



Instruction Guide

Subject: **Refund of Surplus Under the *Pension Benefits Standards Act, 1985***

Date: **September 2001**

Purpose

The purpose of this instruction guide is to explain the requirements of the *Pension Benefits Standards Act, 1985* (PBSA), the Pension Benefits Standards Regulations, 1985 (Regulations) and OSFI's policies and procedures for refund of surplus. This instruction guide outlines the requirements for a refund of surplus based either on employer entitlement or an employer established claim.

This Instruction Guide for Refund of Surplus under the *Pension Benefits Standards Act, 1985* replaces the Memorandum to Employers Seeking Consent of the Superintendent of Financial Institutions to A Refund of Surplus Under the *Pension Benefits Standards Act, 1985* issued in March 1993.

This instruction guide has been prepared for convenience of reference only and has no official sanction. For all purposes of interpreting and applying the law, users should consult the PBSA and Regulations. The PBSA, as passed by Parliament, is published in the "Assented to" Acts Service, Part III of the *Canada Gazette* and in the Annual Statutes of Canada and is available in most public libraries. The Regulations, as registered by the Clerk of the Privy Council, are published in Part II of the *Canada Gazette* and are available in most public libraries.

An Application for a Request for a Refund of Surplus is included with this instruction guide.

Effective June 1998, every plan filed for registration must provide for the use of surplus on both a going concern and termination basis (subsection 10(6) of the PBSA). This requirement will facilitate approval of refunds of surplus in the future.

Questions and comments with respect to this instruction guide and application should be directed to Nancy Begg-Durkee, Manager, Supervision and Policy, Private Pension Plans Division, Office of the Superintendent of Financial Institutions, 255 Albert Street, Ottawa, K1A 0H2, telephone: (613) 991-9382, fax: (613) 990-7394, or e-mail: penben@osfi-bsif.gc.ca.

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1.0 Introduction

There are two methods by which an employer may seek the consent of the Superintendent of Financial Institutions for a refund of surplus from a pension plan. The first is based on employer **entitlement** to the surplus, which is derived from clear, unambiguous, non-contradictory language in the pension plan documents. The second is by way of establishing a **claim** to the surplus, regardless of the terms of the plan. A claim can be established with the consent of two-thirds of each category of beneficiary.

Instructions for an application for a refund of surplus under the *Pension Benefits Standards Act, 1985* (PBSA) by establishing **entitlement** or a **claim** are in sections 3 and 4 respectively of this instruction guide. Section 2 of this instruction guide is general and applies both to an entitlement and a claim. Details of the different notice requirements for requests for refund of surplus are included. An Application for a Refund of Surplus is attached to this instruction guide. Employers are required to submit an application, with all supporting documentation, before consent to a refund of surplus will be considered.

Beneficiaries for purposes of this instruction guide are those persons defined in subsection 9.2(3) of the PBSA, which in turn refers to sub-paragraphs (a) and (a.1) of the definition of “former member” in subsection 2(1) of the PBSA and those prescribed in subsection 16(5) of the Pension Benefit Standards Regulations, 1985 (Regulations). Beneficiaries may authorize, in writing, a third party to act on their behalf and should be encouraged to seek independent legal advice.

2.0 Refund of Surplus – General

2.1 Legislative Provisions

Subsection 2(1) of the PBSA and subsection 16(1) of the Regulations define surplus as the amount by which the assets of the plan exceed the liabilities of the plan, as shown in an actuarial report filed with the Superintendent pursuant to subsection 12(3) of the PBSA.

Refund of surplus to the employer may be made under the PBSA in respect of both going-concern and terminated plans, provided that:

- (a) the plan documents **establish an entitlement** in the employer to the surplus; **or**
- (b) the employer **establishes a claim** through beneficiary consent; **and**

- (c) all the other requirements set out in the PBSA (section 9.2) and the Regulations (sections 16, and 16.1) have been satisfied (see sections 3 and 4 of this instruction guide); **and**
- (d) the Superintendent consents to the refund.

A **claim** may also be established through arbitration under circumstances specified in subsections 9.2(4) through (13) of the PBSA and section 16.2 of the Regulations.

