



May 3, 2018

Lester Wong
Deputy Superintendent, Pension Division
Financial Services Commission of Ontario
5160 Yonge Street, 16th Floor
Toronto, ON M2N 6L9

Via email: Lester.Wong@fsco.gov.on.ca

Dear Mr. Wong:

Re: FSCO Policy for Administrative Penalties under the Pension Benefits Act (the “PBA”)

The Association of Canadian Pension Management (ACPM) is the leading advocate for plan sponsors and administrators in the pursuit of a balanced, effective and sustainable retirement income system in Canada. We represent plan sponsors, administrators, trustees and service providers and our membership represents over 400 companies and retirement income plans that cover more than 3 million plan members.

ACPM understands that the Financial Services Commission of Ontario (“FSCO”) will likely develop a policy concerning the exercise by the Superintendent of Financial Services (the "Superintendent") of his new power under the PBA to impose administrative penalties. We support the development of such a policy. The PBA and Regulation 365/17 do not address all issues associated with this new power to impose administrative penalties. As a result, there are many questions about this new power, including procedural and application questions. A clear policy framework will provide guidance on this new power and therefore its development serves the interests of all stakeholders.

The ACPM has identified some issues that we believe should be addressed in any FSCO policy on administrative penalties. These issues are set out below.

1. Discretion to impose a penalty

Under Section 108.1(2) of the PBA, administrative penalties may be imposed for either of two purposes: promoting compliance with the PBA and preventing a person from benefitting economically from breach of the PBA. However, even if a penalty would achieve one of those purposes, the Superintendent retains a discretion to impose or not to impose a penalty.

As the government emphasized in the 2016 Ontario Budget, workplace pensions are of central economic and social importance:

Workplace pension plans are an integral part of Ontario's retirement income system. They provide employers with a tool to attract and retain talent, while giving employees a valuable source of retirement income. The 2008 recession and subsequent economic challenges have highlighted the need for regulatory reform. The government continues to pursue reforms to the pension regulatory landscape to encourage innovative and flexible retirement savings tools and to ensure pension plans continue to be a viable retirement savings tool in different economic conditions.

Regulation of pensions must be carefully calibrated so as to avoid dissuading employers from continuing to sponsor workplace pension plans. In implementing administrative penalties, it would not be in keeping with the broader policy objective outlined above for minor or trivial errors to attract penalties. With that in mind, the ACPM believes that a policy governing the exercise of the discretion to impose a penalty would benefit FSCO and other stakeholders. Such a policy should provide that:

- Administrative penalties should be imposed only in cases of serious or persistent breaches, which involve actual or potential harm to the interests of beneficiaries where there was no proactive resolution by the administrator.
- The Superintendent should be required to consider whether the breach was caused by factors outside of the administrator's control.
- The circumstances in which a penalty may be imposed on an individual should be limited to exceptional cases involving wilful misconduct or self-enrichment by that individual.

2. Procedure

(a) General Administrative Penalties

Section 108.2 of the PBA requires the Superintendent to issue a notice of intended decision ("NOID") before issuing an order imposing a general administrative penalty. The recipient of the NOID may request a hearing before the Financial Services Tribunal (the "FST").

The policy for administrative penalties should require the Superintendent to request and consider written submissions from each potential paying party before he decides whether or not to issue a NOID to impose a general administrative penalty. Requiring the Superintendent to request and consider written submissions before making a decision about whether to issue a NOID would be consistent with his duty of procedural fairness for a number of reasons, including:

- It is unlikely that the Superintendent will be aware of all relevant circumstances. It may be that there was no breach or there were extenuating circumstances.
- A NOID is a public document and as such entails reputational risk for those on whom it is issued.

Requiring the Superintendent to consider written submissions before deciding whether to issue a NOID to impose an administrative penalty would be consistent with the procedure under the PBA for summary administrative penalties.

Moreover, unless the Superintendent requests and considers submissions before deciding whether to issue a NOID to impose a general administrative penalty:

- the Superintendent cannot properly assess whether imposing a general administrative penalty would serve the purposes of this new power as prescribed under Section 108.1; and
- the Superintendent cannot properly consider the criteria he is required to consider under Section 3(2) of Regulation 365/17 to assess the amount of an administrative penalty.

Finally, if the Superintendent issues NOIDs to impose administrative penalties without first providing an opportunity for written submissions and without giving due consideration to those submissions before deciding to issue a NOID, it is likely that many more NOID recipients will request a hearing before the FST than if the Superintendent requests and reviews written submissions before making his decision. This would have implications for the proper functioning of the FST and resources of the FST, the Superintendent, and the potential paying party.

Before deciding whether to issue a NOID, the policy on administrative penalties should provide for the Superintendent to request written submissions on:

- whether there was a breach of the PBA;
- whether it has been resolved and how expeditiously;
- whether an administrative penalty should be imposed;
- the amount of the administrative penalty;
- the deadline for paying the administrative penalty; and
- any other information that the potential paying party believes the Superintendent ought to consider in making his decision.

