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SECTION:	Surplus
INDEX NO.:	S900-512
TITLE:	Application by Employer for Payment of Surplus on Wind Up of a Pension Plan - PBA s. 77.11(1) to (8), 78, 79, 112 - Regulation 909, s. 28(5), (5.1) and (6), 28.1, 29.1(4)
APPROVED BY:	Superintendent of Financial Services
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REPLACES:	S900-510, S900-511

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This policy replaces S900-510 (Application by Employer for Payment of Surplus on Full Wind Up of a Pension Plan) and S900-511 (Application by Employer for Payment of Surplus on Partial Wind Up of a Pension Plan) as of the effective date of this policy.

*Note: Where this policy conflicts with the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28 (FSCO Act), Pension Benefits Act, R.S.O. 1990, c. P.8 (PBA) or Regulation 909, R.R.O. 1990, or any other regulations under the PBA (Regulations), the FSCO Act, PBA or Regulations govern. Terms used in this policy have the meaning given to them in the PBA or Regulations unless clearly stated otherwise.*

*Note: The electronic version of this policy, including direct access to all linked references, is available on FSCO's website at [www.fSCO.gov.on.ca](http://www.fSCO.gov.on.ca). All pension policies can be accessed from the **Pensions** section of the website through the **Pension Policies** link.*

## Policy Purpose

This policy sets out the process to be followed when applying to the Superintendent of Financial Services (the Superintendent) for consent to the payment of surplus to an employer on a pension plan wind up pursuant to section 78(1) of the PBA. While compliance with this policy is intended to facilitate the application process, the Superintendent has the ultimate authority to decide whether to consent to or reject an application. Subject to necessary modifications, this policy also applies to partial wind ups with an effective date prior to July 1, 2012.

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**Schedule II** - Certification of compliance with the surplus withdrawal requirements of other designated jurisdictions.

## 1. DEFINITIONS

1.1. For purposes of this policy:

- (a) "Administrator" means the person or persons that administer the pension plan in accordance with section 8 of the PBA.
- (b) "Affected Persons" refers to the members, former members, retired members and any other persons entitled to payments under the pension plan on the date of the wind up. In the case of a partial wind up, the Affected Persons are limited to those persons in the wind up group. In all cases Affected Persons includes any person who is entitled to share in surplus pursuant to section 43.1 of the PBA.
- (c) "Employer" has the meaning set out in section 1(1) of the PBA. An "Employer" may include any party that is authorized to stand in the place of the Employer (e.g., a receiver or trustee in bankruptcy).
- (d) "FSCO" means the Financial Services Commission of Ontario.
- (e) "Historical Analysis" refers to the legal analysis of entitlement to surplus based on the terms of all pension plan documents from the plan's inception. The analysis would encompass all documents that may be relevant to surplus entitlement, including all plan texts, trust agreements, insurance contracts, employee booklets, employee notices, collective bargaining agreements, information brochures and any amendments to these documents. An Historical Analysis is only required under certain types of Surplus Applications, as described later in this policy.

- (f) "NOID" means a Notice of Intended Decision issued by the Superintendent pursuant to section 89(3.1) of the PBA.
- (g) "Non-Ontario Affected Person" means an Affected Person whose benefits in the pension plan were accrued with respect to employment in a designated jurisdiction (i.e., other than Ontario) and whose entitlement and rights to surplus are determined by legislation in that designated jurisdiction.
- (h) "Regulations" refer to Regulation 909, R.R.O. 1990, or any other regulations under the PBA.
- (i) "Surplus Application" refers to the application and supporting materials filed with the Superintendent for purposes of obtaining consent to the payment of surplus to an Employer on a pension plan wind up pursuant to section 78(1) of the PBA. The contents of a Surplus Application are described in Schedule I of this policy.
- (j) "Surplus Notice" refers to the notice of Surplus Application that must be provided to Affected Persons, each Trade Union and, where applicable, the advisory committee of the pension plan, as prescribed under section 78(2) of the PBA.
- (k) "Trade Union" has the same meaning as in the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A.
- (l) "Written Agreement" refers to the agreement providing for the payment of surplus to the Employer in the circumstances specified in the agreement, as described in section 77.11(7) of the PBA.

## **2. BACKGROUND AND GENERAL PRINCIPLES**

- 2.1. When an Employer wishes to be paid surplus on a pension plan wind up, the Employer must apply for the prior consent of the Superintendent as required by section 78(1) of the PBA. Before consenting, the Superintendent must be satisfied that the Employer has complied with all the requirements of the PBA and the Regulations relating to the payment of surplus. The onus is on the Employer to satisfy the Superintendent that its Surplus Application meets the requirements of the PBA and the Regulations.
- 2.2. An Employer winding up a pension plan would generally not file a Surplus Application until after the payment of basic benefits from the pension plan has been approved by the Superintendent.
- 2.3. The distribution of surplus to members may be provided by benefit enhancements or in cash. Where any surplus is to be distributed to an Employer, the surplus can be paid in cash or, in the case of a partial wind up, can be allocated to the ongoing portion of the pension plan (for more information refer to FSCO policy S900-910: Distribution of Surplus to Employer on Partial Wind Up).