2.2 Surplus Withdrawal

2.2.1 Ongoing Plans

Pursuant to subsection 16(2) of the Regulations, the amount of surplus that may be refunded from a going-concern plan can be no greater than the amount by which the surplus exceeds the greater of the following amounts that are attributable to the defined benefit provisions of the plan:

- (a) twice the employer's annual normal cost; and
- (b) twenty-five per cent of the solvency liabilities.

2.2.2 Terminated Plans

With respect to a plan that has been terminated, provision must first be made for the payment of all accrued or payable benefits in accordance with subsection 29(7) of the PBSA before the Superintendent will consider consenting to a refund of surplus.

2.2.3 Information and Notices

Before requesting the Superintendent's consent for a refund of surplus, the employer must send a notice pursuant to paragraph 16(2)(b) and section 16.1 of the Regulations and make full and complete disclosure of all relevant material to all beneficiaries. The documents to be made available for review by beneficiaries include plan texts, trust documents, insurance contracts, employee booklets, notices, collective bargaining agreements, and information brochures dating from plan inception together with any other relevant documents (refer to sections 3.1.1 and 4.3.1 of this instruction guide.)

The actual wording of the provisions from the plan documents that may be relevant to surplus entitlement or claim and the authority to make plan amendments, upon which the employer relies, must be cited in the notices and the application, along with an analysis of their implications. The notice and the application must also include a historical analysis of plan documents to determine whether the plan ever constituted a trust.

The employer has an obligation to ensure full and fair disclosure. The Superintendent may require that a notice be re-issued if the requirements of the PBSA and the Regulations have not been satisfied, or if there has not been full disclosure of all relevant information.

If the office or location where the members were employed is closed, the employer must make alternative arrangements close to the location(s) where business was conducted, that enable plan beneficiaries to review the material relating to the surplus request. If no such arrangements can be made, the employer should offer to distribute the materials by mail.

If the employer previously attempted to establish an entitlement to surplus, details of that application should be included.

Where the plan documents do not contain explicit provisions addressing surplus entitlement, this fact must be disclosed in the notice to beneficiaries and in the application.

2.2.4 The Effect of Special Events on Surplus Entitlement

When pension plans are merged, spun off, converted or partially terminated, the employer should deal with use of, and entitlement to, the plan surplus in an effort to preclude potential court challenges by plan beneficiaries.

Any special event where the employer does not address the issue of pension plan surplus may make it difficult, if not impossible, to determine entitlement. Addressing surplus issues at the time of a special event will make it easier to settle potential surplus refund disputes.

Examples:

- (a) The merger of two plans and their respective surpluses, where one surplus belonged to the employer while the other belonged to plan beneficiaries may preclude a refund of surplus based on entitlement.
- (b) A problem may arise if an employer fails to deal with surplus rights at the time of a partial termination. The employer may have difficulty trying to settle future surplus refund claims.
- (c) The employer may not be able to take intended contribution holidays after a plan conversion because the amended plan does not specifically address the use of surplus.

2.2.5 The Superintendent Consents to the Refund

The Superintendent cannot consent to a refund of surplus until all requirements of the PBSA and Regulations have been satisfied. Statements and documents supporting the applicant's assertion that the requirements have been met should be included with the application. The onus is on the applicant to satisfy the Superintendent that the surplus application meets the requirements of the PBSA and the Regulations.

Applicants must be aware of circumstances that warrant including additional considerations, information or documentation to support the surplus refund application. For example, additional information about members or former members or additional plan documentation may be relevant in special circumstances such as those described previously (section 2.2.4 of this instruction guide). Additional information would be required where all or a portion of the liabilities of a pension plan relate to beneficiaries covered by a provincial jurisdiction.

2.2.6 Waiting Period(s)

A withdrawal of surplus may not be made until:

- **at least** 30 days after the date the employer gave notice that it was seeking the Superintendent's consent for a refund of surplus (paragraph 16(2)(c) of the Regulations); **and**
- 14 days after the day on which the Superintendent gave notice of the Superintendent's consent to the persons who wrote to the Superintendent in response to the employer notice (paragraph 16(2)(e) of the Regulations).

