effective date of transfer under sections 80 and 81of the *Pensions and Benefits Act*

Section 3 of the Draft Regulation deals with the effective date of transfer under section 80 of the *Pensions and Benefits Act.* It defines the effective date of transfer as follows:

> <u>Effective date of transfer under s. 80 of the Act</u>
> 3. The effective date of a transfer of assets under section 80 of the Act from the original pension plan to the successor pension plan is the effective date of the sale, assignment or disposition of all or part of the original employer's business or all or part of the assets of the business to the successor employer.

We would note that the wording may be interpreted to mean that section 80 asset transfers crystallize over a short and discrete period of time. Practical experience tells us that this is often not the case. It is quite common for an asset transfer to occur over a significant period of time, especially when the presence of unionized employees necessitates striking an agreement with their union to permit a post-sale transfer of employees. Accordingly, the wording of section 3 needs to be expanded to accommodate cases where there may be a series of steps which effectively mean there is no *single* effective date—i.e., cases involving union transfers or outsourced employees and the like. Not to do so may dissuade employers from applying for transfers which may be beneficial to plan members.

Given the operational reality that there can be more than just one single effective date for a transaction if the employer's corporate reorganization has multiple phases, this ambiguity we are concerned about here will spill over to other sections, creating more uncertainty for parties trying to follow the rules. For example, other sections of the Draft Regulation mandate that specific timelines—based on the effective date—must be followed: Section 5(3) requires the application be filed within 180 days after the effective date of the transfer; further, section 17(2) requires notice be given within 90 days after the effective date of the transfer.

In light of the ambiguity in other sections of the Draft Regulation surrounding the treatment under the new rules of applications already in process, it would be helpful for the government to make it explicit one way or the other if section 80 and 81 transfers currently under review are meant to be processed under the new rules. If so, then transitional provisions should be incorporated into sections 80 and 81 to provide greater clarity around the issue of the effective date.

> Effective date of transfer under s. 81 of the Act
> 4. The effective date of a transfer of assets under section 81 of the Act from the original pension plan to the successor pension plan is the effective date of the amendment to the original pension plan or the successor pension plan, as the case may be, that relates to the transfer.

Similarly, section 4 of the Draft Regulation defines the effective date of a section 81 transfer as the effective date of the plan amendment relating to the transfer. Again, our concern is the inherent ambiguity in the wording and the lack of direction (at the time of writing) from the Ministry on the possible retroactivity of this provision on applicants who currently have a section 81 asset transfer underway.

If the intention is to have a fully retroactive application, then provisions will be needed to set out how an existing section 81 application will be transitioned from the old system to the new regime as reflected in the Draft Regulation. We ask that the Ministry of Finance provide clarity to plan administrators in this regard.

(16). Sections 1, 3 and 4: transition to the new rules, and liquidity concerns

Again, it is not clear to us that, upon proclamation, the Draft Regulation and amended *PBA* will apply to asset transfer applications already under consideration by FSCO. Since neither the *PBA* nor the Draft Regulation *exclude* the possibility of the effective date being antecedent to the coming into force of the new regime, one *can* conclude that the new rules will apply to old transactions, including those for which an application has already been made under the old rules.

Although it may be safe to assume that the Draft Regulation only applies to asset transfers between pension plans reached between plan employers after the new rules take effect, we would again emphasize the desirability of the drafting of explicit transition provisions. In addition, specific guidance from the Ministry should be forthcoming to assist with asset transfer agreements which are now filed and are currently awaiting approval, and for asset transfer agreements which are now executed but whose plan administrators have not yet filed their applications. At a minimum, we would suggest that plan administrators be given the option to elect to proceed under the new regime. We would ask that the Ministry provide clarity as soon as possible on how pending applications for approval will be affected upon proclamation of the new amendments.

In addition, we are concerned that the proposed deadline for transferring the assets may prove too rigid in cases where the assets to be transferred are relatively illiquid. Any official guidance regarding asset illiquidity would be welcome.

