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New FSRA Guidance on Pension Plan Amendments and Avoiding Deregistration

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“I found someone to speak to our associates about inflation. His fee is \$5,000... \$7,500...\$10,000...\$12,500...”

The Financial Services Regulatory Authority of Ontario (FSRA) recently published two draft consultation documents for comments:

- Proposed Guidance on [Pension Plan Amendments](#)
- Proposed Guidance on Actions to [Avoid Deregistration](#) of a Pension Plan Under the Federal *Income Tax Act*

Let's deal with each of these separately, and I note that these guidelines apply equally to both defined benefit and defined contribution pension plans, so everyone might want to pay attention.

Pension Plan Amendments

Pension plan documents get amended all the time, sometimes for housekeeping, sometimes due to legislative changes, and sometimes to change something substantive in the benefits/contributions provided under the plan.

In this proposed guidance, FSRA has added some clarity in the following areas:

- The effective date of the amendment
- Notice requirements
- Replacing variable indexing with fixed indexing

While some amendments must be retroactive and applicable prior to the date the Plan Administrator adopted the amendment and the date the amendment was filed with FSRA (especially when doing housekeeping or reacting to legislative changes), special care must be taken if making changes to the benefits/contributions provided under the plan.

In the past, it was assumed that if a proposed change to the benefits/contributions were clearly communicated to plan members and/or agreed in a union contract before the effective date, it was acceptable for the official plan amendment to be filed with FSRA sometime later. FSRA is clearly stating that this is not true for amendments that are unfavourable to plan members (i.e. that reduce benefits, reduce employer contributions, or increase member contributions) – such an amendment must be filed with FSRA before it can be effective.

On a related note, the *Ontario Pension Benefits Act* has specific rules around notice requirements to plan members who are 'adversely' affected by a plan amendment. These rules include exceptions if the amendment is of a technical/housekeeping nature, is a result of a union contract, or an amendment to a multi-employer pension plan (MEPP). The proposed guidance makes it clear that Plan Administrators should not assume that they've been exempted from the notice requirements, but instead must specifically request written approval from FSRA before dispensing with the member notice.

In the past it was believed that pension plans could replace an indexing formula that was based on inflation rates or investment returns with a fixed rate of indexing as long as it was 'generous' to the plan members. This situation would often come up when winding up a pension plan, or otherwise buying annuities, and discovering that annuities which promised indexing of 100% of the Consumer Price Index (CPI) were either impossible to purchase or very expensive.

FSRA is stating that they will not accept amendments that replace variable indexing with fixed indexing related to past-service benefits because these types of amendments have the potential to reduce the benefits to plan members and are therefore void amendments.

On a side note, different rules and exemptions are applicable to retroactive and void amendments for MEPPs, target benefit plans, jointly sponsored pension plan, etc., so if you're dealing with something other than a typical single employer pension plan, you may need to seek additional guidance.

While these new guidelines may not make everyone happy, I welcome the increased clarity from FSRA on how pension plan amendments will be registered.

Avoiding Deregistration

A deregistration of a pension plan is a doomsday scenario because the tax-preferred status of the plan is revoked under the *Income Tax Act* – so it must be avoided at all costs.

Generally, a deregistration is treated by the Canada Revenue Agency (CRA) as their big stick if the pension plan has done something wrong such as:

- Provide benefits in excess of the limits under the Income Tax Act
- Employees have paid too much into the pension plan
- The employer has paid too much into the pension plan

However, due to the dual regulation of pension plans by both CRA and FSRA, there needs to be coordination by both regulators to fix these administrative errors when they arise. The *Ontario Pension Benefits Act* specifically allows for pension plan amendments that otherwise wouldn't be permitted if the reason for the amendment is to avoid deregistration.

In the past, before FSRA would approve such an amendment to retroactively reduce benefits and/or refund past contributions they would demand to see a copy of the letter from CRA that threatened deregistration. Unfortunately, these letters were sometimes hard to get from CRA or there would be long delays causing additional problems.

In this proposed guidance, FSRA has removed this requirement for a copy of the CRA letter and replaced it with a requirement for the Plan Administrator to certify in writing that the amendment is required to avoid deregistration and complies with the relevant exemptions allowed under the *Ontario Pension Benefits Act*. This is very sensible and should streamline the process to rectify these problems that thankfully don't come up very often.

