

ONTARIO REGULATION

made under the

ONTARIO FAIR HYDRO PLAN ACT, 2017

Amending O. Reg. 206/17

(GENERAL)

(1) Subsection 1 (1) of Ontario Regulation 206/17 is amended by adding the following definitions:

“average monthly funding obligation” means, in respect of a month, the amount determined in accordance with subsection (2);

“average annual funding obligation” means, in respect of a year, the sum of the average monthly funding obligations for the year;

“funding tranche” means an issuance of funding obligations of a particular class or type, all of which have the same terms, but does not include an issuance of a funding obligation to the Financial Services Manager;

“market comparable fees” means, subject to subsection (1.1), fees, expressed as an annual percentage rate, charged by full-service managers of funds, including but not limited to securitization vehicles, pension funds and other investment funds, hedge funds or other similar funds, for services that are similar to the services provided by the Financial Services Manager under the Act in terms of,

- (a) the type of services provided,
- (b) the scope of services provided,
- (c) the level of services provided, and
- (d) the dollar amount of assets under management;

“market comparable forecast interest rates” means, in relation to a funding tranche, interest rates for a debt obligation that,

- (a) has a principal amount that is comparable to the principal amount of the funding tranche,
- (b) has a term that is comparable to the term of the funding tranche,
- (c) is based on a type of instrument that is comparable to the type of instrument of the funding tranche,
- (d) has payment rights that are similar to the payment rights of the funding tranche, and
- (e) is issued by an issuer with a risk profile comparable to the risk profile of the financing entity issuing the funding tranche;

“net annual funding obligation” means, in respect of a year, the sum of the principal amounts of funding tranches issued in the year, other than any funding tranches that constitute a refinancing;

“prescribed matters” means matters in relation to the establishment, management and administration of financing entities and the investment asset, including but not limited to matters in relation to,

- (a) financing entities that are established or that are planned to be established, and
- (b) funding obligations that have been incurred or that are planned to be incurred by financing entities.

(2) Section 1 of the Regulation is amended by adding the following subsections:

(3) For the purposes of determining the average monthly funding obligation for a month, the following formula applies:

$$(A + B) / 2$$

Where,

- A = the sum of the balances on the first day of the month of the principal amount of all outstanding funding obligations incurred by financing entities,
- B = the sum of the balances on the last day of the month of the principal amount of all outstanding funding obligations incurred by financing entities.

(4) Subject to subsection (5), the fees referred to in the definition of “market comparable fees” in subsection (1) are fees charged by full-service managers in Canada.

(5) The fees referred to in the definition of “market comparable fees” in subsection (1) may be fees charged by full-service managers in a North American jurisdiction other than Canada for the purposes of the Board’s review of a submission under this Regulation only if the Financial Services Manager has proposed such fees in its submission to the Board.

in Canada or another jurisdiction in North America that is determined by the Board,

2. (1) Paragraph 1 of subsection 5 (1) of the Regulation is amended by adding the following subparagraph:

- viii. Amounts paid or payable by or on behalf of a financing entity during the period to any guarantor or surety that made a payment of an amount due and payable under a funding obligation, including pursuant to a guarantee, indemnity, contract of insurance or agreement entered into under subsection 5 (2) or (3) of the Act.

(2) Subparagraph 2 ii of subsection 5 (1) of the Regulation is amended by adding “and carrying costs” at the end.

3. The Regulation is amended by adding the following section:

IESO to pay, remit amounts re carrying costs of financing entity

9.1 (1) During the period beginning on December 1, 2017 and ending on July 31, 2021, the IESO shall pay and remit to a financing entity any amounts charged to the IESO by the financing entity in respect of carrying costs of the financing entity during the period beginning on June 1, 2017 and ending on July 31, 2021.

(2) For the purposes of determining the amounts to be paid and remitted under subsection (1), the IESO may rely on information provided by a financing entity with respect to the amounts.

(3) The carrying costs of a financing entity for a period of time shall be determined as follows:

1. After eliminating any duplication in the following amounts, calculate the sum of the following amounts:
 - i. Funding costs paid or payable during the period.
 - ii. Derivative payments required to be made during the period.
 - iii. Amounts deposited, as required under the governing documents of funding obligations, into accounts other than capital accounts during the period.
 - iv. Financing entity expenses paid or payable during the period.

