THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: Claire.ezzeddin@osfi-bsif.gc.ca

Claire Ezzeddin
Manager, Approvals Team
Private Pension Plans Division
Office of the Superintendent of Financial Institutions
255 Albert Street, 12th Floor
Ottawa, ON K1A 0H2

Dear Ms. Ezzeddin:

Re: Authorization of Amendments Reducing Benefits in Defined Benefit Pension Plans

I write on behalf of the Canadian Bar Association's Pensions and Benefits Law Section (CBA Section) to comment on OSFI's Draft Instruction Guide, *Authorization of Amendments Reducing Benefits in Defined Benefit Pension Plans* (Draft Guide).[1] The Draft Guide outlines factors and specific requirements OSFI generally considers in reviewing applications seeking authorization for an amendment with respect to paragraph 10.1(2)(a) of the *Pensions Benefits Standards Act* (PBSA). We offer suggestions to clarify and improve the Draft Guide.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section contributes to national policy, reviews developing pensions and benefits legislation and promotes harmonization. Our members are involved in all aspects of pensions and benefits law, including counsel who advise pension and benefit plan administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

Footnote 6

The second section of the Draft Guide addresses what constitutes a reducing amendment, and lists scenarios likely to require authorization from the Superintendent under paragraph 10.1(2)(a) of the PBSA. The CBA Section is concerned about the second bullet in that list and the associated footnote 6.

The second bullet states that the Superintendent's authorization under paragraph 10.1(2)(a) would likely be required when an "amendment reduces or could reduce any accrued periodic amount (i.e. an accrued pension benefit)".

1 Office of the Superintendent of Financial Institutions, Authorization of Amendments Reducing Benefits in Defined Benefit Pension Plans. (2019)

Footnote 6 states:

> If it is possible that an amendment could reduce an accrued periodic amount (an accrued pension benefit, it requires authorization under paragraph 10.1(2)(a) of the PBSA. For example, an amendment to replace full consumer price index (CPI) indexation of an accrued pension benefit with a fixed level of indexation would require authorization, regardless of the relative aggregate values of these two types of indexed pension benefit. This is because a future increase in CPI could potentially be higher than the fixed rate, such that the application of the fixed rate would result in a lower pension benefit payment.

We recommend removing the second bullet and footnote 6, which were not included in the previous version of the guide. Removing these additions would allow the Superintendent the flexibility to determine whether an alternative form of indexing is acceptable (i.e., does not reduce accrued pension benefits) in the circumstances.

If it is possible to replicate the aggregate commuted value of CPI-based indexation through a plan amendment providing an alternative indexation formula or approach (i.e., an alternative that would produce the same commuted value of the benefit as the CPI-based indexing as at the effective date of the amendment), the amendment should not automatically trigger the application of paragraph 10.1(2)(a). For example, in circumstances where a plan wind-up and the related annuitization of pension benefits is unavoidable, such as the insolvency of the employer, indexed annuities reflecting CPI-based increases may be difficult and prohibitively expensive to obtain. To automatically apply paragraph 10.1(2)(a) regardless of how generous the alternative form of indexing proposed may be under the plan amendment would unduly burden the administrator by requiring their compliance with the Draft Guide's application requirements.

An amendment with an alternative form of indexing would be filed with the Superintendent in the ordinary course and could be challenged by the Superintendent if after reviewing the form of alternative indexation in the amendment, he or she believes that the amendment was void under subsection 10.1(2) of the PBSA. In this case, the administrator could seek the Superintendent's authorization pursuant to the Draft Guide. We prefer this flexible approach, which is consistent with the existing guideline before the changes proposed in the Draft Guide.

General Principles and Considerations – Third Paragraph

The third paragraph of the third section of the Draft Guide states: "the employer or administrator should consider the interests of all affected groups … ***and apply its discretion in an even-handed manner in deciding on reductions that may apply to each of the affected groups***" (emphasis added). This phrase could be interpreted as suggesting that any benefit reductions should be applied equally to all affected groups (for example, an equal percentage reduction to the benefits of actives, deferred vesteds and retirees).