(17). Section 7: commuted benefits

Section 7(2) of the Draft Regulation deals with the criterion to be use regarding the commuted value of a member's benefits. It reads as follows:

> Criterion re commuted value of benefits
>
> 7. (2) The commuted value of a transferred member's benefits must be determined as if his or her employment had terminated on the effective date of the transfer of assets under section 80 or 81 of the Act and as if an activating event described in subsection 74 (1) of the Act had occurred on that date.

On our reading of section 7(2), if the member's employment is deemed continuous under Section 80 of the *PBA*, then it would seem that grow-in benefits will be included in the calculation of the commuted value of a transferred member's benefit under the Draft Regulation.

But under the *PBA* grow-in benefits are contingent upon a specific event: they are required only when the employer terminates the member's employment. Under the Draft Regulation, as we read it, the post-transfer inclusion of grow-in benefits in the calculation of the commuted value of a member's benefits will inappropriately amplify the value reported on that member's account statement. The problem is this: by fostering the expectation, however erroneous, that the member is entitled to these benefits, the member is now exposed to unnecessary risk when it comes to his or her overall retirement planning.

Accordingly, we submit that the value of grow-in benefits does not belong in the determination of a transferring member's commuted value.

B. TRANSFER OF DEFINED CONTRIBUTION BENEFITS

(18). Section 9: amount of assets to be transferred and funding requirements

The new section 9 of the Draft Regulation makes provision for the calculation of the amount of assets to be transferred under section 80 or 81 of the *PBA*. It reads as follows:

> FUNDING REQUIREMENTS
> Amount of assets to be transferred
> 9. (1) The amount of assets to be transferred under section 80 or 81 of the Act from the original pension plan to the successor pension plan with respect to defined benefits is the sum of the following amounts:
> 1. The amount calculated as of the effective date of the transfer using the formula,
> $(A \times B/C) - D$ in which,
> “A” is the sum of the total amount of the solvency assets of the original pension plan and the total amount of all letters of credit held in trust under section 55.2 of the Act for the original pension plan,
> “B” is the total amount of the solvency liabilities to be transferred from the original pension plan to the successor pension plan,
> “C” is the total amount of the solvency liabilities of the original pension plan before the transfer of assets,
> and “D” is the total amount to be paid into prescribed retirement savings arrangements under subsection 79.2 (8) of the Act and paid to individuals under subsection 79.2 (9) of the Act.
> 2. The amount calculated using the formula, $E \times B/C$ in which,
> “B” has the same meaning as in paragraph 1,
> “C” has the same meaning as in paragraph 1, and
> “E” is the amount of special payments made into the original pension plan from the effective date of the transfer of assets to the date on which the transfer is made.

In our construction, section 9, when read in conjunction with the *PBA*, mandates that a *proportional* amount of surplus be transferred from the original plan to the successor plan. Some stakeholders will take the position that the draft text, by requiring that any surplus be transferred to a successor plan, at least beyond a “cushion” or “buffer” amount, is therefore prejudicial to both the original plan’s members and the transferring plan’s members. After all, their benefit entitlements will be harmed since the surplus amount will be immediately diluted upon transfer the successor plan. The result is that opponents of section 9 can claim, with a degree of plausibility, a violation of the public policy goal that the regulator should seek to preserve the funding of the benefit entitlements of transferring members.

Accordingly, we would suggest that the Ministry or regulator release guidance on the advantages and disadvantages of including a full proportion of surplus in the transfer as against a lower buffer level of surplus, one sufficient to allow full funding of the transferring benefits upon transfer to the successor plan. In this latter case, the entitlement to surplus in the original plan held by the transferred members would continue post-transfer and remain governed by the *PBA*'s surplus-sharing rules. As well, requiring the full proportion of the surplus be included in the transfer value may deter employers from executing asset transfers, even in cases where plan members will benefit from the consolidation of their pension benefits.

Along with guidance by way of an official policy statement, we would suggest that the plan administrators be allowed to follow the section 9 and receive immediate *pro forma* consent, and also have the option of reaching agreement on a lower, buffer-level of surplus, in which case a more detailed review by the Superintendent, as under the old rules, could be conducted.