- v. Tax liabilities payable during the period.
2. After eliminating any duplication in the following amounts, calculate the sum of the following amounts:
 - i. Amounts withdrawn, as permitted under the governing documents of funding obligations, from accounts other than capital accounts during the period.
 - ii. Any payments received in connection with a derivative agreement, including ordinary course receipts, payments received on termination and payments received in connection with margining or collateral arrangements.
 - iii. Tax refunds received during the period.
 3. Subtract the sum calculated under paragraph 2 from the sum calculated under paragraph 1.

(4) The determination of the carrying costs of a financing entity for a period of time shall be made on an accrual basis accounting method.

(5) The IESO may grant security to a financing entity in order to secure its obligations to pay and remit present and future amounts due under this section.

4. The Regulation is amended by adding the following sections immediately after section 10:

FINANCIAL SERVICES MANAGER - FEES

[OLC Note: I have not renumbered or corrected cross-references yet but have indicated new potential section numbers in square brackets.]

Fees that may be established, charged

2.[10.1] (1) For the purposes of subsection 19 (3) of the Act, the fees established and charged by the Financial Services Manager may be charged to financing entities in relation to prescribed matters.

[OLC Note: As discussed, consider whether the base fee, variable fee and the \$3.1 million fee for 2017 are in relation to “prescribed matters”. Consider seeking Constitutional Law Branch advice on whether they have concerns where the fees in question do not seem to be linked to these matters. In particular, I am concerned about the \$3.1 million fee which you mentioned is in fact linked to recovery of costs incurred prior to the coming into force of the Act.]

(2) The Financial Services Manager shall not establish or charge any fees to financing entities other than those fees provided for under this Regulation.

Submission re general fee for 2017

3.[10.2] (1) The Financial Services Manager shall submit to the Board, on or before February 28, 2018, the proposed fee for the period beginning on June 1, 2017 and ending on December 31, 2017.

(2) The proposed fee shall be \$3.1 million plus the amount of any costs and expenditures paid during the period mentioned in subsection (1) by the Financial Services Manager in relation to prescribed matters.

(3) The costs and expenditures referred to in subsection (2) include, but are not limited to, costs and expenditures in respect of the following:

1. Underwriters or selling agents for funding obligations.
2. Banking fees, including but not limited to structuring fees or work fees.
3. Fees of issuing and paying agents for funding obligations.
4. Fees of trustees.
5. Fees incurred in the preparation of financial statements, financial reports, compliance certificates and tax returns.
6. Fees of legal counsel.
7. Rating agency fees.
8. Filing or registration fees.
9. Direct costs of the Financial Services Manager for employees whose work for the Financial Services Manager consists exclusively of the provision of the services described in subsection 2 (1) to financing entities.
10. Costs and expenditures incurred on behalf of any financing entity in connection with the Financial Services Manager's duties under the Act in relation to the financing entity.
11. Costs and expenditures incurred in relation to a management agreement between the Financial Services Manager and any financing entity, where the agreement provides for the reimbursement of the costs and expenditures.

(4) The submission shall include written confirmation from the Financial Services Manager's external auditor or another external auditor of the following:

1. That the amounts of the costs and expenditures that the Financial Services Manager seeks to recover through fees, as set out in the submission, are accurate.
2. That the amounts of the costs and expenditures, as set out in the submission, were incurred by the Financial Services Manager.
3. That, except in the case of amounts referred to in paragraph 9 of subsection (3), the amounts were paid or payable to third parties.

Board review of general fee for 2017

4.[10.3] (1) The Board may,

- (a) approve the fee proposed under section 3; or
- (b) subject to subsection (2), refuse to approve all or a portion of the amount included in the proposed fee relating to any costs and expenditures and approve the remainder of the proposed fee.

(2) The Board may refuse to approve all or a portion of an amount relating to costs and expenditures if the Board is of the view that it was not incurred and paid in relation to prescribed matters, including but not limited to costs and expenditures described in clauses 3 (2) (a) to (d).