- 2.4. This policy applies to surplus in the context of a defined benefit plan, defined contribution plan, or a plan with both defined benefit and defined contribution provisions.
- 2.5. Where the wind up of the pension plan is as a result of an event that affects the employment of members (such as a plant closure), generally all members participating in the pension plan on or after the date notice of the event is provided but prior to the event actually occurring, must be included in the wind up group for the purposes of the wind up, including the surplus distribution.
- 2.6. The Administrator must identify if annuities have previously been purchased from the pension plan in circumstances where a discharge applied pursuant to section 43.1 of the PBA. If such a purchase has occurred and the annuitants would have been entitled to payment of surplus under the pension plan if the pension plan had been wound up on the date of the annuity purchase, then those annuitants have the same rights with respect to payment of surplus under the pension plan as former members and retired members who, as of the date of the wind up, are entitled to payments under the pension plan.
- 2.7. The following addresses shall be used for purposes of submitting or filing paper and electronic copy of notices, applications, submissions and other correspondence with the Superintendent:

Paper copies: Superintendent of Financial Services  
Financial Services Commission of Ontario  
5160 Yonge Street, 4<sup>th</sup> Floor  
Toronto ON M2N 6L9

Electronic copies: PensionInquiries@fsco.gov.on.ca

### **3. PAYMENT OF SURPLUS TO THE EMPLOYER**

- 3.1. The PBA provides three sources of authority for the payment of surplus to an Employer on pension plan wind up, all of which are subject to the prior consent of the Superintendent. Each scenario is described in detail below.

#### **Entitlement under pension plan provisions**

- 3.2. The Superintendent may consent to the payment of surplus to the Employer under section 77.11(1) of the PBA if the Employer demonstrates by means of an Historical Analysis that it is entitled to the payment of surplus under the terms of the documents that create and support the pension plan and pension fund.
- 3.3. If the Employer is seeking a payment of surplus based on its entitlement under the terms of the documents that create and support the pension plan and pension fund, and the plan is a successor plan as a result of a transfer of assets with an effective date on or after December 8, 2010, then the Employer must demonstrate that an Historical Analysis of both the original pension plan and the successor pension plan provide for the payment of

surplus to the Employer on the wind up of the pension plan pursuant to section 77.11(4) of the PBA.

- 3.4. However, section 77.11(4) of the PBA is not applicable to asset transfers with an effective date prior to December 8, 2010. Where one or more such transfers have occurred, the ability of the employer to establish its entitlement to a portion or all of the surplus will be determined in accordance with the common law. This will generally require an Historical Analysis of the plan and all predecessors plans.

#### **Court Orders**

- 3.5. The Superintendent may, pursuant to section 79(3)(b) or section 79(3.1)(b) of the PBA, consent to payment of surplus to an Employer out of a pension plan that is being wound up, where the payment of surplus to the Employer on wind up of the pension plan is authorized by a Court Order.

#### **Written Agreements**

- 3.6. The Superintendent may consent to the payment of surplus to an Employer pursuant to a Written Agreement as described in section 77.11(7) of the PBA between the Employer and the following prescribed threshold of Affected Persons:
  - (a) at least two-thirds of the members of the pension plan (for this purpose, a Trade Union that represents or represented members on the date of the wind up may agree on behalf of those members); and
  - (b) the number which is considered appropriate in the circumstances by the Superintendent of former members, retired members and other persons entitled to payments under the pension plan on the date of the wind up. In most cases, the Superintendent has determined the appropriate number is two-thirds of this group; however, the number is ultimately at the discretion of the Superintendent.

In circumstances of a partial wind up, the above thresholds for Written Agreement would only apply to those in the partial wind up group.

- 3.7. As provided by section 77.11(8) of the PBA, where the thresholds for consent have been met, a Written Agreement prevails over language in the documents that create and support the pension plan and pension fund regarding surplus entitlement, including any trust that may exist in favour of any person.

### **4. SURPLUS APPLICATION PROCESS**

- 4.1. The Surplus Application process involves the following components, although the components differ depending on the authority for the payment of surplus to the Employer:
  - (a) As required by section 28(5.1) of Regulation 909, the Employer must first file a copy of the Surplus Notice with the Superintendent, and then transmit the Surplus Notice to the parties identified in section 78(2) of the PBA. The Surplus Notice must contain the information prescribed by section 28(5) of Regulation 909. See Part 5 of this policy for more information on the Surplus Notice.

- (b) After the Surplus Notice has been transmitted, the Employer must file a Surplus Application to the Superintendent that meets the requirements of the PBA and the Regulations. See Part 7 and Schedule I of this policy for more information on the Surplus Application.
- (c) Once submitted, the Superintendent will review the Employer's Surplus Application to determine if it is complete and compliant, and will make a determination as to whether consent will be provided. See Part 8 of this policy for more information on the application review process.

## **5. NOTICE OF SURPLUS APPLICATION (SURPLUS NOTICE)**

- 5.1. The Employer must give notice of the Surplus Application as required by section 78(2) of the PBA to all Affected Persons, and if applicable, any Trade Unions and any advisory committee existing under the pension plan.
- 5.2. The Employer must file both a paper and an electronic copy of the Surplus Notice with the Superintendent before transmitting it to Affected Persons, as required by section 28(5.1) of Regulation 909. For the purposes of section 28(5.1), the Surplus Notice will be considered to be filed when either the paper or electronic copy is first submitted to the Superintendent. Refer to paragraph 2.7 of this policy for the Superintendent's mailing and e-mail addresses. Once the Surplus Notice is filed with the Superintendent, it may be transmitted to Affected Persons.
- 5.3. The Superintendent will not approve the Surplus Notice before its transmission to Affected Persons but may require that the Surplus Notice be re-issued at any time prior to the approval of the Surplus Application, if the Surplus Notice does not satisfy the requirements in paragraph 5.4 of this policy.