Finally, we would submit that it would be helpful to include a provision for making adjustments for the return of funds and benefit payments made after the effective date of transfer. Indeed, it should prove useful in terms of expediency of administration to mandate that the asset transfer amount allow for adjustments regarding certain variables, such as returns on investment, allocation of expenses, and payment of benefits which occur between the effective date of the asset transfer and its actual date of transfer.

However, it should also be noted that, in terms of assets transfers which involve assets subjected to a trust, the flexibility of section 9 should prove helpful: in the event a transferring plan has been subject to a trust, section 9 of the Draft Regulation provides a formula to calculate the amount of assets to be transferred which is in part dependent on the transferring plan's solvency ratio. We are pleased to note that the formula requires a proportional share of any surplus related to liabilities being transferred will also have to be transferred. Certain pension experts may judge this mandatory proportional share as an issue of inflexibility to be avoided; we would disagree: the proposed formula should obviate the need for expensive and time-consuming—and quite possibly contentious—analyses of the plan's trust provisions. Surely this is development plan members and administrators alike will see as laudable.

(19). Sections 9 to 12: the new funding requirements and solvency issues

We have a series of minor comments on what is a technically complex area, given that the Draft Regulation, the *PBA*, established accounting and reporting principles are all at play here.

(i). <u>Sections 79 to 81 of the Pensions and Benefits Act: waiver of funding requirements</u>

First, it would be preferable to have a complete set of provisions governing the Superintendent's ability to waive of funding rules. At present, it appears to us that the list of provisions is incomplete. As noted above, the *PBA* provides that the

Superintendent can waive funding requirements in prescribed circumstances. We note that the Draft Regulation does not include a provision for what constitutes the prescribed circumstances, nor a list which enumerates them; therefore, as presently drafted, the totality of the pension legislation, strictly construed, would seem not to allow for a funding requirements waiver. We would like to know if this is a deliberate policy direction or merely lacunae in the drafting which is to be rectified at a later date.

(ii). <u>Sections 9 to 12 of the Draft Regulation: flexible benefit security and solvency requirements</u>

As noted above, we are pleased to note that the solvency tests in the Draft Regulation appear to be more flexible than those in FSCO's current asset transfer policies. This should amplify the ability of plans to execute asset transfers without requiring the contribution of additional amounts of capital to plans; in turn, more Ontarians will be able to enjoy the various advantages afforded by plan consolidation. The new tests also offer employers a much-needed degree of latitude to accomplish asset transfers without the automatic triggering—in cases where it is not needed—of the requirement to contribute additional amounts to the plans. The benefit security for members in both the original and successor plans is protected by ensuring that the original plan will not be less funded on a solvency basis after the transfer than it was before the transfer, and by restricting the extent to which the funded status of a successor plan can be affected by an asset transfer.

It would appear to us to be reasonable to expect the funding rules to protect benefit security, and the ability to merge plans with a 0.05 per cent change in solvency ratio adds a modest level of flexibility. Whether the prescribed level of change provides an appropriate balance of adequate protection and flexibility should be considered by stakeholders with the requisite expertise in such matters during the consultation period. In this regard we would submit that any overly-prescriptive or rigid solvency-based approach for determining the amount of assets to be transferred—or any rigid approach to the funded status requirements—will not prove satisfactory for plans which have existing solvency exemptions.

(iii). <u>Sections 9 to 12 of the Draft Regulation: solvency tests and Letters of Credit</u>

Finally, the definition of "solvency ratio" and new solvency tests do not indicate how Letters of Credit will be factored into as asset transfer. If the new rules mean that Letters of Credit cannot be transferred and must stay with the original plan, then provision must be made for that outcome. Otherwise, an original plan which relies on a Letter of Credit in its solvency funding will likely find its solvency ratio skewed and consequently unable to execute the asset transfer. Clarity in this area—perhaps in the form of a solvency provision which resolves the Letters of Credit issue—wwould be welcome.

(20). Section 14: restrictions of transfers and solvency tests

We have several additional minor concerns regarding the solvency provisions. Our first concern relates to section 14 of the Draft Regulation:

> Requirement re accrued pension benefits
>
> 14. For a transfer of assets under section 81 of the Act with respect to defined benefits, the amount of a transferred member's accrued pension benefits under the successor pension plan (calculated without taking into account ancillary benefits) must equal at least 85 per cent of the amount of his or her accrued pension benefits under the original pension plan (calculated without taking into account ancillary benefits) as of the effective date of the transfer.