3.0 Establishing an Entitlement to Surplus

Under subparagraph 9.2(1)(a)(i) of the PBSA, the onus is on the employer to show that it is entitled to a refund of the surplus on a going-concern or plan-termination basis, as applicable. Any amendments to the plan that appear to establish a right of the employer to the surplus must be properly undertaken and permitted by the plan. An assertion that this right exists will not be sufficient to establish entitlement. The burden is on the employer to provide evidence of this entitlement.

In considering a refund of surplus request based on entitlement, the employer must have either a court decision or show clear legal and/or documentary evidence that it is entitled to the plan surplus. A citation of supporting evidence and an analysis of the plan's history and/or contradictory provisions are required.

Before the Superintendent may consent to a refund of surplus, the Superintendent must be satisfied that the employer has a right to the surplus and that the employer has met the required conditions (surplus margins, benefit payments, information and notices – refer to sections 2 and 3.1.1 of this instruction guide).

3.1.1 Notice for a Refund of Surplus Request Through Entitlement

Notice is to be given to plan beneficiaries that the employer believes it has entitlement to the plan's surplus and is requesting the Superintendent's consent for a refund of surplus. The notice for purposes of paragraph 16(2)(b) and section 16.1 of the Regulations must be in writing, and must contain the following information:

- (a) the amount of the refund of surplus requested;
- (b) any reference that appears in the plan documents that clearly and unequivocally establishes the employer's entitlement to the surplus;
- (c) the financial condition of the plan immediately prior, and for going-concern plans, subsequent to the surplus refund (i.e., an actuarial balance sheet showing plan assets, liabilities and surplus computed on a going-concern and/or a solvency basis, as the circumstances require); such information must be based on an actuarial valuation conducted as of a date within the 12 months prior to the date of notice;
- (d) any events occurring at the same time that may be connected with the surplus refund (e.g., plan termination, benefit changes, plan mergers, spin-offs, plan amendments that are currently under consideration, etc.), as well as a summary of any representations made by the employer to OSFI in support of the employer's request;
- (e) the availability, time and place for review of an actuarial report supporting the refund request, and other documentation related to current and prior versions of plan texts, trust agreements, collective agreements and pension communications to employees, including those of predecessor employers;
- (f) confirmation that the surplus refund may not be taken without the written consent of the Superintendent of Financial Institutions;
- (g) a statement that a refund, if approved, cannot be made until **at least** 30 days following the date of the notice; **and** 14 days after the day on which the Superintendent gave notice of the Superintendent's consent to the persons who wrote to the Superintendent in response to the employer notice; and
- (h) a statement that written comments may be sent to the Superintendent within 30 days of the date of receipt of the notice and that all comments will be considered.

Comments from beneficiaries are to be sent to:

Superintendent of Financial Institutions
13th Floor
255 Albert Street
Ottawa, Ontario K1A 0H2

4.0 Establishing a Claim to Surplus

Provisions of section 9.2, including subparagraph 9.2(1)(a)(ii) and subsection 9.2(3) of the PBSA, allow the employer to make a claim to the surplus, or part of it, provided that at least two-thirds of each beneficiary category have consented to a surplus refund proposal by the employer. The beneficiary categories, as defined in subsection 9.2(3) of the PBSA and subsection 16(5) of the Regulations, include:

- (a) active plan members;
- (b) former members, including retirees and those with deferred vested benefits payable from the plan; and
- (c) any other persons who are entitled to a pension benefit payable from the plan, including survivors, spouses, former spouses, common-law partners and former common-law partners, and any persons for whom the administrator has provided a pension through the purchase of an annuity.

Notices for consent to a claim are to be made pursuant to paragraph 16(2)(b) and section 16.1 of the Regulations.

If the proposal (first notice – section 4.3.1 of this instruction guide) receives more than one-half but fewer than two-thirds support in each category, the employer may submit – or, if the pension plan is terminated, must submit – the surplus refund proposal to arbitration. Where the employer is winding up or is in liquidation, the employer's claim must be submitted to arbitration within 18 months of the termination of the plan.

