

April 17, 2025

The Financial Services Commission  
39-43 Barbados Avenue  
Kingston 5

**Attention: Ms. Tracy-Ann McIntosh**  
Senior Director, Pensions (Acting)

Dear Sirs,

**Re: Draft Bulletin – Surplus Distribution and Treatment of Deficit on Winding-up  
(the “Draft Bulletin”)**

We appreciate the Commission sharing the captioned Draft Bulletin for review and feedback. We have collated and set out below the comments this Association has received in respect thereof and, in so doing, we make reference to the relevant paragraphs of the Draft Bulletin.

1. **1.05** – It is stated that the trustees are required to provide the Commission with a copy of the winding up valuation within 60 days of receipt. This timeline is not set out in relevant statute and it should be made clear whether this is a policy requirement.
2. **3.04** – The factors listed should not be relevant when allocating surplus. It introduces too much subjectivity and discretion into the determination. The Commission needs to provide the legal basis for applying these factors in determining surplus entitlement.
3. **4.01** – There may be constitutive documents (perhaps for some older pension plans) that are silent on the intended recipients of surplus on a winding up. The Commission should provide guidance on whether in any such instances the Commission will consider that the trustees have a discretion as to the recipients/allocation or whether a resulting trust arises.
4. **4.02** –
  - The phrase that “the assets of a plan are to be used for the exclusive benefit of members” generally means that the assets must be used to provide pensions

and benefits to plan members and cannot be diverted for other unrelated purposes. On its own, this does not automatically disentitle a sponsor from receiving a share of surplus. A thorough examination of relevant case law will show that it depends on the specific construction of the language used in the constitutive documents. This paragraph of the Draft Bulletin suggests that the Commission will adopt a singular approach regardless of how the provisions are worded.

- If there is a statement that “the assets of a plan are to be used for the exclusive benefit of members”, particularly one located in the preamble/recitals (wherein it is not an operative clause), and there is no applicable fetter on amendments to the documents, there is no reason why the document cannot be amended to provide the sponsor with an entitlement to surplus. The Commission should provide the legal basis for its position. In fact there are constitutive documents, drafted upon the establishment of a plan, that contain such a statement yet still provide for the sponsor to share in surplus. The Commission should also consider that a recital is not an operative part of a deed and is subordinate to the operative provisions.
  - The Commission should appreciate that even where the current or prior versions of the constitutive documents contain a restriction on amendments which result in a reversion of assets to the sponsor, this does not, in all cases, mean that the sponsor is to be excluded from sharing in surplus. If the sponsor’s entitlement to share in surplus existed from the establishment of the plan (i.e. from the original TDR) and was not introduced by way of an amendment, then the sponsor has a legitimate right to share in surplus.
5. **4.04** - This paragraph stipulates that trustees and actuaries should conduct a review to determine the source of surplus. It sets out the Commission’s expectations as to those portions of surplus allocable to members. To be fair, the bulletin should provide some indication as to those portions of surplus that the employer may participate in (assuming there is no overriding language in the constitutive documents).
6. **4.05** – This paragraph requires that, in determining the portion of surplus to be allocated to a sponsor on winding up, consideration must be given to the history of contribution holidays taken by the sponsor and the legitimate expectations of the participants.
- It should be appreciated that surplus can also be shared with participants while a plan is on-going via benefit enhancements, i.e. pension increases and plan amendments (for e.g. reducing final average salary to final salary and a

reduction in members' mandatory contributions). It would be expected that if consideration is to be given to surplus allocations to the sponsor while the plan is on-going, then allocations to the participants should also be considered. This is not mentioned in the Draft Bulletin.

- Also, giving consideration to a history of surplus distributions from the plan's inception could be quite onerous. If the amount of surplus used by the sponsor for contribution holidays could not be quantified, would this preclude an allocation to the sponsor on wind-up?
  - The relevance of participants' expectations is not clear and the Commission should elaborate thereon and set out the basis for this statement. The participants will be entitled to whatever is outlined in the constitutive documents and if the constitutive documents provide for the sponsor to share in surplus, then the sponsor should be allowed to receive surplus unless it wishes to forgo the benefit. If there are burdensome hurdles to a sponsor sharing in surplus on winding up then we could find sponsors defaulting to a position of funding at the lowest level required, rather than building surplus cushions for the plans. This could be to the detriment of participants.
7. **4.06** – The Commission should advise in this paragraph that allocations within a class of participants should be pro-rata.
8. **General Comment on the Draft Bulletin** - It is curious that the Draft Bulletin does not make any mention of more principles discussed and laid down in the case law regarding the distribution of surplus on a winding up. These principles would govern and fill in the gaps in the event that any stakeholder decides to litigate a surplus distribution issue.

