

## Changes to the Pension Benefits Act coming in January

### ESG in the SIPP

The Ontario legislature has recently amended its regulation 909 to the *Pension Benefits Act* (Ontario) (**PBA**) to require that the Statement of Investment Policies and Procedures (**SIPP**) of Ontario registered plans include information “as to whether environmental, social and governance (“**ESG**”) factors are incorporated into the plan’s investment policies and procedures and, if so, how those factors are incorporated”<sup>1</sup>.

The changes are effective January 1, 2016; for plans currently registered in Ontario the SIPP must be filed with the Superintendent of Financial Services (**FSCO**), within 60 days of January 1, 2016. As well, effective July 1, 2016, member, former member and retiree statements must state that the administrator must establish a SIPP that contains information about whether ESG factors are incorporated into the SIPP and if so, how. These requirements appear to usher in a change to the legal landscape for pension investment. Set against a legal discussion worldwide that sustainability and the interactions of sustainability dynamics on the success of any business are key considerations in evaluating investment value, is the growing view that there is no longer a material distinction between non-financial and financial criteria that may affect investment performance. At a minimum, the changes are challenging administrators of pension plans in Canada to consider whether or how to take ESG factors into account.

On June 30, 2015 FSCO published, for public consultation, Investment Guidance Note IGN-004 on the incorporation of ESG factors in SIPPs (**IGN-004**). The comment period ended August 28, 2015 and, as of writing, final guidance had not yet been published.

While IGN-004 purports to provide background information and guidelines on ESG factors to assist plan administrators to meet the requirement to include information as to whether ESG factors are incorporated into the pension plan’s investment policies and procedures and if so, how those factors are incorporated, it falls short of requiring that administrators and their agents incorporate ESG in their decision making

Yet the growing body of evidence demonstrates the link between ESG considerations and the analysis of investment value. Articulated in papers published by, among others, the UNEP Finance Initiative<sup>2</sup> and other research bodies<sup>3</sup> and also much publicized programs for

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<sup>1</sup> S.78(3)

<sup>2</sup> UNEP Finance Initiative, “A legal framework for the integration of environmental, social and governance issues into institutional investment”, October 2005; See also “Fiduciary Duty in the 21<sup>st</sup> Century”, Principles for Responsible Investment, 2015.

<sup>3</sup> UK Law commission, “Fiduciary Duties of Investment Intermediaries”, July 2014; Manitoba Law Reform Commission, “Ethical Investments by Trustees”, January 1993

divestment of fossil fuels<sup>4</sup> and other developed arguments, such as the carbon bubble hypothesis which states that successful climate policy or a low-emissions energy economy would leave unburned carbon in the form of energy reserves held by coal, oil and gas companies in the ground – a stranded asset – and fossil company valuations would drop, leading to financial losses for investors<sup>5</sup>.

A pension plan administrator is responsible for investing the pension fund in accordance with the administrator's standard of care, in a prudent manner and in the best interests of the pension plan's beneficiaries. All investment decisions that are made by the administrator (or an investment manager as the administrator's delegate and agent), including the decision as to whether or not to incorporate ESG factors, and if so, how must be made in accordance with the administrator's and its agent's fiduciary duties. A consensus is emerging that considering ESG is an integral part of meeting this fiduciary duty. Since the plan's SIPP is an integral plan document and the administrator is responsible for ensuring compliance with the SIPP, the investment policies and procedures, including those relating to ESG should be clearly drafted to ensure that it can be complied with by the plan administrator and its external managers.

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<sup>4</sup> See, for example, 350.org climate action network launch of "Go Fossil Free: Divest from Fossil Fuels" Campaign

<sup>5</sup> Pacific Institute For Client Solutions "Fossil Fuel Divestment. Reviewing Arguments, Implications & Policy Opportunities", January 2015