

FTR Now

Ontario's Bill 70: The New Face of Pension Regulation Revealed

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Editor's Note: Bill 70 received Royal Assent on December 8, 2016, as amended by the Standing Committee on Finance and Economic Affairs. The Committee amendments do not impact the overview below.

On November 16, 2016, the Ontario government introduced [Bill 70, Building Ontario Up for Everyone Act \(Budget Measures\), 2016](#) (Bill 70). Bill 70 is omnibus legislation that includes various pension-related initiatives, including substantive changes to certain pension minimum standards. As importantly, Bill 70 includes framework legislation for a new financial services regulator with responsibility for pension plans registered in Ontario, and proposes administrative monetary penalties for violations of pension standards.

In this *FTR Now*, we highlight the key pension-related aspects of Bill 70 that are of particular interest to pension plan administrators and employers.

Amendments to the Ontario *Pension Benefits Act* (PBA)

Portability for retirees: Bill 70 would amend section 42 of the PBA to expressly allow a retired member to elect a portability transfer from a pension plan if the pension plan permits the election. This change would resolve uncertainty created by amendments to the PBA in 2012, which carved out pensioners from the definition of "former member" and defined them under a separate term, "retired member". The 2012 amendments failed to include "retired members" among the persons able to elect portability under section 42.

Annuity purchases on wind up: In some wind up situations, the Superintendent of Financial Services (Superintendent) may appoint an administrator to conduct the wind up and settlement of benefits, including by way of annuity purchase. Bill 70 would amend the PBA to require a Superintendent-appointed administrator to obtain the Superintendent's approval before purchasing annuities in satisfaction of the wind up liabilities of the plan. The Superintendent may defer the giving of such approval in respect of some or all of the annuities to be purchased if the Superintendent is of the opinion that the annuity purchase would adversely affect the financial position of the Pension Benefits Guarantee Fund (PBGF).

Allocation of Monies from the PBGF: The PBGF is a fund established by the Ontario government to cover defined benefit (DB) pension benefits in the event a DB plan is wound up

because the employer is insolvent and the plan is underfunded. Bill 70 amends the PBA to authorize the government to prescribe regulations respecting the timing and allocation of PBGF monies to pension plans, and authorizing the Superintendent to determine the timing and manner of allocating and paying those amounts from the PBGF.

Liabilities on wind up: Bill 70 would amend the PBA to authorize the government to make regulations exempting an employer or a successor employer from the requirement to make payments into the pension plan on wind up. The regulations, which will be forthcoming, will be limited to circumstances when: (i) there is a court order under the *Companies' Creditors Arrangement Act* made on or before December 31, 2015 staying all proceedings taken against the employer; and (ii) the employer or successor employer and other parties specified in the regulation have entered into an agreement related to the wind up liability and the Superintendent has approved the agreement.

Administrative monetary penalties: Bill 70 would amend the PBA to allow the Superintendent to levy administrative monetary penalties (AMP) in certain circumstances. AMPs are a form of civil penalty imposed by a governmental authority for failing to comply with a legislative requirement. The introduction of AMPs to the PBA likely signals a significant change in the regulation of pension plans registered in Ontario.

Contravention of the PBA or its related regulations is a regulatory offence. Persons convicted of an offence under the PBA are liable for a fine of not more than \$100,000 for the first conviction and not more than \$200,000 for each subsequent conviction. Prosecution of regulatory offences under the PBA is relatively rare because doing so requires a trial before the courts. For this reason, prosecutions under the PBA are generally limited to violations where the security of members' benefits is alleged to have been seriously compromised.[\[1\]](#)

Unlike the fines already contained in the PBA (which require a trial and conviction of a regulatory offence), AMPs are due and payable immediately, subject only to any rights of review that may be available to the alleged violator under the relevant statutory scheme. AMPs are levied without a formal trial on the basis that, due to their lower monetary value, the alleged violator's constitutional "due process" rights are not engaged.

