MERCER

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COMMUNIQUÉ

ONTARIO PENSION ASSET TRANSFERS

Ontario's new pension plan merger rules under new versions of section 80 (sale of business) and 81 (same employer mergers) of the *Pension Benefits Act* (PBA), and related regulations, will come into effect on January 1, 2014. These new asset transfer rules require the Superintendent of Financial Services to consent to the transfer if the prescribed requirements are met. Under the former rule, an asset transfer could be refused consent if, in the Superintendent's view, it failed to protect members' pension and other benefits. Overall, the new rules are intended to facilitate transfers and as a result, make it easier to keep members' benefits whole and in one plan.

This Communiqué describes the new rules as they will be from January 1, 2014 onward.

Changes from the draft regulations

The final regulations that set out detailed requirements are very similar to the draft regulations that were released for consultation earlier this year. Some changes were made, including:

- Removal of a requirement to offer past service purchases to certain transferred members;
- Addition of adjustments to an asset transfer amount for the period between the effective date of the transfer and its completion; and
- Extension of most time lines and addition of a power for the Superintendent to extend the deadline for an asset transfer application.

Effective date

The legislation and related regulations come into effect on January 1, 2014. The regulation states that it applies to every transfer of assets under sections 80 and 81 and the regulation does not explicitly exclude asset transfer effective dates prior to January 1, 2014. The effective date of an asset transfer is defined as the date of sale or the effective date of the original plan/successor plan amendments, as applicable.

The Financial Services Commission of Ontario (FSCO) has indicated in a Q&A that the new rules apply to asset transfer applications filed on and after January 1, 2014 regardless of the asset transfer effective date. Asset transfer applications already filed with FSCO, or filed prior to January 1, 2014, will be reviewed in accordance with the legislation applicable prior to January 1, 2014. For asset transfers with an effective date before 2014 for which application for approval is filed on or after January 1, 2014, the Superintendent will apply the notice deadlines and application deadline from January 1, 2014 instead of from the asset transfer effective date.

Defined benefit transfers

The PBA provides that assets transferred from a defined benefit provision must be used to provide defined benefits in the successor plan. The rules for sale of business under section 80 and those for same employer mergers under section 81 are substantially the same, except as indicated below.

Protection of benefits

The PBA provides that it is not necessary for a successor plan to duplicate the past service benefits of transferred members, if the commuted value of those benefits is the same. The regulation requires this value test to be done as of the effective date of the asset transfer using the transfer value basis (section 3500 of the Canadian Institute of Actuaries *Standards of Practice*, June 3, 2010) as if the member's employment terminated on the effective date. If a member's benefits are reconfigured, the termination of employment must be treated as an "activating event" so that the value of grow-in benefits is included and the transferred member's accrued pension amount (calculated without ancillary benefits) cannot be reduced by more than 15%.

Transfers from plans that cannot reduce accrued benefits into plans that can reduce accrued benefits are prohibited. For example, this would disallow transfers from a traditional single employer plan to a multi-employer pension plan.

Funding requirements

The regulations include a formula for determining the amount of assets to be transferred. The amount is a share of solvency assets (including letters of credit) proportionate to the solvency liabilities to be transferred, and includes a proportionate amount of solvency surplus. To that amount there is added a proportionate share of special payments (solvency and going concern) made between the effective date of the transfer and the date on which the transfer is made. The asset transfer amount is reduced by the amount of payments made during the same period under the original pension plan in respect of transferred members, former members, retired members or other persons entitled to benefits.

An asset transfer must satisfy at least one of two conditions:

1. After the transfer, the successor plan has a solvency ratio of 0.85 (for section 80 sale of business) or 1.00 (for section 81 successor plans); or
2. After the transfer, the solvency ratio of the successor plan is not reduced by more than 0.05 below the solvency ratio of each of the original plan and the successor plan before the transfer.

If an asset transfer results in a new going concern unfunded liability or a new solvency deficiency in the successor plan, special payments must be made following the normal funding rules.

If the original plan or the successor plan files a funding valuation with a review date after the effective date of an asset transfer but before the date consent is granted, the report must disclose the amount of assets and liabilities to be transferred on a going concern and a solvency basis.