In our experience, depending on the situation, it may be appropriate to reduce the benefits of a certain group or groups of plan beneficiaries more or less than other groups. For example, if the employer is insolvent, the court-supervised process may result in an agreement among stakeholders for active members to face a greater reduction in benefits than retirees, as retirees are generally unable to make up benefit reductions with future employment. Requiring each affected group to be treated in an even-handed manner in all situations would be unduly restrictive. Acting in an even-handed manner is also a fiduciary concept ultimately monitored and enforced by the courts. In the case of an amendment made by the plan sponsor to a single-employer plan, the sponsor may be subject only to a duty of good faith rather than fiduciary duties. For these reasons, we recommend removing the phrase "and apply its discretion in an even-handed manner in deciding on reductions that may apply to each of the affected groups" from the third section of the Draft Guide.

Amendment Powers

OSFI should consider amending section 3.1 of the Draft Guide to allow it greater discretion to determine the level of member consent required for a reducing amendment. The Draft Guide indicates that OSFI expects written agreement to the reducing amendment by "anyone" whose pension benefit would be reduced by that amendment. We believe that in some situations having less than the unanimous consent of affected members may be appropriate. For example, unanimous consent may not necessary if: (i) it is impossible to contact all affected members as some members are unlocatable despite reasonable efforts to find them; (ii) some affected members may be incapable of consenting due to capacity issues; (iii) some affected members refuse to consent in order to obtain leverage against an employer; or (iv) in an insolvency where a court is supervising a restructuring process. With our suggested changes to the Draft Guide the Superintendent would retain the power to authorize the proposed reducing amendment in these situations while having the flexibility to consider all relevant circumstances in determining the appropriate level of member consent.

Filing Historical Plan Documentation as Part of the Application

Sections 3.1 and 3.6.3 of the Draft Guide impose a new requirement on administrators of plans other than negotiated contribution plans to submit all current and historical plan texts and supporting documents relating to the power to amend the plan when applying to the Superintendent for authorization to make a reducing amendment. We believe this new requirement may set an unreasonably high threshold that could unfairly limit the ability of some plan administrators to seek authorization to make a reducing amendment.

Administrators of longstanding pension plans may have difficulty submitting all historical documentation to OSFI particularly if the plans have been involved in divisions, spin-offs or mergers over the years. The breadth of the filing requirement, which the Draft Guide notes may also include collective bargaining agreements, amongst other documents, would make this expectation exceedingly difficult to comply with.

While section 3.1 of the existing guideline states that reducing amendments must be allowed by the plan text, supporting documents, and historical documents, it expressly contemplates that the permissibility of amendments "can be determined in different ways" and stops short of requiring plan administrators to file all current and historical plan documentation as part of their application. We believe this more flexible approach allows OSFI to protect plan members' interests while also appreciating the full context in which applications to authorize reducing amendments are made.

Consistent with the current guideline, the CBA Section encourages OSFI to retain flexibility and discretion in its requirements for historical documentation from plan administrators. This could be achieved by not requiring all historical documents be included in the application to the Superintendent. Instead, the Draft Guide could state that plan administrators may be asked to submit all available, relevant historical documentation if OSFI determines in reviewing the application that this is required in the circumstances. Alternatively, if OSFI wants historical documentation to be filed with an application, it would be reasonable to require plan administrators to file the relevant historical documents in their possession along with an attestation that they have taken reasonable steps to search for all other relevant documents. These steps could include reviewing their own records and those on file with OSFI.

The CBA Section appreciates the opportunity to comment on the Draft Guide. We trust that our comments are helpful and would be pleased to offer further clarification.

Yours truly,

(original letter signed by Nadia Sayed for Jeff Sommers)

Jeff Sommers
Chair, CBA Pensions and Benefits Law Section