### **Content of Surplus Notices**

- 5.4. The Surplus Notice must include the content prescribed by section 28(5) of Regulation 909 and the additional information required by the Superintendent as outlined below:
  - (a) The name of the pension plan and its registration number (as required by section 28(5)(a) of Regulation 909).
  - (b) The valuation date of the report to be provided with the Surplus Application (as required by section 28(5)(b) of Regulation 909). The Superintendent also expects that the Surplus Notice will indicate the date of the wind up report, and the date of any supplementary wind up reports existing at the date of the Surplus Notice.
  - (c) The amount of surplus in the pension plan (as required by section 28(5)(b) of Regulation 909). The Employer should indicate the source of this figure and the date of the source.

- (d) The amount of surplus withdrawal requested (as required by section 28(5)(d) of Regulation 909). This should include the proposed amount to be paid to the Employer, and if applicable, the proposed amount to be distributed to Affected Persons and a description of how this amount is proposed to be allocated among them.
- (e) A statement that written representations may be made to the Superintendent with respect to the Surplus Application within thirty (30) days of receipt of the Surplus Notice (as required by section 28(5)(e) of Regulation 909), that the Superintendent will provide copies or a summary of the written representations to the Employer upon receipt, and that only those who make written representations will receive a copy of the Superintendent's NOID and thus be entitled to a hearing if they object to the NOID. The Surplus Notice must also state that written representations are to be sent to the Superintendent, and must include the mailing and e-mail addresses listed in paragraph 2.7 of this policy.
- (f) The authority, if any, for surplus reversion (as required by section 28(5)(f) of Regulation 909); that is, a statement as to whether the Employer will be proceeding on the basis of entitlement under the documents that create and support the pension plan and pension fund, under a Court Order, or under a written agreement between the Employer and the Affected Persons, as described under section 77.11(7) of the PBA. The Surplus Notice should also include the following, as applicable:
  - i. Where the Employer's Surplus Application is based on entitlement under the documents that create and support the pension plan and pension fund, an Historical Analysis of the ownership of surplus, or an address of a website where the Affected Persons can access the Historical Analysis. Where access to the Historical Analysis is provided through a website, the Surplus Notice must also include instructions on how Affected Persons can obtain hard copies of the Historical Analysis;
  - ii. Where the Employer's Surplus Application is based on a Court Order, a copy of the Court Order declaring that the Employer is entitled to the surplus on plan wind up; or
  - iii. Where the Employer's Surplus Application is based on a Written Agreement between the Employer and Affected Persons, a description of the consent process, and where applicable, a statement that a Trade Union that represents or represented members on the date of the wind up has the authority to agree on behalf of those members.

In the case of a Surplus Application based on a Written Agreement, the Employer is not required to make any statement regarding the plan's surplus provisions or the Employer's entitlement to surplus. However, if the Employer elects to make such statements in the Surplus Notice or any communications that accompany the Surplus Notice, then the Employer will be required to support such statements through an Historical Analysis. We note that it is

acceptable to indicate that there may be differing views on entitlement to surplus and that the Employer is proceeding by means of a Written Agreement to avoid making a determination on entitlement based on the provisions of the plan, or language to that effect; such a communication would not require the submission of an Historical Analysis.

- (g) A statement that copies of the wind up report and supplementary wind up reports filed with the Superintendent in support of the Surplus Application are available for review at the offices of the Employer and information on how copies of the report(s) may be obtained (as required by section 28(5)(g) of Regulation 909).

Where the offices of the Employer are closed, the Employer must provide for and communicate in the Surplus Notice alternate location(s) where these documents can be reviewed (for example, at an alternative location near to the offices of the Employer where the individual previously worked or another location that is agreed upon by the Administrator and the person making the request).

- (h) A statement that pursuant to sections 29(1) and (2) of the PBA, upon written request Affected Persons, a Trade Union, and their agents are entitled to review the documents prescribed under section 45(1) of Regulation 909, at the premises where the member, former member or retired member was employed or other location that is agreed upon by the Administrator and the person making the request.
- (i) A statement that, pursuant to section 30(1) of the PBA, Affected Persons, a Trade Union, and their agents are entitled to review at the Superintendent's offices the documents that create and support the pension plan and the pension fund, and any other documents that are prescribed under section 45(1) of Regulation 909.
- (j) A statement that the documents prescribed in sections 45(2) and 46(2) of Regulation 909 will be provided by mail or electronically, if requested from the Administrator or from the Superintendent in writing, subject to an applicable fee.
- (k) A statement that the Surplus Application and the Surplus Notice were prepared by the Employer.
- (l) A statement that the Affected Person may wish to seek independent legal advice with respect to the Employer's Surplus Application.

#### **Transmitting the Surplus Notice**

5.5. After the Employer has filed a copy of the Surplus Notice with the Superintendent, the Employer must transmit the Surplus Notice to the following parties as required by section 78(2) of the PBA:

- (a) each member, former member and retired member of the pension plan to which the pension fund relates;
- (b) each Trade Union that represents members of the pension plan;



- (c) each Trade Union that represents the members, former members or retired members of the pension plan on the date of the wind up;
- (d) any other individual who is receiving payments out of the pension fund; and
- (e) the advisory committee of the pension plan, if applicable.

Notice must be given to those annuitants for whom a pension was purchased under section 43.1 of the PBA, provided the annuitants would have been entitled to payment of surplus under the pension plan if the pension plan had been wound up on the date the pension was purchased.

- 5.6. The Employer may transmit the Surplus Notice by personal delivery or by regular mail addressed to the person to whom the Surplus Notice is being transmitted. The Employer may use electronic means to send the Surplus Notice to the Affected Person if it has the person's permission to do so and if the Employer complies with the Electronic Commerce Act, 2000, S.O. 2000, c. 17, and with FSCO policy A300-807: Electronic Communications between Plan Administrators and Plan Beneficiaries.

