

Pensions Law

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Ontario Government Calls for Comments on Proposal to Eliminate the 30% Rule for Pension Investment

The Pension Policy Branch of the Ontario Ministry of Finance has issued a call for comments on proposed amendments to eliminate the “30% Rule” for investments by Ontario pension plans. Submissions are due by April 29, 2016.

The 30% Rule restricts pension plans from, directly or indirectly, investing the moneys of the plan in the securities of a corporation to which are attached more than 30% of the votes that may be cast to elect the directors of a corporation. It is one of the most onerous quantitative limits on investments by pension plans contained in the federal pension regulations and incorporated by reference into the Ontario regulations.

As noted in our December 2, 2015 Update, *Ontario to Eliminate the 30% Pension Investment Rule, Move Forward with the ORPP and Provide Solvency Funding Relief*, the Ontario government’s Economic and Fiscal Review released on November 26, 2015 contained a surprise announcement of the government’s intention to eliminate the 30% Rule.

As promised in the Economic and Fiscal Review, the government has now posted a *description* of the proposed regulation for consultation.

Call for Comments

Comments are being sought on all aspects of the proposal including, in particular the following:

1. Should there be disclosure requirements or undertakings requested from a corporation if a plan invests in more than a threshold percentage of the voting shares (e.g., 30%) of that corporation? If so,
 - a) what should the required disclosure or undertakings consist of?
 - b) what is the appropriate threshold?
2. Should the same disclosure and undertakings be required from all types of corporations?
3. Should the disclosure requirements and undertakings depend on the features of the plan (e.g., size of plan, governance structure, investment capability)?
4. Are there any other considerations or concerns associated with eliminating the 30% Rule? For example, should measures be introduced to reduce the potential for conflicts of interest?

Amendments Being Considered

The amendments being considered contemplate that a plan administrator would no longer be prevented from investing in more than 30% of the voting shares of any corporation.

In order to make such an investment, the target corporation may be required to comply with certain disclosure requirements and undertakings. These are similar to the obligations currently applicable to real estate corporations, resource corporations and investment corporations that are exempt from the 30% Rule. Namely, the target corporation would be required to:

1. file with the Superintendent of Financial Services: its financial statements, a list of its officers, directors and shareholders, a list of assets of the corporation and the “fair value” (as opposed to “market value” as currently applicable to real estate, resource and investment corporations) of each asset, and a certificate of compliance with the undertaking;

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2. permit FSCO staff to visit its head office and examine its books and records;
3. obtain an appraisal at the request of the Superintendent (for privately-held corporations);
4. adhere to the “Related Party Rule”, which restricts the lending of any assets to, or investment of any monies in, a related party of the pension plan;
5. restrict its investments and loans to those authorized under the *Pension Benefits Act*; and
6. not invest, or hold an investment, in securities of any other corporation to which are attached more than a threshold percentage (e.g. 30%) of the votes that may be cast to elect the directors of that corporation, unless the corporation deposits an undertaking by the other corporation not to invest in the securities of any other corporation. This is similar to the “stacking restriction” currently applicable to investment corporations and would effectively limit the number of investments over a specified voting threshold in an investment structure to two.

Lastly, any financial statements filed by the pension plan must value the common shares of the corporation in accordance with a pre-defined formula.

It is important to note that the disclosure requirements and undertakings being considered may not automatically apply once a 30% voting share threshold is crossed. Rather, the government is calling for comments on the appropriate voting threshold that would trigger these obligations, leaving open the possibility that they may be triggered at higher investment levels (for example, over 50% voting shares).

Interested parties may wish to make submissions before the April 29th deadline.

Please contact any member of our Pension, Benefits and Compensation Group for further information.