CONFIDENTIAL DRAFT: FOR DISCUSSION PURPOSES ONLY

ONTARIO REGULATION

made under the

ONTARIO FAIR HYDRO PLAN ACT, 2017

FEES

Definitions

1. (1) In this Regulation,

"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;

"market comparable fees" means fees, expressed as a yearly percentage rate, charged by asset managers [or management and financial service providers] in Canada or another jurisdiction specified by the Board for services that are similar to the services provided by the Financial Services Manager under the Act in terms of,

[NTD for leg counsel: I am trying to get more clarity around "management and financial service providers". I am not sure whether the intent is to say "management service providers or financial service providers". If the intent is to refer to a "management and financial service provider", I will try to ascertain whether this is a well-understood industry "term of art" (since based on a brief search it did not appear to be).]

(a) the type of services provided, being services in respect of funds including securitization vehicles, pension funds, other structured investment funds, hedge funds and other similar structured funds,

(b) the scope of the services provided,

(c) the level of the services provided, and

(d) the dollar amount of assets under management;

Comment [DS1]: NTD for OEB: Is "specified by" the right way to say this?

Comment [DS2]: NTD for ESP/MoF: Should there be a "temporal" connection too? E.g. "... services that are similar to, and provided at a time that is similar to the time the services are provided by, the FSM ...".

"funding tranche" means an ~~specific~~ issuance of ~~debt by a financing entity and constitutes all or part of a~~ funding obligations of a particular series, class or type that have the same terms;

"FSM services" means services provided by the Financial Services Manager to financing entities in relation to the management and administration of the financing entities and the investment asset, including in relation to funding obligations incurred or that are planned to be incurred by the financing entities;

"market comparable forecast interest rates" means, in relation to a potential funding tranche described in the submissions mentioned in subsection 6 (3) or 6 (4), interest rates charged by lenders in Canada **[at the time the submissions are made]** 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 **[in terms of length and commencement]**,

(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;

Comment [DS3]: NTD for OPG/MoF: Should this contemplate "posted" rates rather than rates "charged by"?

"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;

(2) 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.

Forecast interest rate

1.1 For the purposes of this Regulation, the Financial Services Manager shall determine the forecast interest rate for a funding tranche that forms part of the net annual funding obligation for a year, by taking into account the following factors:

1. The interest rate for debt of or guaranteed by the Government of Ontario with a term or duration that is comparable to the term or duration of the funding tranche.

[NTD for leg counsel: We are confirming whether we need to refer to both "term" and "duration" here and in 2 ii below (and if yes, how these terms mean different things).]

2. The estimated credit spread, relative to the interest rate described in paragraph 1, for a debt obligation that,

   i. has a principal amount that is comparable to the principal amount of the funding tranche,

   ii. has a term that is comparable to the term of the funding tranche **[in terms of length and commencement]**,

   iii. is based on a type of instrument that is comparable to the type of instrument of the funding tranche, ~~and~~

   iv. has payment rights that are similar to the payment rights of the funding tranche, and

   v. is issued by an issuer with a risk profile comparable to the risk profile of the financing entity issuing the funding tranche.

3. Anticipated fees and commissions expected to be payable in connection with the issuance of the funding tranche.

Fees that may be established, charged

2. (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 the management and administration of financing entities and the investment asset, including in relation to funding obligations incurred or that are planned to be incurred by~~for FSM services provided to the financing entities.

(2) A fee mentioned in subsection (1) shall be comprised of a base fee calculated under section [3] and a variable fee calculated under section [6].

Comment [DS4]: NTD for OPG/MoF: Even if the term is the same length, would the commencement date of the term not also be relevant?

Comment [DS5]: NTD for OPG: Energy Policy is asking whether the fees and commissions are relevant to the determination of the forecast interest rate for the tranche, given that they are recoverable by the FSM under s. 7(2) below.

(3) For the purposes of subsection 19 (3) of the Act, fees may be established and charged by the Financial Services Manager to financing entities for the recovery of costs and expenditures, as provided for in section [7].