Charging of general fee for 2017

5. [10.4] (1) If the Board approves a fee under section 4, the fee is payable no later than 30 days following the last day of the month following the month in which the Board's approval is given.

(2) Where there is more than one financing entity, the portion of the fee allocated to and payable by a financing entity shall be based on a reasonable allocation as determined by the Financial Services Manager.

Submission re general fee for January 1, 2018 to March 31, 2019

6.[10.5] (1) The Financial Services Manager shall submit to the Board, on or before December 15, 2017, the proposed fee for the period beginning on January 1, 2018 and ending on March 31, 2019.

(2) The Financial Services Manager shall establish the proposed fee for the period mentioned in subsection (1) as follows:

1. Apply the following formula in respect of each funding tranche that forms part of the sum of the principal amounts of funding tranches issued in the period, other than any funding tranches that constitute a refinancing:

$$(A \times (B - C)) \times 0.10$$

Where,

A = the principal amount of the funding tranche,

B = the forecast interest rate for the funding tranche, and

C = the actual interest rate for the funding tranche.

2. Calculate the sum of the amounts determined by applying the formula under paragraph 1.

2.1 If the result calculated under paragraph 2 is greater than the following, decrease the result to an amount that is less than the following: the amount that is 2 per cent of the amount that is 5 per cent of the sum of the principal amounts of funding tranches issued in the period, other than any funding tranches that constitute a refinancing.

2.2 If the result calculated under paragraph 2 is less than the following amount, increase the result to an amount that is greater than the following: the amount that is - 2 per cent of the amount that is 5 per cent of the sum of the principal amounts of funding tranches issued in the period, other than any funding tranches that constitute a refinancing.

3. Calculate the amount that is 0.00625 per cent of the average monthly funding obligation for each month in the period mentioned in subsection (1).

4. Calculate the sum of the amount determined under paragraph 2 and the amounts determined under paragraph 3.

(4) If, subsequent to the initial submission to the Board under subsection (1), the Financial Services Manager determines that a funding tranche may be issued that was not contemplated in the initial submission, the following rules apply:

1. **If the Board has not yet made a decision** in respect of the proposed fee, the Financial Services Manager may, on a day that is later than December 15, 2017 but before such day as may be specified by the Board, [notify the Board and?] submit an amendment to the submission that sets out a forecast interest rate for that funding tranche.

OLC Note: The Board might have refused to approve the fee, hence my use of broader language re “made a decision”. In paras. 1 and 2 this is okay but it doesn’t really make sense in the context of para. 3 below.

2. **If the Board has** approved the proposed fee, the Financial Services Manager may, before such day as may be specified by the Board, submit to the Board a forecast

interest rate for that funding tranche along with a proposal to amend the fee to include that funding tranche.

3. If the Board has refused to approve the proposed fee....

OLC Note: The Board might have refused to approve the fee. In that case, there would be nothing to amend. What is the policy in that case?

(5) A proposal to amend a fee under paragraph 2 of subsection (4) shall be deemed, for the purpose of the Board's review of the proposal, a new proposed fee under this section.

Board review of general fee

7.[10.6] (1) The Board may,

- (a) approve the fee proposed under section 6; or
- (b) refuse to approve the fee if the Board is of the view that any forecast interest rate used for the purposes of paragraph 1 of subsection 6 (2) is materially inconsistent with market comparable forecast interest rates.

(2) If the Board refuses to approve the proposed fee,

- (a) the Board may make recommendations to the Financial Services Manager regarding each forecast interest rate that the Board found was materially inconsistent with market comparable forecast interest rates; and
- (b) the Financial Services Manager shall submit to the Board,
 - (i) a revised proposed fee that takes into consideration the recommendations of the Board, if any, and
 - (ii) a description of the methodology that the Financial Services Manager has applied to determine revised forecast interest rates for each funding tranche in respect of which the Board found an inconsistency with market comparable forecast interest rates.

(3) If the Financial Services Manager submits a revised proposed fee, this section applies, with necessary modifications, to the submission as if it were the initial submission.