Bill 70 would amend the PBA to allow AMPs to be levied in specific circumstances, specifically where a person has not complied with a prescribed requirement of the PBA, a requirement imposed by Order of the Superintendent or an obligation assumed by way of undertaking. Not all failures to comply with the PBA will attract AMPs. Rather, if the relevant provisions of Bill 70 are passed, the Ontario government will issue regulations to specify which PBA requirements will attract AMPs if they are not complied with. Under Bill 70 as it presently reads, the maximum AMP that could be levied is \$10,000 for an individual and \$25,000 for a corporation or other legal entity (other than an individual). Bill 70 would permit lower monetary caps on AMPs to be prescribed by regulation.

Bill 70 contemplates two tiers of AMPs: one tier for more severe violations and a second tier for less severe violations. Under the first tier (referred to as “general administrative penalties”), the Superintendent would give notice of his intention to impose the AMP and the alleged violator would have 15 days to request a hearing before the Financial Services Tribunal (FST) to challenge the imposition of the AMP. If no such hearing is requested, the Superintendent may proceed to order payment of the AMP. Failures to comply with an order of the Superintendent or an undertaking would fall within this first tier; failures to comply with a requirement of the PBA could fall within either tier.

Under the second tier (referred to as “summary administrative penalties”), the Superintendent merely provides the alleged violator an opportunity to make written submissions as to why an AMP should not be imposed. If the Superintendent continues to take the view that a violation has occurred and an AMP is payable, he or she may order payment of the AMP. The person ordered to pay the AMP may appeal the order to the FST, and payment of the AMP is stayed pending final disposition of the matter. With both general and summary administrative penalties, the Superintendent cannot order an AMP more than five years after the date when the violation occurred or is alleged to have occurred.

Together with the Ontario government’s creation of a new pension regulatory authority (discussed below), the introduction of an AMP framework likely signals a significant shift in the manner in which compliance with the PBA will be enforced in future. To date, the significant resources required to prosecute regulatory offences under the PBA has meant that minor technical breaches of the PBA have generally not resulted in fines. However, the introduction of AMPs could mean that, in future, pension plan administrators and their agents could face monetary penalties for violations such as late, incomplete or missed filings.

New Financial Services Regulatory Authority

Bill 70 introduces the *Financial Services Regulatory Authority of Ontario Act, 2016*, to establish the Financial Services Regulatory Authority of Ontario (FSRA), as a new regulator having responsibility over aspects of industry sectors that currently fall within under the purview of the Financial Services Commission of Ontario (FSCO), the FST and the Deposit Insurance Corporation of Ontario (DICO), including:

- Pension plans (including persons who establish or administer pension plans, and all employers or other persons on their behalf who are required to contribute)
- Insurance companies and intermediaries
- Loan and trust companies
- Credit unions and caisses populaires
- Mortgage brokerages and others involved in mortgage brokering
- Co-operative corporations

Introduction of the *Financial Services Regulatory Authority of Ontario Act, 2016* follows from recommendations made in a [November 4, 2015 Preliminary Position Paper](#) (Preliminary Paper) and [March 31, 2016 Final Report](#) (Final Report) of the expert panel that had been established to review the FSCO, FST and DICO mandates. The Final Report had advocated for establishing FSRA as a new, independent and integrated regulator, having responsibility for many of the regulatory functions that are presently performed by both FSCO and DICO. Specifically, the Final Report concluded that:

...many of the regulatory functions that are performed by both FSCO and DICO could be performed better by a single integrated organization — FSRA. FSRA should exercise both prudential and market conduct functions in a coordinated but distinct fashion, each with its own Division within the regulator. We also recommend that FSRA should have a separate Pensions Division with its own Superintendent, and it should operate in a manner that is interconnected, but distinct from, the other two FSRA divisions. We recommend that FSRA, with its modified “twin peaks-plus” approach to regulation, should have its own corporate identity and be:

- a. Self-funded
- b. Properly governed by an expert board of directors
- c. Operationally independent from government
- d. Authorized to make and enforce rules, as limited by its enabling statute
- e. Guided by a clearly articulated mandate, as set out by its enabling statute, and
- f. Obligated to act in a transparent and principled manner, manage risk and strive for a specified set of positive outcomes.