#### **Alternate Surplus Notice**

- 5.7. Pursuant to section 112(3) of the PBA, the Superintendent may authorize the transmission of the Surplus Notice or reasonable notice of the contents of the Surplus Notice by public advertisement or otherwise (i.e., an alternate surplus notice). The Superintendent may do so where of the opinion that the persons who are to be given the Surplus Notice are so numerous as to make personal delivery impractical, or where the plan has a significant number of missing members, or if for any other reason it is not reasonable to give the Surplus Notice to all or any of the persons individually by personal delivery, by regular mail or electronically as described above.
- 5.8. Where an Employer requests an alternate surplus notice for the reason that the plan has a significant number of missing members, the Employer, or Administrator where a separate entity from the Employer, must have made substantive efforts to locate those Affected Persons – and should describe those efforts in its request to the Superintendent. Refer to FSCO Policy A300-900 Searching For Plan Beneficiaries in this regard.
- 5.9. Where an Employer requests an alternate surplus notice, the Employer must submit to the Superintendent one paper copy and one electronic copy of the proposed alternate surplus notice for the Superintendent's prior approval. The proposed alternate surplus notice should include at least the following information:
- (a) the name of the pension plan and its registration number;
  - (b) the persons to whom the alternate surplus notice is addressed;
  - (c) the reason that these persons are being notified (i.e., to notify them of the Employer's Surplus Application and their right to make written representations to the Superintendent with respect to the Surplus Application);
  - (d) the amount of surplus in the pension plan;

- (e) the amount of the surplus withdrawal requested;
- (f) the authority for the surplus reversion to the Employer (i.e., entitlement under the pension plan documents, by Written Agreement, or on the basis of a Court Order);
- (g) how the complete Surplus Notice (if not included in the alternate surplus notice in its entirety) may be obtained from the Employer; and
- (h) a statement that written representations may be made to the Superintendent within thirty (30) days after the delivery of the alternate surplus notice is deemed to be provided, and that the Superintendent will provide copies or a summary of the written representations to the Employer.

5.10. The alternate surplus notice must state that written representations are to be sent to the Superintendent, and include the mailing and e-mail addresses listed in paragraph 2.7 of this policy.

5.11. The alternate surplus notice is deemed to be provided on the date it is first published or otherwise provided as directed by the Superintendent.

## **6. THE WRITTEN AGREEMENT**

6.1. If the Surplus Application is based on a Written Agreement, it is FSCO's expectation that the Written Agreement provided to Affected Persons and, where applicable, their Trade Union(s), include the information specified below:

- (a) the name of the pension plan and its registration number;
- (b) a brief history of the pension plan, including any predecessor pension plan that may have transferred assets to the wound up pension plan;
- (c) the event that has triggered the refund of surplus (i.e., a pension plan wind up);
- (d) a statement that any payment of surplus is dependent on the consent of at least two-thirds of the members of the pension plan, and at least two-thirds of former members, retired members and other persons who are entitled to payments under the pension plan as of the date of the wind up (or such other number that the Superintendent considers appropriate in the circumstances);
- (e) a statement that each Affected Person may wish to obtain independent legal advice with respect to the proposed Written Agreement;
- (f) the time limit for accepting the Written Agreement (which should be reasonably sufficient to give Affected Persons an opportunity to retain and consult with legal counsel; in most situations FSCO expects that this will be at least sixty (60) days);
- (g) a description of the payment of expenses related to the Surplus Application; and

- (h) a signature page.
- 6.2. In the Written Agreement, the Employer is not required to make any statement regarding the plan's surplus provisions or the Employer's entitlement to surplus. However, if the Employer elects to make such statements in the Written Agreement, or any communications that accompany the Written Agreement, then the Employer will be required to support such statements through an Historical Analysis. We note that it is acceptable to indicate that there may be differing views on entitlement to surplus and that the Employer is proceeding by means of a Written Agreement to avoid making a determination on entitlement based on the provisions of the plan, or language to that effect; such a communication would not require the submission of an Historical Analysis.
- 6.3. A Trade Union that represents or represented some but not all of the members of the pension plan on the date of wind up may execute the Written Agreement on behalf of its members. However, if the Trade Union represents or represented less than two-thirds of the members of the pension plan, the agreement of a sufficient number of members that are not represented by the Trade Union will also be required so that the threshold of two-thirds of the total of all active members at the date of the wind up is achieved.
- 6.4. Where there is a Trade Union that represents or represented members of the pension plan on the date of wind up and the Trade Union is agreeing on behalf of those members, the Trade Union's signature page to the Written Agreement should include the full name of the Trade Union and the full name and signature of the person who is authorized to execute the Written Agreement on behalf of the Trade Union. In addition, the Trade Union should attach to its executed Written Agreement a list of the Affected Persons on whose behalf the Trade Union is representing.
- 6.5. Where an Affected Person is represented by legal counsel, legal counsel may execute the Written Agreement on behalf of the Affected Person, provided that legal counsel satisfies the requirements of policy S900-514: Surplus Distribution by Written Agreement - The Role of Legal Counsel.

## **7. SURPLUS APPLICATION**

- 7.1. The format and content of the Surplus Application should be consistent with Schedule I to this policy. All information supporting the application must be attached to the Surplus Application.
- 7.2. The Employer must ensure that all the information contained in its Surplus Application and in any supporting documents is accurate and complete.
- 7.3. The onus is on the Employer to ensure that its Surplus Application complies with the relevant provisions in the PBA and Regulation 909 and considers the guidance provided in this and other relevant policies and frequently asked questions (FAQs) posted on the FSCO website.