Charging of general fee

8.[10.7] (1) If the Board approves a fee under section 7,

- (a) subject to subsection (2), each monthly amount determined under paragraph 3 of subsection 6 (2) is payable no later than the last day of the month following the month in respect of which the amount was determined; and

- (b) all other amounts are payable no later than 30 days following the later of March 31, 2019 and the last day of the month in which the Board's approval is given.

(2) If the Board approves a fee under section 7 after January 1, 2018, each of the monthly amounts referred to in clause (1) (a) is payable no later than the later of,

- (a) the last day of the month following the month in respect of which the amount was determined; and
- (b) the last day of the month following the month in which the Board's approval is given.

(3) Where there is more than one financing entity, the portion of the fee allocated to and payable by a financing entity shall be based on a reasonable allocation as determined by the Financial Services Manager.

Submission re base and variable fees for 2019-2020, subsequent years

9.[10.8] (1) The Financial Services Manager shall submit to the Board, on or before February 28, 2019 and on or before February 28 in each subsequent year, the proposed base fee and variable fee for the period beginning on April 1 in the year of the submission and ending on March 31 in the following year.

(2) In this section and sections 10 to 13, a reference to a "year" means the 12-month period beginning on April 1 and ending on the following March 31.

Base fee

10.[10.9] (1) The Financial Services Manager shall establish a proposed base fee mentioned in subsection 9 (1) for each month in a year by determining the amount that it considers to be consistent with market comparable fees, expressed as a percentage of the average monthly funding obligation for the preceding month.

(1.1) The Financial Services Manager shall determine the amount that it considers to be consistent with market comparable fees by applying the following rules:

1. Subject to paragraph 2, the Financial Services Manager shall determine the average of at least five fees that satisfy the definition of "market comparable fee" in subsection 1 (1).
2. If the Financial Services Manager is not able to determine the average of five fees for the purposes of paragraph 1, the Financial Services Manager shall determine the average of as many fees as possible.

3. Subject to paragraph 4, the Financial Services Manager shall ensure that at least 80 per cent of the fees included in the average are fees charged by full-service managers of securitization vehicles.
4. If the Financial Services Manager is not able to ensure that at least 80 per cent of the fees meet the description set out in paragraph 2, the Financial Services Manager shall ensure that the highest percentage possible of the fees included in the average meets that description.

(2) The Board may,

- (a) approve the proposed base fee; or
- (b) subject to subsection (3), refuse to approve the proposed base fee if the Board is of the view that the proposed base fee is materially inconsistent with market comparable fees.

(3) When determining whether the proposed base fee is materially inconsistent with market comparable fees, the Board shall apply the rules set out in subsection (1.1) and may use market comparable fees other than those used by the Financial Services Manager for the purposes of that subsection.

(4) If the Board refuses to approve a proposed base fee,

- (a) the Board may make recommendations to the Financial Services Manager regarding the determination of a base fee that is consistent with market comparable fees; and
- (b) the Financial Services Manager shall submit to the Board,
 - (i) a revised proposed base fee that takes into consideration the recommendations of the Board, if any, and
 - (ii) a description of the methodology that the Financial Services Manager has applied to determine the revised proposed base fee, including but not limited to details concerning the market comparable fees that the Financial Services Manager considered.

(5) If the Financial Services Manager submits a revised proposed base fee, this section applies, with necessary modifications, to the submission as if it were the initial submission.

(6) If the Board has not approved a proposed base fee by the first day of the year for which the proposed base fee would be charged,

- (a) the Financial Services Manager may continue to charge the base fee that was most recently approved by the Board, if any base fee was previously approved; and
- (b) the Financial Services Manager shall adjust the base fee in the month following the month in which the Board approves the proposed base fee, to reflect the difference between the base fee charged for the year to date and the base fee approved by the Board for the year to date.

Variable fee

11.[10.10] (1) The Financial Services Manager shall establish a variable fee mentioned in subsection 9 (1) for a year as follows:

1. Apply the following formula in respect of each funding tranche that forms part of the net annual funding obligation for the year:

$$(A \times (B - C)) \times 0.10$$

Where,

A = the principal amount of the funding tranche,

B = the forecast interest rate for the funding tranche, and

C = the actual interest rate for the funding tranche.