Before the Superintendent will consent to a refund of surplus, the Superintendent must be satisfied that the employer has met the required conditions explained in section 1 of this instruction guide. In addition to establishing a claim for the employer, the application should provide evidence that:

- (a) there was a recommendation that plan beneficiaries obtain independent legal advice with respect to the proposed surplus distribution agreement or claim;
- (b) sufficient time was given to all plan beneficiaries to consider the surplus distribution proposal or claim before the employer requested written consent; and
- (c) written consents required under subsection 9.2(3) of the PBSA were obtained.

Where the proposal has been arbitrated, a certified copy of the arbitrator's decision must be forwarded with the application.

After the employer has established a claim, a second notice (section 4.3.2 of this instruction guide) is to be given to the plan beneficiaries informing them that a claim has been established and that the employer intends to seek the consent of the Superintendent for a withdrawal of surplus.

4.1 Special Requirements for Unions

The appropriate union for the purposes of subsection 9.2(15) of the PBSA is the union that represents active unionized plan members at the date the surplus refund agreement is signed by the union on behalf of those members. OSFI may require additional evidence that the union represents the active unionized plan members whose consent is sought, and that those signing on behalf of the union are authorized to do so.

Unless the collective agreement provides otherwise, the written agreement of the union that represents the active unionized plan members of the pension plan must be obtained. The union cannot automatically represent former members of the plan, even if a former member remains a member of that union. If a pension plan involves more than one union, the written agreement of each union should be sought. All notifications to unionized members must also be made to the executive of their union (subsection 9.2(14) of the PBSA). This applies even where the union does not bargain the provisions of the pension plan.

If a pension plan covers both unionized and non-unionized members or members in more than one union, for the purposes of subsection 9.2(3) of the PBSA, the consent of two-thirds of the total active plan members is required, regardless of union affiliations. In this regard, if a union consents to a surplus refund, then all its members will be considered to have consented for purposes of complying with the two-thirds member consent requirement.

4.2 Who Has an Interest in Plan Surplus?

In a claim situation, beneficiaries may have an interest or potential interest in the surplus and must be a part of the process. Beneficiaries are sometimes hard to identify and often difficult to locate but this does not detract from the interest they may have in the surplus. For example, former members who have exercised their portability options after the termination of a plan must be included in the claim process. In other cases, entitlement might be defined by the terms of the plan. Therefore, the employer, when developing a proposal, should consider the interests of all plan beneficiaries and as well as the plan provisions.

4.3 Notice for a Refund of Surplus Request Through a Claim

4.3.1 First Notice

The notice seeking consent for a proposed refund of surplus is to be given to beneficiaries in writing. It must include a surplus refund proposal or agreement that provides for the name and signature of the individual, the name and signature of a witness, and the date on which the agreement is signed. Notices must be sent to beneficiaries in accordance with section 16.1 of the Regulations.

The notice should inform the beneficiaries and any union of:

- (a) the amount of requested refund of surplus and the amounts to be paid to the employer and to the entitled beneficiary groups;
- (b) references in the plan documents that address surplus entitlements as well as a summary of any representation to be made in support of the claim;
- (c) the financial condition of the plan immediately prior, and for going-concern plans, subsequent to the surplus refund (i.e., an actuarial balance sheet showing plan assets, liabilities and surplus computed on a going-concern and/or a solvency basis, as the circumstances require); such information must be based on an actuarial valuation conducted as of a date within the 12 months prior to the date of notice;
- (d) any events occurring at the same time that may be connected with the surplus refund (e.g., plan termination, benefit changes, plan mergers, spin-offs, plan amendments that are currently under consideration, etc.);
- (e) the availability, time and place to review the actuarial report supporting the refund request, and other documentation related to current and prior versions of plan texts, trust agreements, collective agreements and pension communications to employees, including those of predecessor employers;
- (f) the requirement that at least two-thirds of each beneficiary category must support the proposal in accordance with subsection 9.2(3) of the PBSA (the number of signed consents from each category required for the employer to establish the claim for the proposed surplus distribution to proceed should be indicated);
- (g) the requirement that if fewer than two-thirds but more than 50 per cent of the beneficiaries in each category support the proposal, the employer may, or in the case of a terminated plan must, take the proposal to arbitration;
- (h) a recommendation that each beneficiary seek independent legal counsel with respect to the proposed surplus refund; and

- (i) the right of the executive of a union to represent their members, other than former members of the plan, for the purpose of obtaining member consent for the surplus distribution agreement, unless otherwise provided in the relevant collective agreement (subsections 9.2(14) and 9.2(15) of the PBSA).

