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Pension regulators step up amid turmoil

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For almost a year now, federal and provincial pension regulators have been busily trying to mitigate the coronavirus pandemic's effects.

Regulators have never been more proactive than during COVID-19," says Mitch Frazer, a pensions and employment law partner at Torys LLP. "They deserve full credit for refusing to live in a bubble and moving with the kind of speed we've never seen them

move before."

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But have they overreacted or underreacted? And did they do so in a timely manner?

Feedback from stakeholders is favourable, for the most part.

"On the whole, pension regulators have been sensible and reasonable," says Gavin Benjamin, partner in Morneau Shepell Ltd.'s retirement solutions business.

They've been responsive as well, which could help account for the positive reviews. "Regulators have been very engaged in consultations with stakeholders," says Andrea Boctor, a pension partner at Osler, Hoskin & Harcourt LLP.

Hindsight (on 2020) is 20/20

Indeed, experts recognized the unfairness of using hindsight to evaluate decisions taken in uncertain times and fluid conditions. Still, opinions vary somewhat depending on the performance of individual regulators and regional sensitivities.

"Here in Calgary, we needed things to happen quickly because of the double whammy caused by the pandemic and low oil and gas prices, and it did," says Brenda Mullen, an employee retirement plan consultant with Belay Advisory. "But some of my colleagues out east felt things weren't happening fast enough. What I do know is that by the middle of April, many pension regulators made efforts to extend filing deadlines or create processes where employers or consultants could make pandemic-specific inquiries that the authorities channelled and fast-tracked appropriately."

Still, Mullen notes, the regulators weren't perfect.

"I would say there was a certain lack of empathy, at least at the beginning, for the on-the-ground scenario in specific federally-regulated industries like airlines and railways, where so many jobs were at stake," she says. "Lately, there's more consensus that regulators need to be mindful and empathetic."

Nonetheless, a few stakeholders believe that regulators overreacted.

"I've heard complaints that regulators were changing things too often, and that may be true for some nitpicky items," says Jason Vary, president of Actuarial Solutions Inc. "But a fast-moving crisis requires people to reconsider their decisions as the situation develops."

Frazer agrees.

"The problem is that the economy hasn't settled, yet we continue to see lockdowns and reopenings, and companies are still trying to figure out whether they're going to last and what relief they might need," he says. "Give the regulators credit for trying to anticipate where the need might be by offering up meaningful, flexible programs, some of which may be proving unhelpful only because the economy is still volatile."

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Finally, there's the "never waste a good crisis" school of thought, which holds that the pandemic has offered missed opportunities for systemic reform.

"Sadly, our regulators seem to be caught in linear thinking, debating whether to apply one more patch to the chronically leaking pension system or perhaps demonstrate courage and use two more patches," said Roman Kosarenko, director of pension investments at George Weston Ltd., in an email interview with Benefits Canada. "It's quite emblematic that federal pension regulators, who are now the only major Canadian jurisdiction without funding reform, are reaching for their third round of temporary relief measures."

Focusing on solutions

All this being said, the Financial Services Regulatory Authority of Ontario was quick to respond to the once-in-century crisis. By March 23, 2020, within two weeks of the World Health Organization's classification of a global coronavirus pandemic, the FSRA acknowledged the rapidly evolving circumstances and the administration and compliance difficulties they would create for plan sponsors.

Acting quickly, the regulator authorized extensions for regulatory filings, audited financial statements and valuation reports. Among the extensions most welcomed by stakeholders were those that applied to early valuations.

"In the past, extensions were not possible for early valuations, but making them available gave sponsors the option to hedge somewhat and lock things in for three years," Vary says. "For some, the extensions allowed them to take advantage of the higher market values toward the end of 2019."

At the same time, the FSRA acknowledged that plan administrators might be unable to meet member disclosure information guidelines prescribed by the Pensions Benefits Act, including annual and biennial pension benefit statements, termination statements, and retirement statements.

Where meeting these deadlines was challenging, the FSRA assured sponsors, it would not impose administrative monetary policies so long as sponsors gave timely notice to their pension officers. Normally, such late payments attract a 20 percent penalty plus interest on the amount owing.

Finally, the FSRA assured administrators whose defined benefit transfer plan ratios had deteriorated that it would mandate regulatory approval for commutations.

“When the financial markets became volatile, there was concern that mass layoffs could lead to an outflow of commuted funds from pension plans whose status had deteriorated due to market volatility,” Gavin says. “While that may have been an overreaction — because markets recovered — a bit of an overreaction was in retrospect probably better than an underreaction.”

In early April, the feds made their first moves. The Office of the Superintendent of Financial Institutions froze portability transfers and annuity purchases to help federally-regulated private DB plans cope with the tough times.

In mid-April, the Association of Canadian Pension Management and the Pension Investment Association of Canada called on the government to help federally-regulated plans with cash flow, liquidity and broader solvency reform. In particular, the organizations asked the government to alleviate operating cash flow problems by suspending special payment obligations for at least six months. Within days, Canada paused solvency payments until the end of 2020 for plans under its jurisdiction.