2. Calculate the sum of the amounts determined by applying the formula under paragraph 1.
 3. If the result calculated under paragraph 2 is greater than the following, decrease the result to an amount that is less than the following: the amount that is 2 per cent of the amount that is 5 per cent of the sum of the principal amounts of funding tranches issued in the period, other than any funding tranches that constitute a refinancing.
 4. If the result calculated under paragraph 2 is less than the following amount, increase the result to an amount that is greater than the following: the amount that is - 2 per cent of the amount that is 5 per cent of the sum of the principal amounts of funding tranches issued in the period, other than any funding tranches that constitute a refinancing.
- (3) The Board may,
- (a) approve the proposed variable fee; or

- (b) refuse to approve a proposed variable fee if the Board is of the view that any forecast interest rate used for the purposes of subsection (1) is materially inconsistent with market comparable forecast interest rates.

(4) If the Board refuses to approve the proposed variable fee,

- (a) the Board may make recommendations to the Financial Services Manager regarding each forecast interest rate that the Board found was materially inconsistent with market comparable forecast interest rates; and
- (b) the Financial Services Manager shall submit to the Board,
 - (i) a revised proposed fee that takes into consideration the recommendations of the Board, if any, and
 - (ii) a description of the methodology that the Financial Services Manager has applied to determine revised forecast interest rates for each funding tranche in respect of which the Board found an inconsistency with market comparable forecast interest rates.

(5) If, subsequent to the initial submission to the Board under subsection (1), the Financial Services Manager determines that a funding tranche may be issued that was not contemplated in the initial submission, the following rules apply:

1. **If the Board has not yet made a decision** in respect of the proposed fee, the Financial Services Manager may, on a day that is later than February 28 but before such day as may be specified by the Board, [notify the Board and?] submit an amendment to the submission that sets out a forecast interest rate for that funding tranche.

OLC Note: The Board might have refused to approve the fee, hence my use of broader language re “made a decision”. In paras. 1 and 2 this is okay but it doesn’t really make sense in the context of para. 3 below.

2. **If the Board has** approved the proposed fee, the Financial Services Manager may, before such day as may be specified by the Board, submit to the Board a forecast interest rate for that funding tranche along with a proposal to amend the fee to include that funding tranche.

3. If the Board has refused to approve the proposed fee....

OLC Note: The Board might have refused to approve the fee. In that case, there would be nothing to amend. What is the policy in that case?

(6) A proposal to amend a fee under paragraph 2 of subsection (5) shall be deemed, for the purpose of the Board’s review of the proposal, a new proposed fee under this section.

In-year amendments to base fee or variable fee

12.[10.11] (1) The Financial Services Manager may, no more frequently than once in any consecutive twelve month period, make submissions to the Board to amend any fees approved by the Board under section 10 or 11, and section 10 or 11 apply, as the case may be and with necessary modifications, in respect of the submissions.

(2) Nothing in subsection (1) authorizes an amendment to a fee that would result in the fee failing to meet the criteria for approval set out in section 10 or 11, as the case may be.

(3) If the Board approves an amendment to a fee under subsection (1), the fee as amended may be charged,

- (a) in the case of a base fee, starting in the month following the month in which the Board's approval is given; and
- (b) in the case of a variable fee, in respect of funding tranches issued starting in the month following the month in which the Board's approval is given.

Charging of base and variable fees

13.[10.12] (1) If the Board approves a fee under section 10 or 11,

- (a) in the case of a base fee, subject to subsection (1.1), the fee is payable no later than 30 days after the end of the month for which the fee is payable; and
- (b) in the case of a variable fee for a year, on the last day of the third month in the following year.

(1.1) If the Board approves a fee under section 10 after March 31, 2019, each of the monthly amounts referred to in clause (1) (a) is payable no later than the later of,

- (a) the last day of the month following the month in respect of which the amount was determined; and
- (b) the last day of the month following the month in which the Board's approval is given.

(2) If the variable fee for a year is a negative amount, it shall be deducted from the first payments of base fees payable in the following year until the amount has been fully deducted.