We would ask for an explanation for the imposition of the additional funding test on section 81 transfers in the Draft Regulation. This test mandates that the transfer amount of a member's benefit be equal to at least 85 per cent of the amount of accrued pension benefits under the original plan. Under section 80 transfers, the protection of benefits is determined to be the preservation of 100 per cent of the commuted value, it would seem that the same should hold true for section 81 plan mergers. We note that the alternate test which requires 100 per cent solvency in the successor plan for same-employer mergers seems at odds with the requirement for 85 per cent solvency in the sale-of-business mergers This strikes us as inequitable toward same-employer members and we would suggest that the level of solvency protection should be the same for all affected plan members.

Moreover, as we read the totality of the Draft Regulation and the *PBA*, we understand this is in fact a second or additional test, which make the introduction of it all the more puzzling. The *extra* 85 per cent test required by the Draft Regulation is perplexing; from a public policy perspective, it seems to indicate that section 81 plan mergers are less desirable than section 80 asset transfers.

From a practical point of view, with regard to the welfare of plan members, this is additional test is highly problematic, as a plan merger can and often does produce a single better funded single plan. Given the apparent inequity of the current wording of the Draft Regulation, and in the absence of a compelling public policy justification for the disparity in treatment, we submit that this additional funding requirement be removed.

(21). Section 15: restrictions of transfers and the calculation of years of service

Section 15 of the Draft Regulation, which is intended to govern the calculation of credited years of service post-transfer, reads as follows

> Requirement re purchasing service

> 15. (1) This section applies if, after the transfer of assets under section 80 or 81 of the Act with respect to defined benefits, a transferred member will be credited with fewer years of service under the successor pension plan than he or she has under the original pension plan.
>
> (2) Within a reasonable period after the Superintendent consents to the transfer of assets under section 80 or 81 of the Act, the administrator of the successor pension plan must give transferred members the option to purchase additional service in the successor pension plan.

While we welcome the flexibility afforded by section 15, we realize that many stakeholders will judge as misguided the new requirement that plan members may be credited with less service in the successor plan than they were credited with in the original plan. Strict proponents of the principle of preserving and protecting the value of a member's benefits will object to the new rules effectively imposing a buy-back requirement on the successor plan. While common enough in public sector plans, many private sector employers and plans will be unfamiliar with the implementation of a service buy-back rule. As such, they may not fully realize that although a plan member may bear the front-end cost of the buyback provision, his or her successor employer will be assigned the cost for funding it for the duration of the member's employment.

Accordingly, we hope that all stakeholders will recognize that section 15 is a significant departure from the current asset transfer regime and we suggest that additional guidance on this new buy-back requirement should be forthcoming from the regulator. We fear that some private sector employers may simplistically see section 15 as a barrier to asset transfers. Such a view would be reductionist and detrimental to cases where a plan merger would amount to being a net benefit to plan members.

(22). Sections 5, 6, 17 and 18: notice of application to transferred members and others, content of notices and timeframes

The Draft Regulation means that an asset transfer must comply with detailed requirements for notice to members with the application for approval. In terms of their content, the new rules dictate that notices to members must contain information analogous to that provided them in their annual statements. The regulation now means that members will receive notice of an application for approval from the original plan administrator and from the successor plan administrator; as well, in certain circumstances, the notices may be combined. We would suggest it might prove more flexible to let the plan administrators themselves determine which party distributes which notices.

We are pleased to note that the Draft Regulation helpfully gathers together and codifies, from a series of earlier FSCO policies, many of the previously prescribed requirements for the provision of notice and the preservation of the individual's benefits. It is useful to have these requirements in one text. The Draft Regulation and its accompanying schedules include detailed notice requirements which clearly identify the information to be submitted with an asset transfer application in order to obtain the Superintendent's consent to the Draft Regulation. In addition, the Draft Regulation imposes clear time limits on when certain items of information have to be provided to plan beneficiaries or to the Superintendent both prior to and after the Superintendent has consented to the asset transfer. Typically, notice will have to be filed within specified deadlines to all affected members, former members, unions, as well as the Superintendent.