Provincial regulators responded as well. British Columbia extended deadlines for filing annual statements, annual information returns and delivering termination of active membership statements to certain plans.

Alberta provided extensions for filing annual information returns and associated fees, audited financial statements, annual reports to members, actuarial valuation reports and costs certificates. The province implemented restrictions on asset transfers without regulatory consent, and granted extensions to the amortization period for unfunded liabilities, solvency deficiencies and employer and employee contributions, all on a case-by-case basis.

Saskatchewan embraced extensions for filing annual information returns and annual statement disclosures to members. Manitoba, New Brunswick and Nova Scotia also extended various filing deadlines.

By the numbers

> A May 2020 survey for the Vanier Institute of the Family found **59%** of pre-retirees said their investments and retirement savings were negatively impacted since the start of the coronavirus pandemic last March, while only **52%** of retirees reported a negative impact on savings and other investments.

Toward the end of April, the FSRA permitted a suspension of employer contributions to defined contribution plans, even as Ontario cut financial penalties for late payments on pension benefits guarantee fund assessments. The Canada Revenue Agency followed by waiving the one per cent minimum employer contribution on DC plans to the end of the year, thereby reducing payroll costs. The CRA also decreased minimum withdrawal amounts for registered retirement income funds, pooled registered pension plans and DC variable benefits.

In July, the federal government allowed registered pension plans to borrow money and extended the deadline for retroactively crediting pension service under DB plans. Other measures followed, including enacting stop-the-clock rules for limits on leave periods under deferred salary leave plans; permitting catch-up contributions to DC plans for 2020 to be made in 2021; setting aside the 36-month employment condition in the definition of "eligible period of reduced pay" for 2020; and allowing wage rollbacks to 2020 to qualify as eligible periods of reduced pay under registered pension plans.

Quebec chimed in with regulations that permitted individuals to maintain their membership in supplemental plans even if they were experiencing a temporary suspension in accruing benefits. The province also extended the deadline by which plans with funding levels under 90 per cent had to file actuarial valuations, as well as deadlines for providing certain documents to the regulator and to members and beneficiaries of supplemental pension plans. Additionally, the regulations mandated that all transfers or refunds to the end of 2020 had to consider a degree of solvency that reflected a plan's current financial situation.

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Backing up these measures were pre-coronavirus reforms in various jurisdictions aimed at strengthening funding on a going-concern basis.

"The struggling economy and volatile markets during the pandemic have surely tested the principles behind these reforms, which was to make the contribution curve more stable and less onerous," Gavin says. "And in fact, the new funding regimes have held up fairly well."

Key takeaways

• Generally speaking, plan sponsors credit provincial and federal pension regulators for moving proactively and collaboratively on ameliorative measures during the coronavirus crisis.

• Key measures included deadline extensions for regulatory filings, disclosures, communications to members and early valuations, as well as limitations on commutations and transfers.

• "Don't waste a crisis" advocates lament the lost opportunity for broader reforms, including risk sharing, sustainable funding and plan consolidation.

Looking ahead

That's not good enough, Kosarenko maintains. "Funding reform is only part of the solution," he said. "Single-employer plans, especially small plans, will always be at greater risk, even if solvency requirements are eliminated."

The funding reform that has occurred, Kosarenko adds, "buys quite a bit of time," but should be used by regulators to make the system more sustainable.

"Regulators should help with plan mergers and accept that risk sharing between plan sponsor and plan member is not an exception — it's the norm," he says.

By way of example, Kosarenko believes that Ontario should remove the requirement to track surplus for future sharing with respect to annuitized liabilities. "This is just one of many aspects of regulation where a risk-sharing approach is long overdue," he said.

As well, Kosarenko maintains, the mass layoffs that characterized the coronavirus crisis have demonstrated that the commuted value standard is unfair to remaining plan participants because most regulators require commuted values to be paid out at an "unrealistically low" discount rate.

"Inflated payouts worsen plans' funded status and exacerbate funding challenges for sponsors," he says. "It is far more logical to pay commuted value using the going concern discount rate."

Which is precisely what Alberta, arguably the province hit hardest economically by the pandemic, has implemented. "It should be adopted everywhere," Kosarenko says.

The issues raised by the coronavirus, then, are not about "a linear approach, which is to say more relief as opposed to less relief. This is about finally tackling the long overdue systemic problems related to risk sharing, sustainable funding and plan consolidation. Let's not waste this crisis."

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The call to arms has not gone unheeded, it seems. In November, the feds published a consultation paper on solvency relief funding options for 2021 and on measures to strengthen the framework for federally regulated pension plans.

Gavin, however, says "total overhauls" are not necessary.

"There are overarching questions and challenges that are directly related to volatility, like different regulations in different jurisdictions, but the current COVID-driven environment has not particularly highlighted them."

At the same time, he agrees, there's no reason to be smug. "Given that the ultimate direction COVID and the economy are taking are still uncertain, it's quite possible that regulators could be challenged again and again in the next few weeks and months."

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