4.3.2 Second Notice

After the employer has established a claim, a second written notice must be given to plan beneficiaries informing them that the employer intends to seek the Superintendent's consent to withdraw surplus. The notice must include:

- (a) the anticipated date **on or after** which the surplus refund may be made (to be **at least** 30 days following the date of this notice **and** 14 days after the day on which the Superintendent gave notice of the Superintendent's consent to the persons who wrote to the Superintendent in response to the employer notice), and the amount of surplus to be paid to the employer and the entitled beneficiary groups; and
- (b) a statement that written comments concerning the agreed surplus refund may be sent to the Superintendent within 30 days of receipt of the notice. Comments from beneficiaries are to be sent to:

Superintendent of Financial Institutions
13th Floor
255 Albert Street
Ottawa, Ontario K1A 0H2

4.4 Arbitration

Under subsection 9.2(4) of the PBSA, an employer may take a proposal for a refund of surplus to arbitration, provided that at least 50 per cent of each of the beneficiary categories consented to the employer's proposal to refund surplus. If the pension plan is terminated and at least 50 per cent of each of the categories supports the proposed refund of surplus, the employer must submit the claim to arbitration. Under subsection 9.2(5) of the PBSA, if the plan has been terminated as a result of the employer winding up or being liquidated, and the employer's entitlement or claim to surplus has not been established under paragraph 9.2(1)(a) of the PBSA, the employer's claim must be submitted to arbitration within 18 months of the date of the plan termination.

When the refund proposal is to be submitted to arbitration, the employer must so notify the Superintendent and the beneficiaries (subsection 9.2(4) of the PBSA and subsections 16.2(3), (4), (5) and (6) of the Regulations).

The employer and the plan beneficiaries will choose the arbitrator, or, in the absence of an agreement within the prescribed period of time, the Superintendent will nominate an arbitrator (subsections 9.2(7) of the PBSA and 16.2(2) of the Regulations).

The arbitrator must publish in a newspaper a notice of the time and place of the arbitration and invite beneficiaries to make written representations (subsections 16.2(3), (4) and (5) of the Regulations). The arbitrator's decision is binding on all parties (subsections 9.2(8), (11) and (13) of the PBSA).

- END -

Applicants are to provide a cover page as follows:

**Application to the
Superintendent of Financial Institutions
for Consent to a Refund of Surplus**

(insert name of employer)
(insert name of pension plan)

(Date)

**Application by (insert name of employer) to the
Superintendent of Financial Institutions
for Consent to a Refund of Surplus**

Table of Contents

Applicants are advised to read the Instruction Guide for Refund of Surplus under the *Pension Benefits Standards Act, 1985* (PBSA) before completing the Application for a Request for a Refund of Surplus. Applicants are to provide a Table of Contents to the application. Supporting documents should be categorized and assigned a section that will be indicated in the Table of Contents. Attachments must include all documents relevant to the refund of surplus from the pension plan.

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**Application to the
Superintendent of Financial Institutions
for Consent to a Refund of Surplus**

Applicants are to complete the application and provide information as follows:

1. Pension Plan

The official name of the pension plan, and the OSFI and Canada Customs and Revenue Agency registration numbers.

2. Employer

The legal name and mailing address of the employer making the application.

3. Administrator

The person or group of persons, such as a Board of Trustees, that acts as plan administrator, if the administrator is not the employer.

4. Unions

All unions who represent members of the plan.

5. Advisors

Advisors, such as legal counsel and actuary and the firms for which they work, retained in respect of the application by, or on behalf of, the employer and by, or on behalf of, members/former members/other beneficiaries/unions.

Counsel/Actuary for the Employer

Counsel/Actuary for Members/Former Members/Other Beneficiaries

Counsel/Actuary for Union(s) (List, as necessary for each union.)

6. Contact Information

The name, address, telephone and fax numbers for the person who is to receive correspondence from OSFI in respect of the application. This may be a representative or agent of the employer.