To ensure that the potential paying party has a reasonable opportunity to respond to the Superintendent, the policy on administrative penalties should also:

- require the Superintendent to provide the individual or organization with all relevant information; and
- require the Superintendent to provide the individual or organization with at least thirty days to make written submissions and enable the Superintendent to extend this deadline in appropriate circumstances.

(b) Summary Administrative Penalties

Section 108.3 of the PBA requires the Superintendent to provide a "reasonable opportunity" to make written submissions. The policy for administrative penalties should provide guidance on this requirement. We suggest that it would be reasonable for the policy to indicate that the Superintendent will provide at least thirty days for persons to make written submissions and grant requests for extensions of this deadline in appropriate circumstances.

The policy on administrative penalties should require that orders imposing summary administrative penalties under Section 108.3 of the PBA provide information about appeals of that order, i.e., the right to appeal, deadline for filing an appeal, and process for appeals. This would be consistent with the FST's recommendation for Superintendent orders imposing summary administrative penalties in the mortgage broker sector (see *Centum Premium Financial Inc. v. Ontario (Superintendent of Financial Services)*, 2017 ONFST 10 (CanLII)).

Plans Administered by a Board of Trustees or Pension Committee

The PBA prohibits administrative penalties from being paid from a pension fund. This has significant implications for plans administered by boards of trustees and pension committees. Liability insurance does not typically cover administrative penalties. Trustees and committee members appointed by an organization often do not have an indemnity from that organization. In addition, elected trustees and committee members, such as elected retiree trustees, likely do not have any source from which to seek indemnification as they are elected rather than appointed by a sponsoring organization. As a result, individuals who serve on boards of trustees and pension committees are subject to the risk of personal liability for administrative penalties.

While it is important to ensure that boards of trustees and pension committees comply with applicable requirements, the risk of personal liability for administrative penalties will likely impact the willingness of individuals to serve, or to continue to serve, as members of a board of trustees or pension committee. Members of boards of trustees and pension committees frequently serve without remuneration.

The policy on administrative penalties should require the Superintendent to consider their personal exposure and limited role in the day-to-day affairs of the plan before imposing administrative penalties on boards of trustees and pension committees. No penalty should be imposed on an individual except in exceptional cases involving wilful misconduct or self-enrichment by that individual. This should address some concerns about the risk of personal liability for administrative penalties for individual members of boards of trustees and pension committees.

Prohibit or Restrict the Stacking of Administrative Penalties

The policy on administrative penalties should prohibit or restrict the stacking of administrative penalties as this practice would be unreasonably disproportionate and unduly punitive. Stacking of administrative penalties would occur if an administrative penalty were to be imposed for each breach arising out of the same act or omission. For example, if in one year the administrator does not send an annual statement to twenty members by the deadline, this arguably constitutes twenty breaches. Imposing an administrative penalty for each of these occurrences – stacking – should not occur as the focus of any policy should be to address the whole of the breach. Such a policy would be in line with practice in the mortgage broker sector, where typical practice is not to stack penalties, although where there are a large number of breaches, the penalty may be higher than in cases where there is a single breach (see *Centum Coachwood Mortgage Corporation v. Ontario (Superintendent Financial Services)*, 2015 ONFST 15 (CanLII), at para 14).

Voluntary Disclosure

The policy on administrative penalties should address the possibility of a circumstance of non-compliance being voluntarily disclosed to the Superintendent. The policy should provide that the Superintendent will consider voluntary disclosure, an extremely significant factor weighing against the imposition of administrative penalties. This approach would be consistent with the objective of promoting compliance with the PBA.

Limitation Period

A NOID or order for an administrative penalty may not be provided more than five years after the date the breach occurred or is alleged to have occurred. The policy on administrative penalties should provide direction on this provision. There is no explicit indication in the legislation that this new power is intended to operate retroactively. As such and to provide certainty to the industry, the policy should clarify that the Superintendent should only exercise his new power to impose administrative penalties to circumstances that occurred on or after January 1, 2018.

Deadline for paying penalty

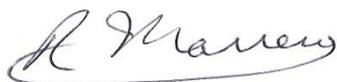
Sections 4 and 7 of Ontario Regulation 365/17 refer to the deadline for paying an administrative penalty. The deadline is thirty days after the applicable date or such longer time as may be specified in the order. The policy should provide guidance on the factors that the Superintendent is to consider in determining the payment deadline. We suggest that some factors that ought to be considered include:

- the amount of the penalty;
- whether the paying party is an individual or not;
- previous penalties imposed on that paying party; and
- the extent to which the paying party derived an economic benefit from the breach.

We trust that the foregoing will be of assistance to the Superintendent.

If you have any questions or would like to discuss this matter, please do not hesitate to contact us at your earliest convenience.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ric Marrero".

Ric Marrero
Interim CEO
ACPM