Comment [DS6]: NTD for OPG/OEB: The policy instruction is to provide that costs and expenditures are recoverable so long as they relate to the matters described in s. 7.1(1), and that the Board review the costs and expenditures from that perspective.

In order to implement this instruction and give the Board the authority to review, we have to deem the costs and expenditures to be fees.

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

Base fee

3. (1) Subject to sections [5.1] and [5.2], the Financial Services Manager shall establish the proposed base fee for a month as follows:

1. Determine the amount that is 0.075 per cent of the average monthly funding obligation for the preceding month.
2. Divide the amount determined under paragraph 1 by 12.

(2) The first month in respect of which the base fee may be established is ~~July~~ November 2017.

[OLC Note: Just need to confirm -- will there be an average monthly funding obligation for the month of June 2017? If not, it would not be possible to apply this method in respect of July 2017.] **[NTD for leg counsel: The first funding obligation may not be incurred until around November 2017. The base fee for a month would be zero if there was no average monthly funding obligation for the preceding month (i.e. if it was zero).]**

(3) The Financial Services Manager shall submit to the Board the base fee proposed to be charged in respect of the period from November 1, 2017 to December 31, 2018 no later than October 31, 2017.

(4) The Financial Services Manager shall submit to the Board the base fee proposed to be charged in respect of any year after 2018 no later than 120 days before the start of the year in respect of which the base fee would be charged.

[NTD for leg counsel: Let's move the submission provisions (other than the amendment submission provision) from section 9 to the respective sections that deal with the fee in question. As you will see in s. 6 and 7 below, the submission process will be different for each of the types of fees (base, variable, and costs/expenditures).]

[Further NTD for leg counsel: The Board's review of the base fee for the period from July 1, 2017 to December 31, 2018 will be limited to ensuring that the base fee is calculated correctly (i.e. calculated in accordance with ss. 5 (3)).]

Comment [DS7]: NTD for OPG/OEB: Ss. 19(4) of the OFHPA requires the Board to approve fees.

Board review of base fee

5.1 (1) The Board shall refuse to approve the proposed base fee mentioned in subsection 5 (3) if the Board is of the view that the proposed base fee was not established in accordance with subsection 3 (1).

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

(a) the Board shall provide reasons for the refusal; and

(b) the Financial Services Manager shall submit to the Board a revised proposed base fee that is established in accordance with subsection 3 (1)

[NTD for leg counsel: If the Board does not refuse to approve a proposed base fee under ss. (1) or (3), then we should explicitly say that the Board will approve the proposed base fee. Please tweak ss. 5.1 (1) and (3) accordingly.]

(3) The Board may refuse to approve a proposed base fee mentioned in subsection 5 (4) if the Board is of the view that the proposed base fee is materially inconsistent with market comparable fees.
[OLC Note: Should this section only apply starting January 1, 2019?]
[OLC Note: Are you sure that this is the only reason why the Board can refuse the proposed base fee?]
[NTD for leg counsel: In response to your notes, for the proposed base fee applicable in 2019 and beyond, the only basis upon with the Board can withhold approval is inconsistency with market comparable fees. For the proposed base fee applicable July 1 – Dec31/17 and Jan1 – Dec31/18, the Board can only withhold approval if the base fee is inconsistent with the formula in s. 3(1).]

Comment [DS8]: Explanatory note for OEB: The reg-making powers in s. 19 of the OFHPA don't appear to provide the same ability to impose on the Board (by reg.) the base fee as with the OESP reg-making powers in ss. 79.2(6) of the OEBA.

(~~1.1~~4) If the Board refuses to approve the proposed base fee,

(a) the Board shall provide reasons for the refusal and 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 details concerning the market comparable fees that the Financial Services Manager considered.