- 7.4. The Superintendent has the right to request additional information as part of their consideration of the Surplus Application.
- 7.5. The Surplus Application, including enclosures or attachments to the application, should be submitted on 8 ½ inch x 11 inch paper (subject to legibility).
- 7.6. At least two paper copies and one electronic copy of the Surplus Application should be filed with the Superintendent. Refer to paragraph 2.7 of this policy for the appropriate mail and e-mail addresses.
- 7.7. Where other documents or information relevant to the Surplus Application are discovered after the Employer has applied to the Superintendent for consent to its Surplus Application, such documents or information must be filed with the Superintendent as an addendum to the initial Surplus Application.
- 7.8. The Employer must provide a copy of its Surplus Application to the Administrator if the Employer and the Administrator are not the same legal entity.
- 7.9. The Superintendent will acknowledge receipt of the Employer's Surplus Application.

## **8. REVIEW PROCESS**

- 8.1. On behalf of the Superintendent, FSCO staff will review the Surplus Application and all accompanying documents in support of the Surplus Application for completeness and compliance.
- 8.2. If a Surplus Application is incomplete, FSCO staff will inform the Employer by letter. The review of a Surplus Application will not proceed until the earlier of the date when:
  - (a) FSCO staff receive all of the information or documents requested;
  - (b) the Employer informs FSCO staff that the information requested by FSCO staff will not be forthcoming; or
  - (c) the time for a response, as set out in the letter by FSCO staff, expires.
- 8.3. If any compliance issues are identified, FSCO staff will send a letter to the Employer, and any other parties that FSCO considers appropriate. In addition to outlining the compliance issues, the letter from FSCO staff will specify the time period within which the Employer must provide a written response to the compliance issues if it wishes to have its response considered before the Superintendent decides whether or not to consent to the Surplus Application.
- 8.4. FSCO staff may request a meeting with the Employer to discuss the Surplus Application.
- 8.5. Pursuant to section 89(3.1) of the PBA, the Superintendent's NOID to consent or refuse to consent to the Surplus Application, with reasons, will be served on the Employer and

on any person who has made written representations to the Superintendent in respect of the Surplus Application.

- 8.6. The Superintendent may also provide the NOID to the Administrator, where the Administrator is a different party than the Employer. As well, the NOID will be posted on FSCO's website.
- 8.7. A person on whom the NOID is served under section 89(3.1) is entitled to a hearing by the Financial Services Tribunal (the Tribunal) under section 89(6) of the PBA, if within thirty (30) days after being served with the NOID the person delivers to the Tribunal a completed Financial Services Tribunal Form 1 – Request for Hearing.
- 8.8. If a completed Financial Services Tribunal Form 1 is received by the Tribunal from a person on whom the NOID is served under section 89(3.1) within the thirty (30) day period, the Tribunal will appoint a time for and hold the hearing pursuant to section 89(8) of the PBA. If the Tribunal does not receive a completed Financial Services Tribunal Form 1 – Request for Hearing from any person on whom the NOID is served under section 89(3.1) within the thirty (30) days, the Superintendent may make the intended decision as provided by section 89(7) of the PBA.
- 8.9. The Superintendent's order consenting or refusing to consent to the Employer's Surplus Application will be provided to the Employer and, where the Administrator is a different party than the Employer, to the Administrator. The Superintendent's order will also be posted on the FSCO website.

## **9. AFTER APPROVAL OF THE SURPLUS APPLICATION**

- 9.1. The Administrator must ensure that all benefits and liabilities under the plan are settled, and that any surplus owing to Affected Persons is distributed or provided for in a manner agreed to by the Superintendent, before the remaining surplus assets are paid to, or as directed by, the Employer.
- 9.2. The Administrator must notify the Superintendent in writing within thirty (30) days of the final distribution of the assets of the pension plan, including surplus, as required by section 29.1(4) of Regulation 909.
- 9.3. Once all assets, including surplus, have been distributed or provided for in a manner agreed to by the Superintendent, the Superintendent will close the plan's registration and will inform the Employer and, where the Administrator is a different party than the Employer, the Administrator.
- 9.4. The Employer is responsible for informing the Canada Revenue Agency of the closing of the plan's registration.

## SCHEDULE 1

### FORMAT AND CONTENT OF THE EMPLOYER'S APPLICATION TO THE SUPERINTENDENT FOR CONSENT TO THE PAYMENT OF SURPLUS TO THE EMPLOYER

- Date:** Provide the date of the Surplus Application
- Pension Plan:** Provide the full name of the pension plan and its registration number
- Employer:** Provide the full legal name of the Employer
- Applicant:** Provide the full legal name of the Employer or, where applicable, the receiver or trustee in bankruptcy that is authorized to stand in the place of the Employer

#### **Nature of the Surplus Application:**

Provide a full description of the application to the Superintendent with reference to the relevant section(s) of the PBA and Regulations pursuant to which the application is being made.

For example, if the application is based on entitlement under the pension plan provisions, the application may state as follows:

Application for the Superintendent's consent pursuant to section 78(1) of the Pension Benefits Act, R.S.O. 1990, c. P.8, as amended (the PBA), to the payment of surplus to [provide full legal name of the Employer] in the amount of \$ [insert the amount of surplus sought at the effective date of the wind up of the pension plan] as at [insert the effective date of wind up of the pension plan] plus investment earnings thereon to the date of payment [insert any other adjustments the Employer may be seeking to the amount being sought].

The application is based on section 77.11(1) of the PBA. The Employer relies on the documents that create and support the pension plan in support of its position that it is entitled to payment of surplus under the pension plan.

If the application is based on a Court Order, the application may state as follows:

Application for the Superintendent's consent pursuant to section 78(1) of the Pension Benefits Act, R.S.O. 1990, c. P.8, as amended (the PBA), to the payment of surplus to [provide full legal name of the Employer] in the amount of \$ [insert the dollar amount of surplus sought at the effective date of the wind up of the pension plan] as at [insert the effective date of wind up of the pension plan] plus investment earnings thereon to the date of payment [insert any other adjustments the Employer may be seeking to the amount being sought].