In addition, this proposed guidance includes a special approach for MEPPs which sometimes have administrative issues where contributions are made by or on behalf of an employee who has turned age 71. While the *Income Tax Act* has long prohibited benefit accruals or contributions to pension plans or RRSPs for people after age 71, there was an exemption for MEPPs that has recently been removed. Given that these overcontributions happen all the time to MEPPs, FSRA is proposing an annual cycle of refunds, notices and reporting that appears workable (although they admit that they will monitor how it goes and may make adjustments down the road).

Next Steps

The comment deadline for these two proposed guidance documents was September 15, 2022, so I expect that the final versions will be published soon. If there are substantial changes from these drafts, we'll let you know in a future blog.

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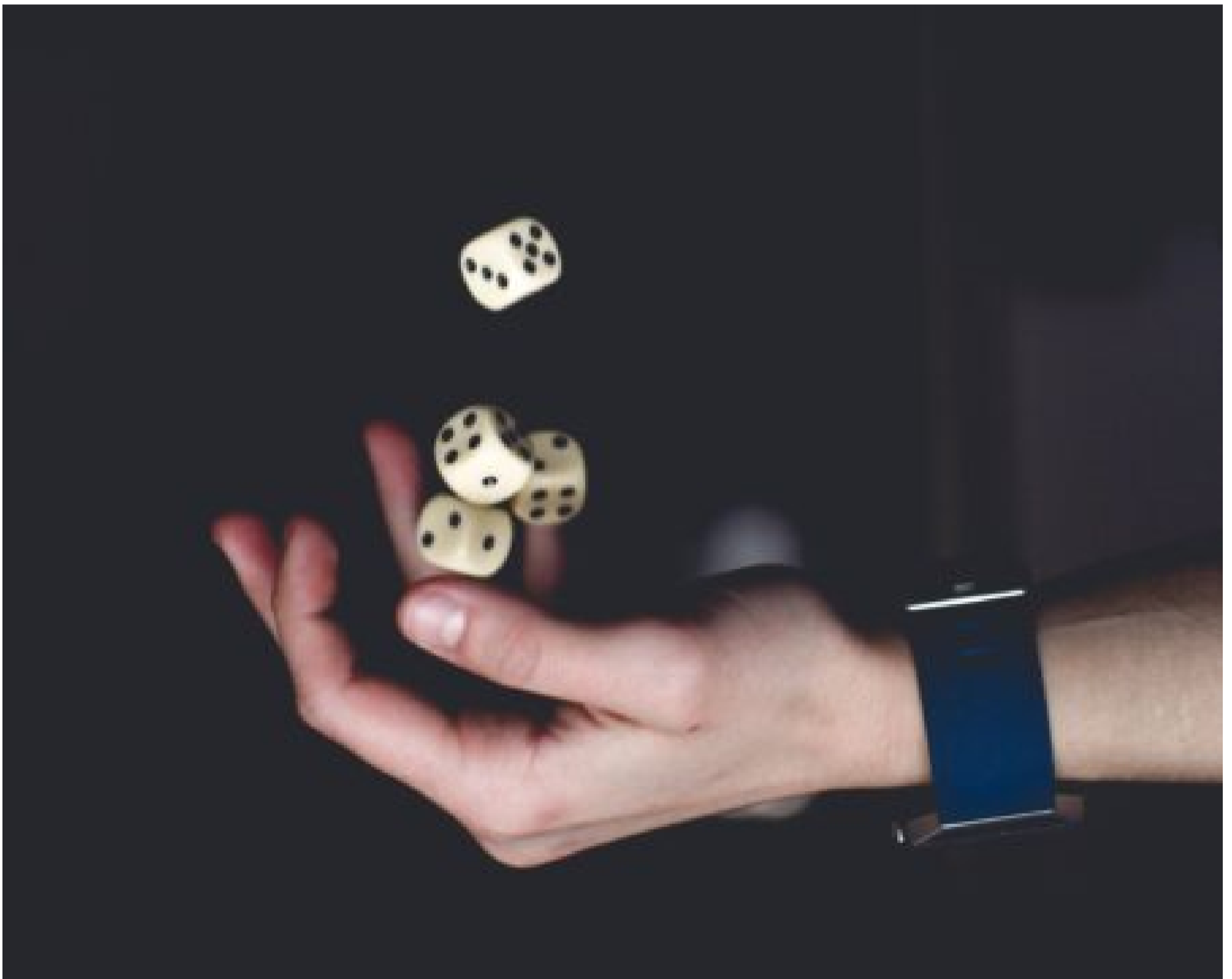


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