(5) **[NTD for leg counsel: Please add a provision that says that the process (i.e. the process outlined in ss. (1) and (2) above, or (3) and (4) above) will be repeated until the Board approves a proposed base fee for the year in question, unless you are of the view that that is already clearly implicit in those provisions.]**

(6) [NTD for leg counsel: Please add a provision that says that:

- **Until a new proposed base fee is approved, the FSM may continue to charge the most current Board-approved base fee (if any).**
- **Once the new proposed base fee is approved by the Board, the FSM shall make a "retrospective" adjustment to the base fee (in the month following the month in which the approval is given). The adjustment will be the difference (positive or negative) between the base fee actually charged in the relevant period up to that point, and the new base fee approved by the Board for that period. In other words, the Board approved fee would be "retrospectively" applied to the whole period. By "period" I mean either the initial period from Nov1/17 – Dec31/18 or any calendar year starting with 2019. Note that any amendment to fees (under s. 9.1) would only apply prospectively starting in the month following the month in which the amendments were approved by the Board.]**

Variable fee

6. (1) Subject to subsection (2) and section 6.1, the Financial Services Manager shall establish the variable fee for a year after 2017 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:

$$(A \times (B - C)) \times 0.05$$

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) If the circumstances set out in Column 1 of the following Table apply in a year, the variable fee payable for a year is subject to the rules set out opposite those circumstances in Column 2 of the Table:

Item	Column 1 Circumstances	Column 2 Rules
1.	The average annual funding obligations are $10 billion or less.	The variable fee payable for the year shall not be more than 1 per cent of the amount that is 5 per cent of the net annual funding obligation for the year.

		The variable fee payable for the year shall not be less than -1per cent of the amount that is 5 per cent of the net annual funding obligation.
2.	The average annual funding obligations are greater than $10 billion.	The variable fee payable for the year shall not be more than 2 per cent of the amount that is 5 per cent of the net annual funding obligation for the year. The variable fee payable for the year shall not be less than -2 per cent of the amount that is 5 per cent of the net annual funding obligation for the year.

(3) The Financial Services Manager shall make submissions to the Board in respect of the **[variable fee proposed to be charged in 2018, including the]** forecast interest rates for the funding tranches anticipated to be issued in 2018, no later than **[October 31, 2017]**.

Comment [DS9]: NTD for OPG/OEB: Is this wording appropriate?

(4) The Financial Services Manager shall make submissions to the Board in respect of the variable fee proposed to be charged in any year after 2018, including the forecast interest rates for the funding tranches anticipated to be issued in the year, no later than 120 days before the beginning of the year.

(5) If the Financial Services Manager has not submitted a forecast interest rate under subsection (3) or (4) for a funding tranche that will be issued in a year after 2017, the Board may require the Financial Services Manager to submit a proposed forecast interest rate for the funding tranche **[and may specify the time by which the submission must be made]**, or the Board may determine the funding tranche taking into consideration the forecast interest rates submitted by the Financial Services Manager for the year under subsection (3) or (4).

Comment [DS10]: NTD for OPG: The policy instruction is to not require the Board to apply linear interpolation to come up with a forecast interest rate, because the approach would be too prescriptive for this fairly limited subset of total fees.

Board review of variable fee

6.1 (1) The Board may 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 6 (1) is inconsistent with [market comparable forecast interest rates].

[OLC Note: We provide an explanation for how to determine "market comparable fees" but we say nothing about how to determine "market comparable forecast interest rates". Please instruct.]

[NTD for leg counsel: We have created a new defined term "market comparable forecast interest rates" to address this.]

[OLC Note: Are you sure this is the only reason why the Board may refuse the proposed variable fee?] **[NTD for leg counsel: Yes.]**

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

(a) the Board shall provide reasons for the refusal and may make recommendations to the Financial Services Manager regarding each forecast interest rate that the Board found was 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~~]~~.