The application is based on a Court Order declaring that the Employer is entitled to the surplus when the pension plan is being wound up, pursuant to section 79(3)(b) or section 79(3.1)(b) of the PBA.

If the application is based on a Written Agreement, the application may state as follows:

Application for the Superintendent's consent pursuant to section 78(1) of the Pension Benefits Act, R.S.O. 1990, c. P.8, as amended (the PBA), to the payment of surplus to [provide full legal name of the Employer] in the amount of \$ [insert the amount of surplus sought at the effective date of the wind up of the pension plan] as at [insert the effective date of wind up of the pension plan] plus investment earnings thereon to the date of payment [insert any other adjustments the Employer may be seeking to the amount being sought].

The application is based on section 77.11(7)2 or section 77.11(7)3 of the PBA.

This application includes a Written Agreement whereby [insert percentage] per cent of the surplus as at the date of the Written Agreement will be distributed to the Employer and [insert percentage] per cent of the surplus as at the date of the Written Agreement will be distributed to the members, former members, retired members and other persons who are entitled to payments under the pension plan as of the date of wind up.

**Counsel/Agent:**

Provide the name of any person acting as legal counsel or agent for the Employer making the application, for the Administrator and for the Affected Persons. If there is no legal counsel or agent, please state "None".

- Legal counsel or agent for the Employer (and name of firm)
- Legal counsel or agent for the Administrator (and name of firm), where different than the Employer's counsel or agent.
- Legal counsel or agent for the Affected Persons (and name of firm).

**Actuary:**

Please also provide the names of the actuary(ies), if any, for the Employer making the application, for the Administrator and for the Affected Persons. If there is no actuary, please state "None".

- Actuary for the Employer (and name of firm).
- Actuary for the Administrator (and name of firm), where different than the Employer's actuary.
- Actuary for the Affected Persons (and name of firm).

**Plan Administrator:**

Provide the name and address of the Administrator and the name, phone number, e-mail, and address of the contact person for the Administrator.

**Trade Union:**

Provide the name and address of the Trade Union(s), if any, that represent(s) or represented members of the pension plan on the effective date of the wind up, including the name, phone number, e-mail, and mailing address of the contact person(s) for the Trade Union(s).

Advise if the Trade Union(s) also represent(s) or represented former members or retired members of the pension plan on the effective date of the wind up.

For each applicable Trade Union, include and reference as an attachment relevant excerpts from the most recent collective bargaining agreement(s), including the cover page, the execution page(s) and all pension-related provisions.

**Advisory Committee:**

Indicate if the pension plan has an advisory committee established under section 24 of the PBA.

**Background:**

Provide a brief summary of the background of the pension plan leading to the Surplus Application including:

- the effective date of the pension plan;
- the classes of members covered by the pension plan;
- in the case of a partial wind up, a description of those members, former members and other persons entitled to payments as a result of the event that gives rise to the partial wind up;
- the basic benefit structure (e.g., “non-contributory”, “flat benefit plan”, “final average earnings”);
- a brief chronology of the pension plan and prior versions of the pension plan, including any pension plan from which assets were transferred into the wound up pension plan (include references to asset transfers to or from the pension fund of another pension plan);
- the corporate history relevant to the pension plan and any predecessor pension plans, including the background to any changes in the name of the Employer associated with the pension plan;
- the effective date of, and reasons for, the wind up of the pension plan; and
- any other information that will assist in the review of the Surplus Application.



Include and reference as an attachment a list, by class, of the names of members, former members, retired members and any other individual receiving payments out of the pension fund as at the date of wind up. For smaller groups of Affected Persons, this information can be included in the Surplus Application (rather than as an attachment).

This list must include annuitants for whom a pension was purchased under section 43.1 of the PBA, provided the annuitants would have been entitled to payment of surplus under the pension plan if the pension plan had been wound up on the date the pension was purchased.

**Section 78(2) of the PBA – Notice Requirements:**

The applicant must satisfy the Superintendent that notice has been provided pursuant to section 78(2) of the PBA, section 28(5) of Regulation 909, and as required by this policy. As required by section 28(6) of Regulation 909, provide the following:

- A statement that section 78(2) of the PBA regarding the transmission of Surplus Notice has been complied with.
- The date the last Surplus Notice was distributed and the form of delivery of the Surplus Notice. Include and reference as an attachment a list, by class, of the names of the persons to whom the Surplus Notice was transmitted, including any Trade Unions or advisory committees that were sent the Surplus Notice. A reference may be made to the list provided under “Background” above, provided details are included in the application indicating any persons for whom the Surplus Notice was not transmitted (e.g., for reason of no current mailing address).
- A statement that a copy of the Surplus Notice was filed with the Superintendent before the Surplus Notice was transmitted to Affected Persons, as required by section 28(5.1) of Regulation 909.
- Include and reference as an attachment a certified copy of the Surplus Notice.

The Surplus Notice must also be given to those annuitants for whom a pension was purchased under section 43.1 of the PBA, provided the annuitants would have been entitled to payment of surplus under the pension plan if the pension plan had been wound up on the date the pension was purchased.

**Section 112(3) of the PBA - Alternate Service:**

If the Surplus Notice is transmitted by public advertisement with the prior authorization of the Superintendent, list the classes or groups of persons who were served by public advertisement and the dates and newspapers in which the advertisement ran.

If the Surplus Notice is transmitted in an alternative form, other than public advertisement with the prior authorization of the Superintendent, list the classes or groups of persons to whom the Surplus Notice was served in alternative form and the date(s) and method by which the alternative form of service was provided.