The Final Report also recommended that the FST be separate and independent from the FSRA:

We also propose that the FST operate separately from and independent of FSRA and be established by its own statute. While the FST’s governance and operations should be independent of FSRA, the regulator could support the tribunal by providing office space and administrative support service to exploit efficiencies in only those areas distinct from the tribunal’s adjudicative processes and outputs. This outsourcing of support would not be a matter of governance oversight.

The proposed *Financial Services Regulatory Authority of Ontario Act, 2016*, addresses some of these items from the Final Report. Specifically, it provides that FSRA is to:

- be established as a corporation without share capital, as an agent of the Crown
- have a board of at least three and not more than 11 directors to be appointed by the Lieutenant Governor in Council, on the recommendation of the Minister of Finance
- have authority to, subject to approval of the Minister of Finance, make by-laws governing administrative, managerial and procedural matters

Additionally, the *Financial Services Regulatory Authority of Ontario Act, 2016*, provides for the

Lieutenant Governor in Council to make assessments of all entities that fall within the scope of FSRA's regulation with respect to all expenses and expenditures incurred by the Ministry of Finance and by FSRA in preparing FSRA to carry out its functions, and with FSRA's ongoing operations. Regulations will be required for purposes of prescribing the share of any assessment payable by a specific entity within a regulated sector. The manner of determining the share may vary for each regulated sector or for entities that form part of the sector, and unpaid assessments will represent a debt due to the Crown, recoverable by action or by any other remedy or procedures generally available to the Crown.

If Bill 70 is passed, the *Financial Services Regulatory Authority of Ontario Act, 2016*, will come into force on a day to be named by proclamation of the Lieutenant Governor. As drafted, the proposed legislation provides just an initial framework for a new regulatory scheme that will govern pensions and other regulated sectors, and does not specifically address certain recommendations made in the Final Report. For example, the *Financial Services Regulatory Authority of Ontario Act, 2016*, does not contain any provisions requiring that pensions be managed by a separate division, and does not spell out details respecting the FST. It is anticipated that some of these items may be established by way of regulation, by FSRA by-laws, and possibly additional legislation. At this early stage, the potential implications flowing from the proposed changes to the current pension regulatory framework are not clear.

Repeal of Ontario Retirement Pension Plan Legislation

[As previously indicated](#), on July 28, 2016, the Ontario government announced plans to repeal legislation previously introduced respecting the Ontario Registered Pension Plan (ORPP), to be implemented when the Legislature resumed sitting in the Fall. Following through on this commitment, Bill 70 would, if passed, repeal the *Ontario Retirement Pension Plan Act, 2015*, the *Ontario Retirement Pension Plan Administration Corporation Act, 2015*, and the *Ontario Retirement Pension Plan Administration Corporation Act (Strengthening Retirement Security for Ontarians), 2016* and make consequential amendments to other legislation.

This proposed repeal of the ORPP-related legislation follows commitments made to expand the Canada Pension Plan, and the federal government's introduction of Bill C-26, *An Act to amend the Canada Pension Plan, the Canada Pension Plan Investment Board Act and the Income Tax Act* on October 6, 2016 (see our *FTR Now* of October 25, 2016, [Expanded CPP: The Next Generation](#)).

Investment Management Corporation of Ontario (IMCO)

Bill 70 also makes a clarifying amendment to the *Investment Management Corporation of Ontario Act, 2016* to permit the Board of Directors of IMCO to delegate the preparation of investment policies governing the investment funds to be created by IMCO. IMCO is expected to be operational and ready to accept new members in Spring 2017.

Concluding Remarks

We will continue to monitor the progress of Bill 70 and any related regulations, and provide updates on key developments. If you have any questions about this article, please contact [Natasha D. Monkman](#) or any other [member of our Pension, Benefits and Executive Compensation Practice Group](#).

[1] For example, in the past decade, offences under the PBA were prosecuted in at least two cases where it was alleged that a pension plan administrator or its agent failed to exercise due care, diligence and skill in the investment of pension assets, and failed to ensure that the pension fund was invested in compliance with certain quantitative limits set out in pension investment regulations.

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