In the main, the requirements for notice to affected members are comprehensive and the detailed informational requirements should help facilitate the FSCO staff review of applications to the Superintendent. Indeed, we would characterize the asset transfer rules reflected in the Draft Regulation are highly prescriptive, especially with regard to the strict deadlines imposed on employers and plan administrators for the completion of various stages of an asset transfer.

However, of some concern to us are the timelines as to the application and notice to member requirements. In a fully staffed and properly funded system these strict timelines strike us as reasonable; however, given the exigencies of what happens "in the field," we wonder if the proposed timelines will prove workable in practice. We are concerned that the strict timelines proposed for the completion of key steps in the asset transfer rules will appear to employers and plan administrators as overly-prescriptive. Will such prescriptive rules dissuade smaller parties from making use of the rules? Such a consequence would certainly be at odds with the legislative spirit behind *Bill 236*.

Accordingly, we would ask for guidance on the consequences and possible remedial action available if a deadline is missed. While one can read the Draft Regulation as implying that the Superintendent will *not* approve an asset transfer application that involves a missed deadline, we would ask for official guidance on the consequences of a failure to comply with the deadline requirements in the application and approval process.

It seems absurd that plan members should suffer the consequences of a denied asset transfer application simply because of a missed deadline. The history of unintended delays in the application process is richly documented and we see no need to force employers and members to bear an additional administrative burden by requiring the application process begin all over from the start.

At issue in many delayed cases is the welfare of plan members, since many applications which entail an asset transfer or consolidation of benefits will serve to increase the value of the plan to members upon completion of the transaction. Accordingly, we query whether the Draft Regulation should explicitly give the Superintendent the power to extend these deadlines at its discretion so as to ensure an applicant is not denied approval for purely *pro forma* reasons due to inadvertent non-compliance with a deadline.

As support for this proposition, we point to section 17(5), which deals with the time periods for information updates on the original 90-day notices to trade unions representing members, former members and retired members and the relevant advisory committees:

> 17. (1) This section applies with respect to a transfer of assets under section 80 or 81 of the Act with respect to defined benefits provided under the original pension plan.
>
> * * *
>
> (5) After a notice required by subsection (4) [the original notice which must be provided within 90 days] is delivered to the trade union or advisory committee, if there is a substantial change in any information contained in the notice, the administrator must give an updated notice to the trade union or advisory committee within a reasonable time after the administrator becomes aware of the change.

Here the regulator is allowing a period of "reasonable time" to update for a "substantial change" in information. We would suggest that leaving the parties to determine the meaning of "reasonable time" and "substantial change" represents a commitment to flexibility which should be replicated in many of the other notice provisions.

(23). Schedules 6 and 7 of the Draft Regulation: notice to trade unions and privacy concerns

The Draft Regulation, in Schedules 6 and 7, deals with the rule to provide notice to trade unions and advisory committees, and the specific requirement to deliver a list of transferred members to the trade union or advisory committee. The relevant portions of Schedule 6 read as follows:

> SCHEDULE 6—STANDARD NOTICE TO TRADE UNIONS AND TO ADVISORY COMMITTEES FROM ORIGINAL PENSION PLAN
>
> <u>DEFINED BENEFITS</u>
> 1. The standard notice to be given under subsection 17 (4) of this Regulation by the administrator of the original pension plan to a trade union or to an advisory committee with respect to defined benefits under the original pension plan must contain the following information:
>
>> 1. The name of the original pension plan and its registration number.
>> 2. A copy of the application under section 80 or 81 of the Act for the Superintendent's consent to the transfer of assets and a copy of the documents filed in support of the application, including any subsequent revisions and any subsequent valuation reports. However, personal

> information about an individual must be excluded from these copies unless the individual has given his or her prior consent to the disclosure of the information.
> 3. In a notice given to a trade union, the number of transferred members and a list of their names.