Include and reference as an attachment a copy of the public advertisement and/or alternative form of service and the Superintendent's authorization for alternative service of the Surplus Notice.

**Section 79(3) and (3.1) of the PBA – Prerequisites to Superintendent's Consent to Payment of Surplus to the Employer on Wind Up:**

In the following sections, the Employer must satisfy the Superintendent that the prerequisites for payment of surplus set out in the PBA and Regulation 909 have been met.

**a) Section 79(3)(a) – The Pension Plan has a Surplus:**

The applicant must demonstrate that the pension plan has a surplus.

Include and reference as an attachment the letter from the Superintendent approving the distribution of basic benefits to the Affected Persons.

Include and reference as an attachment the wind up report and any supplements to the wind up report. A supplement to the wind up report will be required to be filed if the distribution of surplus is not addressed in the initial wind up report, where the initial wind up report does not reflect: the surplus distribution proposal reflected in the Written Agreement; if the balance sheet contained in the wind up report has been amended to reflect the actual cost of the purchase of pensions being paid or deferred pensions; or if there are errors/omissions, etc. Any supplements to the wind up report must be prepared by an actuary.

Include in the Surplus Application a brief summary of the balance sheet for the pension plan as at the effective date of wind up, along with a balance sheet reconciliation if there has been any significant change in the figures at the date of the Surplus Application. You may use the format below, or a similar format:

**Balance Sheet**

	<b>As at effective date of wind up</b>	<b>As at [insert current date]</b>
<b>Assets</b>		
Market value of assets	\$0.00	\$0.00
Less: Provision for expenses	<u>\$0.00</u>	<u>\$0.00</u>
<b>Available Assets</b>	<b>\$0.00</b>	<b>\$0.00</b>
<b>Liabilities</b>		
Basic benefits	\$0.00	\$0.00
Benefit enhancements if applicable	<u>\$0.00</u>	<u>\$0.00</u>
<b>Liabilities for benefits</b>	<b>\$0.00</b>	<b>\$0.00</b>
<b>Surplus (Deficit)</b>	<b>\$0.00</b>	<b>\$0.00</b>

**b) Section 77.11, 79(3)(b) or 79(3.1)(b) – Authorization of Payment of Surplus to Employer on Wind Up:**

The applicant must demonstrate that the payment of surplus to the Employer on the wind up of the pension plan is authorized either as provided in section 77.11 of the PBA or by a Court Order under section 79(3)(b) or 79(3.1)(b) of the PBA declaring that the Employer is entitled to the surplus when the pension plan is being wound up. The required documentation will differ depending upon the basis for Employer entitlement, and is described below for each basis:

Where surplus entitlement is established through the terms of the documents that create and support the pension plan and pension fund (section 77.11(1) of the PBA):

If the payment of surplus to the Employer is on the basis that the documents that create and support the pension plan and pension fund provide for the payment of surplus to the Employer, the Surplus Application must include an Historical Analysis demonstrating that the Employer is legally entitled to the payment of surplus on wind up.

“Historical Analysis” refers to the legal analysis of entitlement to surplus based on the terms of all pension plan documents from the plan’s inception. The analysis would include all documents that may be relevant to surplus entitlement, including all plan texts, trust agreements, insurance contracts, employee booklets, employee notices, collective bargaining agreements, information brochures, and any amendments to these documents.

The applicant must also describe in detail, with reference to the relevant documents, how it reaches the conclusion that the Employer, and not the pension plan beneficiaries, is entitled to the surplus.

Where there are prior pension plans from which the current plan assets can be traced, or that may otherwise be relevant, the Historical Analysis must take into account the prior plan texts, trust agreements, insurance contracts, employee booklets, employee notices, collective bargaining agreements, information brochures and any other documents that may be relevant to the Superintendent’s determination of whether a plan provides for the payment of surplus to the Employer on wind up. Any predecessor plan information as required by section 3.3 of this Policy must also be included.

Where any plan or trust documentation that may be relevant has been amended since its inception, the Historical Analysis must spell out the authority under the plan or trust to amend the provision or document. The Historical Analysis must also refer to all provisions or documents that do not support the Surplus Application.

The applicant should highlight the portions of the documents that may be relevant to the Superintendent’s decision on surplus entitlement, including those provisions that do not support the Employer’s claim to surplus. Complete documents must be included as attachment(s) to the Surplus Application, arranged in chronological order, and clearly labelled.

Where entitlement to surplus has been established by Court Order (section 79(3)(b) or section 79(3.1)(b) of the PBA as applicable)

If the payment of surplus to the Employer on the wind up of the pension plan is authorized by a Court Order, include and reference as an attachment the Court Order declaring that the Employer is entitled to the surplus on plan windup.

Where surplus entitlement is established through a Written Agreement between the Employer and Affected Persons (section 77.11(7)2 or 77.11(7)3 of the PBA)

If authority for the payment of surplus to the Employer on the wind up of the pension plan is on the basis of a Written Agreement between the Employer and Affected Persons, include the following:

- The proposed distribution of surplus as per the Written Agreement expressed as a percentage and as a dollar amount. You may use the table below, or a similar table.

<b>To members, former members, retired members and other persons entitled to payments under the pension plan on the date of wind up, including persons entitled to share in the surplus pursuant to section 43.1</b>	[insert %]	[insert \$ amount]
<b>To Employer</b>	[insert %]	[insert \$ amount]

- Provide information concerning the executed Written Agreement received by the Employer. You may use the table below, or a similar table.