(3) Where there is more than one financing entity, the portion of the fees allocated to and payable by a financing entity shall be based on,

- (a) in the case of a base fee, the financing entity's proportionate share of the average principal amount of funding obligations for the applicable period; and

- (b) in the case of a variable fee, the portion of the variable fee attributable to the funding tranches issued by the financing entity.

Fees for costs and expenditures, submission to Board

14.[10.13] (1) The Financial Services Manager shall submit to the Board a proposed fee for costs and expenditures,

- (a) no later than February 28, 2019, in respect of costs and expenditures paid during 2018; and
- (b) no later than February 28 in each subsequent year, in respect of costs and expenditures paid during the previous calendar year.

(2) The fee may be established to recover the amount of costs and expenditures paid by the Financial Services Manager in relation to prescribed matters.

(3) The costs and expenditures referred to in subsection (2) include but are not limited to costs and expenditures in respect of the following:

1. Underwriters or selling agents for funding obligations.
2. Banking fees, including but not limited to structuring fees or work fees.
3. Fees of issuing and paying agents for funding obligations.
4. Fees of trustees.
5. Fees incurred in the preparation of financial statements, financial reports, compliance certificates and tax returns.
6. Fees of legal counsel.
7. Rating agency fees.
8. Filing or registration fees.
9. Subject to subsection (4), direct costs of the Financial Services Manager for employees whose work for the Financial Services Manager consists exclusively of the provision of the services described in subsection 2 (1) to financing entities.
10. Costs and expenditures incurred on behalf of any financing entity in connection with the Financial Services Manager's duties under the Act in relation to the financing entity.

11. Costs and expenditures incurred in relation to a management agreement between the Financial Services Manager and any financing entity, where the agreement provides for the reimbursement of the costs and expenditures.

(4) If the costs referred to in paragraph 9 of subsection (3) are paid after March 31, 2019, they are recoverable for a year only if the Board, upon reviewing the submission, makes the following determination:

1. A majority of the market comparable fees used by the Board for the purposes of subsection 10 (3) for a fiscal year that begins in the calendar year to which the submission under this section relates are charged by full-service managers of funds who, in addition to charging those fees, also recover costs that are **materially?** consistent with and similar to the costs referred to in paragraph 9 of subsection (3) that are paid after March 31, 2019.

(4.1) For the purposes of subsection (4), the Board shall consider whether the costs paid after March 31, 2019 are incurred in relation to the establishment, management and administration of the funds to which the market comparable fees relate.

(4.2) For the purposes of subsection (4), a fiscal year begins on April 1 in a year and ends on March 31 in the following year.

(5) The submission shall include written confirmation from the Financial Services Manager's external auditor or another external auditor of the following:

1. That the amounts of the costs and expenditures that the Financial Services Manager seeks to recover through fees, as set out in the submission, are accurate.
2. That the amounts of the costs and expenditures, as set out in the submission, were incurred by the Financial Services Manager.
3. That, except in the case of amounts referred to in paragraph 9 of subsection (3), the amounts were paid or payable to third parties.

Board review of fee for costs, expenditures

15.[10.14] (1) The Board may,

- (a) approve the fee proposed under subsection 14 (1); or
- (b) subject to subsection (2) refuse to approve all or a portion of the amount included in the proposed fee relating to any costs and expenditures and approve the remainder of the proposed fee.

(2) The Board may refuse to approve all or a portion of an amount relating to costs and expenditures if the Board is of the view that it was not incurred and paid in relation to prescribed matters, including but not limited to costs and expenditures described in clauses 14 (2) (a) to (d).

Charging of fee for costs, expenditures

16.[10.15] (1) If the Board approves a fee under section 15, the fee is payable no later than 30 days following the last day of the month following the Board's approval.

(2) Where there is more than one financing entity, the portion of the fee allocated to and payable by a financing entity shall be based on a reasonable allocation as determined by the Financial Services Manager.

5. Section 16 of the Regulation is amended by adding the following paragraph:

3. Any amounts paid or incurred by the IESO under section 9.1.

Commencement

6. This Regulation comes into force on the day it is filed.