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Memorandum

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To:	Len Hatzis, *Treasury Board Secretariat*	**Date:**	September 26, 2016
From:	Jana Steele Jonathan Marin	**Tel:**	416.862.6625 416.862.5935
Subject:	Treasury Board Secretariat	**Matter No:**	1176392

Re: Follow up questions re role of regulator

You have asked us to elaborate on the role of the Superintendent of Financial Services (the "Superintendent"), as it relates to the utilization of surplus under the Ontario Teachers' Pension Plan (the "OTPP"). Further background information can be found in your e-mail to us dated September 25, 2016 (9:46PM).

The Superintendent has the responsibility to "exercise the powers and duties conferred on or assigned to" him/her, to "administer and enforce [the *Financial Services Commission of Ontario Act*] and every other Act that confers powers on or assigns duties to the Superintendent", and to "supervise generally the regulated sectors".[1]

In this regard, the Superintendent is responsible for administering and enforcing the *Pension Benefits Act* (Ontario) (the "PBA"). The Superintendent's statutory functions under the PBA can be divided into three general categories: decision-making functions; administrative and procedural functions; and policy-making functions.[2]

As per your instructions, we have not evaluated the role of the Superintendent as it relates to the *withdrawal* of surplus assets from the OTPP, where the surplus withdrawn is to be paid in whole or in part to the Province of Ontario (the "Province"). However, we note that the prior regulatory approval of the Superintendent would be required in such circumstances.[3]

The Province could potentially receive a financial benefit through the *utilization* of OTPP surplus, for example, as a result of a temporary reduction in the Province's contribution obligations (a

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1 *Financial Services Commission of Ontario Act*, 1997, SO 1997, c. 28 (the "FSCO Act") at ss. 5(2).

2 Ari Kaplan & Mitch Frazer, *Pension Law* (2nd Ed.), Erwin Law Inc., 2013 at p. 131.

3 Subsection 78(1) of the PBA provides that "[n]o money that is surplus may be paid out of a pension fund to the employer without the prior consent of the Superintendent". The Superintendent may not consent to the payment of surplus to an employer out of a continuing pension plan unless certain requirements have been met – see, PBA, ss. 79(1).

contribution holiday) or a change to the contribution formula which reduces the Province's contribution obligations. Neither the PBA nor the regulations to the PBA (the "Regulations") require the Superintendent's consent for surplus to be *utilized* for a contribution holiday[4] or to amend the contribution formula under the OTPP.

Certain changes to the OTPP which provide for the utilization of surplus may require the OTPP text to be amended (for example, changes to the contribution formula). Under Subsection 12(1) of the PBA, the administrator of a pension plan is required to apply to the Superintendent, within sixty days after the date on which the pension plan is amended, for registration of the amendment. The application for registration of an amendment must include certain documentation required under the PBA and the Regulations.[5] However, pursuant to Subsection 13(1) of the PBA, "[a]n amendment to a pension plan is not effective until the administrator of the plan files an application for registration of the amendment and the application meets the requirements of section 12 [of the PBA]". In other words, the Superintendent is not required to register a pension plan amendment as a precondition to such amendment becoming effective. Supporting this conclusion, in *Consumers Packaging*,[6] the Financial Services Tribunal concluded that the pension plan amendment in question became effective once filed, notwithstanding the fact that it had not yet been registered by the Superintendent:

> …It is clear from the *PBA* provisions above that the administrator of a pension plan has an obligation to administer a pension plan in accordance with filed documents and can implement or make effective plan amendments prior to the issuance of a Notice of Registration by the Superintendent. The Tribunal agrees with the Superintendent's and Union's submission that there is "no magic" in registration…[7]

The authority of the Superintendent to refuse to register an amendment under the PBA (in whole or in part) is limited to circumstances where the amendment is void or if the pension plan with the amendment would cease to comply with the PBA and the Regulations.[8] Similarly, the authority

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4 The PBA has been amended to expressly permit an employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, to reduce or suspend contributions for the normal cost of the pension plan if the pension plan has a surplus and if such other requirements as may be prescribed have been satisfied. Contributions could not be reduced or suspended if the documents that create and support the pension plan or the pension fund prohibit the reduction or suspension: see PBA, s. 55.1. However, this provision is not currently in force and will only come into force upon proclamation by the Lieutenant Governor.

5 PBA, ss. 12(2).

6 *Consumers Packaging Inc by its monitor, KPMG Inc., on behalf of O-I Canada Corp v. Superintendent of Financial Services and United Steel Workers of America, Local 203G* (29 November 2002), File No P0162-2001 (Ont. F.S.T.) ("*Consumers Packaging*").

7 *Ibid.*, at p. 11.

8 PBA, ss. 18(1)(d) and (f).

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of the Superintendent to revoke the registration of an amendment (in whole or in part) is limited to circumstances where the amendment does not comply with the PBA and the Regulations.[9]

Under the PBA and the Regulations, a pension plan administrator is required to file certain documentation with the pension regulator. Notably, under section 76 of the Regulations, the administrator is required to file financial statements and, for plans with assets of $3 million or more, an auditor's report for the pension fund or plan as at the plan's fiscal year end. However, we note that the financial statements that are required to be filed with the pension regulator are the financial statements for the OTPP and not the financial statements of the pension plan sponsor(s).

JS:

[9] PBA, ss. 18(1)(e) and (g).