	Total (#)	Written Agreements Issued (#)	Consents (#)	Consents (%)	Refusals / No Response (#)
<b>Members</b>					
<b>Former members</b>					
<b>Retired members</b>					
<b>Other persons (including any annuitants under section 43.1)</b>					
<b>Trade Union #1</b>					
<b>Trade Union #2</b>					

- Include and reference as attachment(s) the following materials:
  - A list, by class, of the Affected Persons who received the Written Agreement.
  - Include those annuitants for whom a pension was purchased under section 43.1 of the PBA, provided the annuitants would have been entitled to payment of surplus under the pension plan if the pension plan had been wound up on the date the pension was purchased.
  - The name of the Trade Union(s) representing and/or agreeing on behalf of members of the pension plan, if any, that received the Written Agreement, and a list of the Affected Persons on whose behalf the Trade Union is acting.
  - An original or certified copy of the Written Agreement signed by the Employer and by any Trade Unions, where applicable.
  - The executed signature page of the Written Agreement for each Affected Person, or copies thereof certified by the Employer as being true copies.
  - A copy of other information that accompanied the Written Agreement provided to Affected Persons, if any.

**c) Section 79(3)(c) of the PBA – Provision has been made for Payment of all Liabilities**

Outline the status of the distribution of benefits and the proposal for the distribution of surplus to members, former members, retired members and any other persons entitled to payments under the pension plan as of the date of the wind up, if any. If the Superintendent is not satisfied that adequate provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of the wind up of the pension plan, the Superintendent may issue a NOID to refuse to consent to the Surplus Application.

**Other Designated Jurisdictions**

The Employer must disclose whether there are any Non-Ontario Affected Persons. Where applicable, the Application must include a table showing the number of Non-Ontario Affected Persons at the date of wind up in each jurisdiction. You may use the table below, or a similar table.

	<b>Ontario #</b>	<b>[insert name of jurisdiction] #</b>	<b>[insert name of jurisdiction] #</b>	<b>[insert name of jurisdiction] #</b>	<b>Totals #</b>
<b>Members</b>					
<b>Former members</b>					
<b>Retired members</b>					
<b>Other persons</b>					

Where the Surplus Application is based on a Written Agreement, include a reference to the tab or attachment that contains a list of Non-Ontario Affected Persons who have executed a Written Agreement (or other applicable document for that jurisdiction).

Include and reference as an attachment a certification in the form set out in Schedule II to this policy confirming that the Employer has complied with the requirements of the relevant legislation applicable to the Non-Ontario Affected Persons for the allocation, payment and distribution of surplus.

### **Written Representations from Affected Persons**

The Employer must specify whether or not it has received any written representations with respect to the Surplus Application. Any written representations must be attached to the Surplus Application. Responses by the Employer to the written representations (if any) must also be attached to the Surplus Application.

### **Written Submissions from the Employer**

Include and reference as an attachment any written representations by the Employer that may be relevant to its Surplus Application.

### **Attachments**

Provide an index of all attachments to the Surplus Application. The attachments should be listed in the order that corresponds to the order of the subject matter in this Schedule and, where applicable, in chronological order. Where a Surplus Application is bound, the relevant tab numbers and their contents should also be included in the index.

### **Signature**

The Surplus Application must be signed by an authorized employee or agent of the Employer (or of the receiver or trustee in bankruptcy authorized to act for the Employer). The individual signing the Surplus Application should print his or her name below his or her signature and should indicate the capacity in which he or she has signed the Surplus Application (i.e. authorized employee or agent).

**DATED** this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_  
(day) (month) (year)

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Signature of the applicant's authorized employee or agent

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Name of the applicant's authorized employee or agent

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Capacity/Title of the applicant's authorized employee or agent

Address of the applicant's authorized employee or agent

It is an offence under the *Criminal Code*, R.S.C. 1985, c. C-46, as amended, for anyone to knowingly make a false document with the intent that it be acted on as genuine.

**SCHEDULE II**

**CERTIFICATION OF COMPLIANCE WITH SURPLUS WITHDRAWAL REQUIREMENTS OF OTHER DESIGNATED JURISDICTIONS**

- Date:** Provide the date of the Surplus Application
- Pension Plan:** Provide the full name of the pension plan and its registration number
- Employer:** Provide the full legal name of the Employer
- Applicant:** Provide the full legal name of the Employer, or, where applicable, the receiver or trustee in bankruptcy that is authorized to stand in the place of the Employer

**I CERTIFY TO THE SUPERINTENDENT OF FINANCIAL SERVICES THAT:**

- (a) I am an authorized employee or agent of the applicant.
- (b) The Surplus Application affects members, former members, retired members and/or other persons whose benefits in the pension plan were accrued with respect to employment in a designated jurisdiction (i.e., other than Ontario) and whose entitlements and rights to surplus are determined by legislation in that designated jurisdiction (Non-Ontario Affected Persons).
- (c) I am aware of or have consulted with professionals with expertise in the requirements of the law for the distribution of surplus in the jurisdictions applicable to the Non-Ontario Affected Persons and I have reviewed the Surplus Application in order to determine whether it complies with such laws.
- (d) I certify, to the best of my knowledge and belief, based on the information and advice provided to me, including that referred to in paragraph (c) of this certification, that this Surplus Application complies with the requirements for the distribution of surplus in jurisdictions (i.e., other than Ontario) with respect to the Non-Ontario Affected Persons.

**DATED** this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_  
(day) (month) (year)

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Signature of the applicant's authorized employee or agent

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Name of the applicant's authorized employee or agent



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Capacity/Title of the applicant's authorized employee or agent

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Address of the applicant's authorized employee or agent

It is an offence under the *Criminal Code*, R.S.C. 1985, c. C-46, as amended, for anyone to knowingly make a false document with the intent that it be acted on as genuine.