7. Basis for the Application

- (a) A brief summary of the basis for the application; i.e., terminated pension plan versus ongoing withdrawal; entitlement versus claim (subparagraph 9.2(1)(a)(i) or (ii) of the *Pension Benefits Standards Act, 1985*); amount of the requested refund, amount, if any, payable to members or former members, etc.
- (b) Applicable sections of the *Pension Benefits Standards Act, 1985* (PBSA) and Pension Benefits Standards Regulations, 1985 (Regulations).
- (c) A description of expenses related to the application, if being paid from the pension plan.

8. Background

A summary of the events that led up to the application, such as:

- (a) the effective date of the plan;
- (b) type of plan – final average earnings, contributory, etc.;
- (c) employer status – winding-up, liquidating or continuing;
- (d) classes of members covered by the plan; e.g., all employees, salaried employees, hourly employees, etc.;
- (e) corporate history relevant to the plan; e.g., change in corporate name, mergers, divestitures, etc.;
- (f) details of liabilities of the plan that relate to members or former members whose employment is not or was not in “included employment” as defined by the PBSA;
- (g) a description of other plans from which assets have been transferred, information regarding plan mergers, spin-offs, conversions, partial terminations, past surplus withdrawals, etc. (note: applications based on entitlement should also provide a detailed history of the plan and support for surplus entitlement);
- (h) compliance with the notice requirements of section 9.2 of the PBSA, paragraph 16(2)(b), section 16.1 and section 16.2 of the Regulations for cases involving arbitration (a copy of the arbitrator’s written decision with reasons should be filed with the Superintendent);
- (i) explanation of the involvement of plan beneficiaries or unions in the process leading up to the application if the application is based on a claim (e.g., formation of representative committees, involvement of legal counsel, meetings, mailing of information regarding the application, etc.); and

- (j) any other relevant information, such as a description of any litigation that affects or could affect the application.

9. Status of the Pension Fund

Complete (A) or (B), as applicable.

(A) Going Concern

If the request is for a refund of surplus from a going-concern plan, provide information on compliance with paragraph 16(2)(a) and subsection 16(4) of the Regulations. Attach copies of relevant actuarial reports.

(B) Terminated Plan – Payment of Accrued Benefits

If the request is for a refund of surplus from a terminated plan, provide information on how provision has been made for the payment of all accrued or payable benefits in accordance with subsection 29(7) of the PBSA. Describe the status of the payment of accrued benefits from the plan.

10. Notice Requirements

Notices provided in accordance with section 9.2 of the PBSA and paragraph 16(2)(b) and section 16.1 of the Regulations. Arbitration notices pursuant to subsection 9.2(4) of the PBSA must contain the information specified in section 16.2 of the Regulations. Specify where records are available and attach a copy of the notices that were provided.

11. Basis of the Request

Complete (A) or (B), as applicable.

(A) Proof of Entitlement

Provide evidence of entitlement to the surplus by way of a court order or a legal analysis of the historical terms of the plan, and an analysis of whether the plan ever constituted a trust. Refer to the Instruction Guide for Refund of Surplus under the *Pension Benefits Standards Act, 1985* for details on entitlement.

(B) Proof of Claim

Information regarding compliance with subsection 9.2(3) of the PBSA must be provided. A chart should be included showing a breakdown of beneficiaries described in paragraphs 9.2(3)(a) and (b) of the PBSA and in subsection 16(5) of the Regulations, together with an indication of the number of consents received. Numbers and percentages are to be provided. Other information to be included:

- (a) information on consent received from unions, if applicable;

- (b) a copy of the consent form;
- (c) if a surplus sharing arrangement has been entered into between the employer and plan beneficiaries, a copy of the surplus sharing arrangement; and
- (d) if applicable, information on the arbitration procedure (subsection 9.2(4), (5), (7) and (11) of the PBSA and subsection 16.2(2) of the Regulations), the name of arbitrator selected, and a copy of the decision.

12. Consent Requested

Finally, the applicant should make a statement of request for consent indicating the amount of surplus refund requested, the status of the plan and whether the application is based on an entitlement or a claim.

The employer, or the person filing the application on behalf of the employer, must sign the application.

Name

Date