We wish to raise a privacy concern here. We would submit that the list of names of transferred plan members contain *only* those plan members who are represented by that particular trade union. Persons who are not represented by that trade union should not have their names and other work-related information sent to the union or advisory committee. Indeed, the sub-clause immediately above states that "personal information about an individual must be excluded from these copies," which suggests that the Ministry is well aware of the privacy concerns at issue here.

Finally, as we read the Draft Regulation as a totality, we are perplexed about the deadlines for notice set down in Schedules 6 and 7 *vis-à-vis* the effective date of transfer. The schedules state that notice must be provided within 90 days after the effective date of the transfer and that this notice must include a copy of the application to the Superintendent. However, the application to the Superintendent is not due until 180 days within the effective date of the transfer. A simple re-draft of the schedules will produce consistency in the dates.

C. Transfer of Defined Contribution Benefits

(24). Sections 20 and 21: transfers of assets

With regard to the operation of sections 20 and 21 of the Draft Regulation, we are not clear on the apparent intent of the drafted sections. Nor do we see how the requirements of the sections will be achievable in practice. The sections read as follows:

> TRANSFER OF DEFINED CONTRIBUTION BENEFITS
>
> Application of Part
> 20. This Part applies with respect to a transfer of assets under section 80 or 81 of the Act if both the original pension plan and the successor pension plan provide defined contribution benefits and if the transfer of assets is in respect of defined contribution benefits.
>
> Amount in individual accounts
> 21. A transfer of assets under section 80 or 81 of the Act with respect to defined contribution benefits provided under the original pension plan is not authorized unless, after the transfer, the amount in each individual account under the successor pension plan is no less than the amount, before the transfer, in each individual account under the original pension plan for each transferred member, former member or other person entitled to benefits under the original pension plan.

In terms of the calculation of the amount in an individual's account, it is not clear to us what is the purpose behind section 21, if, for example, it is intended to provide *additional* protection to a plan member. We raise this query because it is made manifestly clear in the *PBA* itself that a member's account balance should be of the same amount both immediately pre- and post-transfer.

Finally, we are uncertain how this pre- and post- transfer quality will be attainable as a matter of practice. If a member is expected to bear the transaction costs associated with the cashing-out of his or her investments? What is the governing mechanism regarding a member's divestment and re-investment being transacted at no loss to him or her? We would ask for some clarity on this matter. It would seem desirable to have an amendment which makes provisions for transaction costs and the ability to make adjustments related to the asset transfer, such as benefit payments and investment returns made after the effective date but occurring before the asset transfer.

LOOKING AHEAD: NEXT STEPS

In recent years, beginning with *Bill 236* and continuing directly up to the release of this Draft Regulation, the Ontario government has accomplished a great deal by way of improving and clarifying several challenging areas of pension plan law and administration. However, we would note that many employers who sponsor DB plans are adversely impacted by the extended grow-in rules; we are concerned that the costs associated with further reforms, including those contemplated herein, may tend to overshadow the advantages to be realized by the new asset transfer and merger regime. Accordingly, we would urge the government to be cognizant of the transitional and compliance costs faced by Ontario plans and consider ways in which to reduce them.

We would note that a regulator always faces the challenge of balancing larger efficiency concerns with a commitment to maintaining sufficient protection of the rights of individual plan members; in regard to the matter at hand, Advocis is confident that the Draft Regulation will facilitate the restructuring of pension plans affected by corporate reorganizations through reduced administrative and compliance costs, while still protecting benefit security for plan members and pensioners.

In terms of next steps, we look forward to the release of draft amendments which will address the government's commitment in the 2013 Ontario Budget to permit, if specified conditions are met, assets to be transferred from SEPPs to JSPPs or MESPs and to allow SEPPs to be converted to JSPPs.

As always, Advocis is pleased to advocate for the effective maintenance of employer-sponsored retirement plans. To discuss in further detail any of the issues reviewed above with Advocis, please contact pmclachlin@adovics.ca (telephone: 416 342-9823).

We thank you for the opportunity to comment on the Draft Regulation. Advocis would be pleased to provide an additional review of any further amendments to the Draft Regulation, and we look forward to assisting the Ministry of Finance on further pension reform issues in the coming months.

Sincerely,

Sincerely,

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