We invite the Commission to thoroughly consider the comments herein and look forward to the revised version of the Draft Bulletin and the continued participation in the Commission's consultative process with respect to pension matters.

Yours faithfully,

**The Pension Funds Association of Jamaica Limited**



Kerri-Ann Allen Morgan

**Chair, PIAJ Legislative Committee**



DRAFT BULLETIN FOR:

SURPLUS DISTRIBUTION AND TREATMENT OF  
DEFICIT ON WINDING-UP

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a copy of the proposed Scheme of Distribution of Surplus to the FSC for approval. Sub-sections 3 and 4 of this provision also outline the FSC's authority to approve the proposed scheme of distribution of surplus or to amend it after consultation with the trustees who must distribute the surplus in accordance with the scheme of distribution approved by the FSC.

- 2.02 Section 32(5) of the Act stipulates that the FSC must have regard to the payment of assets per the following priority order:
- to the current pensioners and their beneficiaries.
  - providing additional benefits for the remaining members and their beneficiaries; and
  - payment to the employer (sponsor), in the case of a superannuation fund only.
- 2.03 Governance Regulation 31 states that if the FSC takes a decision that a proposed scheme of surplus distribution is to be amended, pursuant to Section 32(3) of the Act, the FSC must have regard to consideration of general equity and such other factors as are appropriate, when amending that scheme of distribution.
- 2.04 Items 30 through 32 of the Second Schedule of the RLR Regulations stipulate that the Constitutive Documents of a pension plan must provide for the method by which the surplus is to be allocated upon the winding-up and the treatment of surplus or deficit during the existence of the plan and on partial winding-up.
- 2.05 Section 31 of the Act outlines the priority order for the payment of all liabilities from the assets determined as at the winding-up date. Therefore, if the assets are not sufficient to cover all the liabilities due, the priority order outlined in Section 31 must be adhered to.
- 3.0 POLICY REQUIREMENTS
- 3.01 When evaluating the scheme of distribution of surplus or the treatment of a deficit, during the winding up of a pension plan, the FSC initially reviews the applicable Trust Deed and Plan Rules ("TDPR"). The TDPR can be highly prescriptive - specifically whether assets can or cannot be reverted to the sponsor and outlining methods for allocation of surplus or treatment of deficit. Alternately, TDPRs might be generic - allowing for surplus to be used to improve benefits, subject to statutory limits, or silent on the issues.
- 3.02 Any allocation of surplus or deficit being proposed must adhere to the provisions in the plan's Constitutive Documents. Allocations of surplus that breach fetters and restrictions enshrined in the Constitutive Documents must not be pursued. For example, an allocation that breaches a non-reversion clause in the TDPR expressly stating that a Sponsor is not entitled to any share of the surplus during the life of the pension plan or upon winding-up does not comply with the terms of the trust and will not be approved by the FSC.
- 3.03 The trustees are required to submit, in writing to the FSC, whether consideration will be given to the inclusion of members whose positions were made redundant within the last twelve months of the effective winding-up date in any distribution of surplus assets. The trustees must also indicate, if applicable, the rationale for not including such persons in any proposed distribution of surplus assets. The exclusion of members who were made redundant should be considered, as there may be cases where a phased layoff strategy was implemented with a clear intention to wind-up the plan, which was delayed in such a manner that adversely impacted the affected members.
- 3.04 The FSC will also consider the demographic profile of the members (membership status, age, pensionable service, gender, etc.), immediate pension entitlement for current pensioners, pensionable salaries, members' contributions (basic, voluntary and employer's), and any other benefits and entitlements (bonuses, transfer values, etc.), amongst other things, when assessing the surplus distribution.