The PBA provides that the Superintendent can waive funding requirements in prescribed circumstances. However, the regulation does not include a provision for the prescribed circumstances, therefore they do not allow for any waiver.

When applying for consent, the original plan and the successor plan must both file valuation reports, as of the effective date of the asset transfer, that contain the information normally required in a funding valuation. Additional required information includes:

- Going concern liabilities and assets, solvency liabilities and assets, solvency ratio and transfer ratio before and after the asset transfer;
- The amount of assets to be transferred;
- Required contributions before and after the asset transfer; and
- A statement by each plan administrator certifying that certain requirements are satisfied.

The obligation of the employer to make special payments under the original plan continues until the transfer of assets is completed.

Process

The timeframes for completion of each stage of the transfer of assets are as follows:

- Notice to members, former members, retirees, unions and advisory committee is due within six months after the effective date;
- If the information changes, an updated notice to a union or advisory committee must be provided within a reasonable time;
- Where special notice is given to members for purposes of obtaining individual consent for a sale of business asset transfer under section 80 (see below), their response is due within no less than 90 days after the special notice date;
- Application for the Superintendent's consent is due within nine months after the effective date;
- The Superintendent can extend the deadline for the application, on request, for up to 60 days if there are reasonable grounds for doing so, and for further periods if there are extraordinary grounds for doing so and no person will be unduly prejudiced;

- The asset transfer must be effected within 120 days after the Superintendent's consent is granted; and
- Notice to the Superintendent of the completion of the asset transfer, together with a certificate of compliance and a cost certificate indicating the amount transferred, is due within 60 days after completion.

For sale of business transactions, the PBA provides an option for plan administrators to make the transfer subject to individual member consent. If that approach is used, then the notice to members must provide information that allows them to compare their options. The PBA provides that where the transfer is made with individual member consent, and where the prescribed requirements are met, the plan administrator of the original plan is entitled to a discharge on completion of the asset transfer. This discharge is in addition to the general provision that after an asset transfer, members have no further claim against the original pension plan.

The transaction must comply with detailed requirements for notice to members and for information to be provided to the Superintendent with the application for approval. For example, notices to members must contain information that is similar to the information provided to them in annual statements. Members would receive notice from the original plan administrator and from the successor plan administrator, or the notices can be combined. A copy of the application and the filed documents (with personal information excluded) must be provided to each trade union that represents transferred members or former member and to each advisory committee for either pension plan. Documents to be provided to the Superintendent with the application include copies of notices, related plan amendments and the agreement between the plan administrators.

Defined contribution transfers

The rules for merger of defined contribution entitlements are simple, as expected. The amount in each individual account under the successor plan must be no less than the amount in each individual account under the original plan.

Trust rules

The PBA provides that after the transfer, members have no further claim against the original pension plan and that the transferred assets cease to be identified as assets of the original plan. The PBA also provides that a successor plan is deemed to be a continuation of the original plan.

The PBA and regulation establish a process in which the Superintendent will not consider trust issues. However, the PBA and regulation do not expressly override member or employer rights and obligations that may be created by trust terms. Claims that an asset transfer is a breach of trust would have to be addressed in court, where the effect of the new legislative provisions might be adjudicated.

It is important for parties to an asset transfer to know that the PBA was amended in 2010 to provide that on wind up of a successor plan, unless the successor plan and the original plan both provided for employer entitlement to surplus, the successor plan is deemed to provide for member entitlement.

Comment

It is disappointing that there are no provisions for the Superintendent's waiver of the funding requirements. These provisions should be added at some time in the future, to provide further flexibility. Perhaps experience will show what the prescribed circumstances for waiver should be.

It was reasonable to expect the funding rules to protect benefit security, and the ability to merge plans with a 0.05 change in solvency ratio adds a modest level of flexibility.

The big innovation is the ability to change past service benefits, subject to protection of the commuted value and the restriction that the pension amount cannot be reduced by more than 15%. It is doubtful that this will serve to facilitate transactions given the complexity of the individual calculations that would be necessary. On the other hand, there will be circumstances in which this is a valuable option despite the effort required.

Setting aside trust issues for purposes of regulatory consent will facilitate obtaining consent where the prescribed conditions are met. However, trust issues remain a factor to be taken into account.

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