RE: FSCO approval for surplus withdrawals

From: "Veinot, Cindy (TBS)" <"/o=govon/ou=exchange administrative group (fydibohf23spdlt)/cn=recipients/cn=veinot, cindy (tbs)d57">
To: "Kaufman, Paul (TBS)" <paul.kaufman@ontario.ca>
Date: Tue, 28 Nov 2017 11:21:09 -0500

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From: Kaufman, Paul (TBS)
Sent: November 28, 2017 11:18 AM
To: Veinot, Cindy (TBS); Laughton, Patrick (TBS); Nelson, Dane (TBS)
Cc: Compagnone, Lisa (TBS); Hosick, Sarah (TBS); Sawosch, Mercedes (TBS)
Subject: FSCO approval for surplus withdrawals

Hi – following up on a question that came up in the minister's briefing this morning, I'm confirming that section 78 of the *Pension Benefits Act* prohibits surplus withdrawals without the consent of the Superintendent of Financial Services (i.e. FSCO)

See below for excerpts from the pension asset panel's report that speak to this issue in the context of the OTPP and OPSEUPP and contrast it with the legal rules regarding contribution reductions (which are more permissive, and which I believe the AG also referenced in her recommendation).

Paul

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The legal requirements for taking assets out of a plan and those for reducing contributions are very different. **Removing assets requires permission to do so in the terms of the plan, agreement with plan members or approval of the joint sponsor, as well as approval of the Financial Services Commission of Ontario.** In contrast, the joint plan sponsors are free to decide on their own level of required contributions as long as they comply with the terms of the plan and with the Pension Benefits Act. All that is required is for the joint sponsors to agree. No external approvals are needed. The Panel concluded that the accounting answer should reflect the significant differences between the legal regimes that apply to contribution reductions and asset withdrawals.

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There is considerable case law in Canada addressing single sponsor plans and the ability of that sponsor either to withdraw surplus from the plan or take contribution holidays. Critical to assessing the ability of the sponsor to withdraw surplus or take contribution holidays are the plan trust agreement and plan text. Clear rights within the plan documents can support the sponsor's right to withdraw surplus or take contribution holidays. However, the law treats surplus withdrawals on a very different basis from contribution holidays.

> Surplus withdrawals are highly regulated by the Ontario PBA , and are regulated differently depending upon whether a surplus withdrawal is being considered from a continuing plan or on plan wind-up. A threshold question in any case of withdrawal is legal entitlement or 'ownership' of surplus. It is often the case that entitlement is not clear, and that neither the employer nor the plan members have an incontrovertible claim to a plan surplus. **In Ontario, all surplus withdrawals are subject to the review and consent of FSCO**. In addition, either legal entitlement to the surplus must be established or there must be an agreement between the employer, active members and retired members about

the surplus withdrawal. Arbitration procedures may also be utilized in some jurisdictions to determine an allocation of surplus.

Under applicable case law and the Ontario PBA, it is generally considered that a sponsor does not have a legal right to withdraw a surplus until these hurdles have been passed.
Since OPSEUPP specifically prohibits surplus withdrawal by either of the joint sponsors, and OTTP is silent on the issue of surplus withdrawal, the joint sponsors cannot avail themselves of any surplus through withdrawal (jointly or separately).

Consequently, the Panel concluded that the Ontario Provincial Government, as joint sponsor, does not have any ability to access the net pension asset through surplus withdrawals. This is consistent with the interpretation of the Ontario Provincial Government and the Auditor General.

Conversely, the Ontario PBA expressly permits contribution holidays without any requirement for FSCOreview or approval. Although certain plan provisions have been found to prohibit contribution holidays, this is the exception rather than the rule and contribution holidays are commonly taken by sponsors of Ontario defined benefit plans. In general, a plan text need not expressly permit a contribution holiday in order for a plan sponsor to reduce its contribution on account of a funding surplus. The plan actuary may take surplus into account in determining the required level of employer contributions. The plan actuary is prohibited from doing so only when express plan provisions or employer commitments require employer contributions regardless of any plan surplus.

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