Fees for costs and expenditures

7. (1) The Financial Services Manager may establish and charge fees for the recovery from a financing entity of any costs and expenditures incurred by the Financial Services Manager,

(a) on behalf of the financing entity in connection with the Financial Services Manager's duties under the Act in relation to the financing entity; or

(b) under a management agreement between the Financial Services Manager and the financing entity, where the agreement provides for the reimbursement of the costs and expenditures.

(2) The costs and expenditures referred to in subsection (1) may include costs and expenditures in respect of the following:

1. Underwriters or selling agents for funding obligations.

2. Banking fees, including 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 who are dedicated to providing FSM services to financing entities.

~~(3) The costs and expenditures referred to in subsection (1) shall not include any overhead costs of the Financial Services Manager, including [….].~~
~~[OLC Note: The phrase "overhead costs" seems a bit vague. Examples would help.]~~

Board review of fees for costs, expenditures

7.1 (1) The Board may refuse to approve a proposed fee for costs and expenditures or a portion of a proposed fee for costs and expenditures if the Board is of the view that the proposed fee is in respect of costs and expenditures that were not incurred in relation to the management and administration of financing entities and the investment asset, including in relation to funding obligations incurred or that are planned to be incurred by the financing entities.

(2) If the Board refuses to approve the proposed fee or a portion of the proposed fee, the amount not approved shall not be payable to the Financial Services Manager and the associated costs and expenditures shall not be recoverable by the Financial Services Manager from the financing entity.

~~(a) the Board shall provide reasons for the refusal and may make recommendations to the Financial Services Manager regarding the proposed fee; 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 how the proposed fee is in respect of costs and expenditures that were incurred in relation to the management and administration of financing entities and the investment asset.~~

Charging of fees

8. (1) Subject to sections [5.1], [6.1] and [7.1], in charging fees, the Financial Services Manager shall provide for,

(a) the base fee for a month to be payable within [x] days after the end of the month;

(b) the variable fee for a year to be payable in the following calendar year in twelve equal monthly instalments that coincide with the payment of the base fee for each month; and

(c) the fee for costs and expenditures for a month to be payable within [x] days after the end of the month.

(2) If the variable fee for a year is a negative amount, it shall be deducted in twelve equal monthly instalments from the base fee payable in the following year.

(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 its proportionate share of the average principal amount of funding obligations for the applicable period.

Comment [DS11]: NTD: Need to specify when the base fee is payable.

Comment [DS12]: NTD: Need to specify when the fee for costs and expenditures is payable.

Comment [DS13]: NTD: Should this be based on the average of the opening and closing balances for the applicable period (e.g. year)?

(4) For the purposes of determining the average principal amount of funding obligations under subsection (3), the formula set out in subsection 1 (2) applies with necessary modifications.
[OLC Note: Please confirm that this works.]

Submissions to Board

9.1 ~~(1) The Financial Services Manager shall make submissions to the Board in respect of fees proposed to be charged in 2018 no later than October 31, 2017.~~

~~(2) The Financial Services Manager shall make submissions to the Board in respect of fees proposed to be charged in respect of any year after 2018 no later than 120 days before the start of the year in respect of which the fees would be charged.~~

~~(3)~~ The Financial Services Manager may, no more frequently than once in any consecutive twelve month period, make submissions to the Board to amend any base fee or variable fee~~s~~ approved by the Board, and the provisions of section [5.1]. [6.1] or [7.1], as applicable, apply in respect of the submissions.

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Board approval, general

10. (1) For the purpose of determining whether to approve a proposed fee, the Board shall consider the information provided by the Financial Service Manager in its submission relating to the proposed fee.

(2) For the purpose of determining whether to approve a proposed base fee or variable fee, the Board may consider, as it determines to be appropriate, the advice provided by third party consultants and experts. **[NTD for leg counsel: We want to retain this provision, but the Board noted that they already have this ability without needing to specifically include it here. The Board flagged the risk of an adverse interpretation in other contexts where the Board is not given explicit statutory authority to consider advice of third party consultants and experts. Can we word this ss. 10(2) in such a way that it is just "for greater clarity"?]**

Commencement

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