- 3.05 A fund or scheme that is being wound up remains subject to the provisions of the Act and Regulations until all assets have been disbursed.
- 3.06 The FSC reserves the right to request further information and documents as necessary to complete its review and its assessment will not be completed until the matters requiring attention have been fully addressed.
- 4.0 ELEMENTS TO CONSIDER IN A SURPLUS ALLOCATION
- 4.01 The TDPR – Trustees and their advisors must thoroughly review and identify any specifications regarding who is entitled to receive surplus, how the surplus must be distributed and whether the employer’s concurrence is required or if consultation-only would suffice.
- 4.02 Non-reversion/Exclusive Benefit Clause Trustees and their advisors must conduct a thorough review of the plan’s Constitutive Documents and determine whether there are stipulations that would restrict how surplus is allocated. If the current TDPR allow for the allocation of a portion of the surplus to the sponsor, the prior versions of the executed TDPR should also be reviewed to ascertain if there exists an amendment fetter that would prevent the reversion of assets to the sponsor or a statement that assets should be used for the exclusive benefits of the members and their beneficiaries. If there are any such provisions, despite what is stipulated in the current TDPR, the sponsor would not be entitled to a portion of the surplus upon the winding-up of the plan. Where the current TDPR is silent on surplus distribution upon winding-up, the prior versions of the executed TDPR should be reviewed to ascertain if there exist any non-reversion clause(s) of assets to the sponsor or exclusive benefit clause in the preamble or the winding-up provisions of the TDPR.
- 4.03 Maximum Limit- Provisions of the TDPR may include language stipulating that the allocation of surplus should consider the allowable limits of the Income Tax Act (“ITA”) or other relevant legislations, with the excess being reverted to the sponsor(s) or some other third party. Actuaries of pension plans are being advised that the pension limit provided for in the ITA speaks to the maximum pension benefits due while a plan is ongoing. As such, this limit is not applicable during the winding-up of a plan.
- 4.04 Surplus Determination Trustees and the plan’s actuary must conduct a thorough review to determine the source of the surplus amount. For instance, the breakdown of the sources may include the portion of the surplus that is attributable to interest gains, where members’ accounts were being credited less than net yield. In the case of Defined Contribution plans, it is expected that surplus deriving from this source would be allocated to the members’ account in such a manner that reduced that disparity between the net yield and credited interest. The surplus may also be attributable to, amongst other things, withdrawal gains, deriving from employer’s contributions made on behalf of non-vested terminated members; and over funding for Defined Benefit plans, where the calculated (current and projected) liabilities are less than assets.
- 4.05 Outstanding Contributions and Contribution Holiday<sup>1</sup>The Act creates an obligation for outstanding contributions to be paid into a pension plan. Trustees should therefore make concerted effort to recover outstanding contributions owed by participating employers or members of the pension plan while the plan is ongoing and after a decision is taken for its winding-up. Upon winding-up, a plan’s Constitutive Documents may allow for a portion of the surplus to be used to grant contribution holidays for the sponsor or be refunded to the sponsor, who may, in turn, wish to use all or a portion of that allocation to offset outstanding contributions. In cases where there are outstanding contributions as at the proposed winding-up date, the plan’s actuary should ensure that outstanding contributions are considered in the determination of the plan’s assets and outline in the WAV, its implication on the surplus allocation. If the employer is entitled to a portion of the surplus as per the TDPRs, consideration must also be given to the history of contribution holidays taken

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<sup>1</sup> There may be amendment provision that states that there cannot be any amendment made to the TDPR that would result in assets of the plan returning to the sponsor.

by the sponsor since the plan's inception and legitimate expectations of the plan's participants when determining the portion of surplus to be allocated to the sponsor upon winding up.

- 4.06 Allocation amongst participants The trustees have a fiduciary duty to all participants of the pension plan. While the law gives priority to pensioners in the distribution of surplus, no other membership group is more important than the other (actives, terminated, vested or non-vested). All participants are affected by the wind-up a plan and as such, unless specified by law or specifically outlined in the termination clauses of the TDPR, priority should not be given to any class of member above the others.
- 5.0 ELEMENTS TO CONSIDER IN A DEFICIT ALLOCATION
- 5.01 The TDPR - Trustees and their advisors must thoroughly review and identify any specifications as to how deficit should be treated; the methods of allocation (which members' benefits will be reduced and by how much); and if the employer's concurrence is required or if consultation only would suffice.
- 5.02 Deficit Determination Trustees and the plan's actuary must thoroughly review and determine the source of the deficit amount, as well as method and timeline by which the deficit will be settled, if applicable.
- 5.03 Allocation amongst participants In keeping with Section 31 of the Act, where the assets are depleted during the allocation of a particular class of members, the portion allocated within that group should be proportionately reduced for all members within that class. Depending on the nature and source of the deficit, benefits to members may not be reduced but the full payment to certain classes of members may be delayed until all or portions of the deficit are paid into the pension plan.
- 6.0 THE FSC'S APPROVAL/NON-OBJECTION
- 6.01 The FSC expects that it will be able to communicate its decision regarding a scheme of distribution of surplus or deficit allocation within five (5) months after receipt of all pertinent documents and information. Where more time is required to complete the review, the trustees will be informed.
- 6.02 The FSC reserves the right to:
- approve a proposed scheme of distribution of surplus, as submitted.
  - request a revision of the proposed scheme of distribution of surplus.
  - amend the proposed scheme of distribution of surplus after consultation with the trustees or provisional trustees.
- 6.03 In the case of a deficit allocation, the FSC will issue its non-objection where no concerns are identified with the proposed distribution or may request that further considerations be made, and the allocation revised.

Questions regarding this bulletin may be directed to:

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