By Mitch Frazer

Introduction

Mergers and acquisitions can entail a host of pension and benefits issues. To minimize the risks associated with acquiring or divesting pension liabilities, each party to a corporate transaction should be aware of its options as well as the consequences that flow from each option. Several types of corporate transactions can trigger pension issues: purchases of shares, mergers and amalgamations, and purchases of assets. The structure of the deal will directly affect the buyer’s and the seller’s pension obligations. This paper identifies and analyzes pension issues, obligations and risks that arise in corporate transactions, with a focus on Ontario-registered pension plans. These plans must be registered with the Canada Revenue Agency (CRA) under the *Income Tax Act*¹ and with the Financial Services Commission of Ontario under the *Pension Benefits Act*.²

The Treatment of Pension Plans in the Context of Corporate Transactions

Surpluses and Deficits in Pension Plans

Registered pension plans must be funded in accordance with the CRA’s requirements, as set out in the ITA, and the applicable pension legislation and regulations. The PBA requires pension plans to be funded on both a solvency basis and a going-concern basis. The actuarial surplus or deficiency of a plan is calculated by an actuary and detailed in an actuarial report, which is prepared using a series of assumptions including interest rates, inflation, salary projections, employee turnover, life expectancy, retirement age and industry return.³

In the context of a corporate transaction, the buyer must determine whether the seller’s pension plan has excess funding (a surplus) or unfunded liabilities (a deficit). Whether a pension plan has a surplus or an unfunded liability is an important consideration for all parties in a business transaction or reorganization. As discussed below, a plan’s funded status may have an impact on the negotiation of the purchase price and the terms of the transaction. Accordingly, it is important that there be an accurate assessment of the plan, and that both the buyer and the seller fully understand and approve the assumptions that were made in completing the assessment.⁴

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¹ R.S.C. 1985, c. 1 (5th Supp.) [ITA].
² R.S.O. 1990, c. P.8 [PBA].
⁴ Note that a defined contribution plan does not need to have regular actuarial assessments because an employer’s financial obligation is fulfilled once the amount specified in the plan text has been paid. *Ibid.*
Managing Pension Risks in Corporate Transactions

Pension issues are often big-ticket items in a corporate transaction, and therefore companies are increasingly concerned about pension liabilities and risks. Registered pension plans may present complicated legal, actuarial or other issues. As a result, it is essential for both the buyer and the seller to conduct thorough due diligence and negotiate the appropriate representations and warranties to be incorporated into the agreement of purchase and sale.

Due Diligence

Acquiring or disposing of pension plans and their associated liabilities in the context of corporate transactions can have a significant impact on a company’s financial viability as well as on employee morale and productivity. Accordingly, it is important for both the buyer and the seller to conduct due diligence before entering into any business deal. The following discussion of the due diligence process is relevant in a share-purchase transaction, a merger or an asset-purchase transaction in which the buyer is assuming pension liabilities. The various pension options available to the buyer in an asset-purchase transaction are discussed later in this paper.

The first stage in the transaction process will often be to execute a mutual confidentiality agreement whereby the parties bind themselves not to disclose any private information that may be acquired during the due diligence process.

The next step is to determine the funded status of any pension plans, because a pension plan’s assets and liabilities may affect the value of the shares of the target corporation or the price a buyer is willing to pay for the company’s assets. If a pension plan has a surplus or a funding deficiency, one of the parties may wish to seek a purchase price adjustment.

Due diligence in a corporate acquisition is often seen as principally a buyer’s concern. However, the seller should also be fully informed of the nature and history of all of its pension plans. If the seller conducts its due diligence early in the transaction, it can identify problems promptly and work toward resolving them before the transaction has progressed too far. Another key reason for the seller to conduct due diligence is to ensure the accuracy of the representations and warranties it makes in the agreement of purchase and sale.

Although a prudent buyer will obtain representations and warranties from a seller to guard against unpleasant surprises even after due diligence has been completed, such representations and warranties generally expire relatively quickly (often on closing in the case of a share purchase or merger). The buyer must carefully examine all documents and other relevant information to understand the nature of the proposed investment.

The importance of reviewing all historical plan and funding documents since the plan’s inception cannot be overstated, because when the buyer assumes a pension plan, it assumes the plan’s history. However, from a practical point of view, there are times when these historical documents are not accessible. When this is the case, the buyer should ensure that key issues such as payment of plan expenses, prior mergers and other potential misapplications of surplus are covered in the representations and warranties and that adequate indemnity language is included (together with survival periods). Moreover, in considering the funded status of a pension plan, the buyer must review the actuarial reports for the plan. If the buyer does not already have an actuary, it should retain one to review the reports.

It is best to involve pension counsel in a corporate transaction as early as possible. In a cross-border transaction, counsel is generally retained in all relevant jurisdictions. Differences in the law in various jurisdictions require local expertise and a unique understanding of national statutory and regulatory regimes. Parties that are negotiating pension mergers would find it extremely helpful to retain counsel as
early in the process as possible. Anticipating potential problems at an early date provides the necessary time to make the changes required to gain plan merger approval. The significant differences between pension regimes around the world mean that a one-size-fits-all approach to this area is not possible.5

**Negotiation of Representations and Warranties**

Once the prospective buyer and seller have completed the necessary due diligence, the representations and warranties with respect to the pension plans must be determined. This process often involves considerable negotiation, because the buyer’s counsel will want to include a long and detailed series of representations and warranties whereas the seller’s counsel will seek to limit and qualify them by reference to materiality and/or knowledge of the seller. The Aegon Canada Inc. v. ING Canada Inc. decision confirmed that a seller should not make broad representations and warranties regarding its pension plans without ensuring the accuracy of such representations.6

A seller must be particularly prudent in making representations regarding plan mergers and asset transfers between plans. Because the courts will not necessarily accept that a merger of pension plans is valid, a seller may have difficulty making the representation that its current pension plan is, in fact, the product of a valid merger of predecessor pension plans.7 Given the prescribed requirements for asset transfers under the new amendments to the PBA, this difficulty may be somewhat alleviated as a seller will have a list of statutory requirements that it can reference to show that the merger was valid.8

Furthermore, a seller should be prudent in making representations regarding any uses of surplus. In the decision of Nolan v. Kerry,9 the Supreme Court of Canada held that the employer was permitted to pay most of the plan expenses from the pension fund and that the employer could use a surplus in the defined benefit component of a pension plan to cross-subsidize its defined contribution obligations. There is currently no legislative or regulatory prohibition on cross-subsidization, paying expenses from the fund or taking contribution holidays in Ontario. Absent such prohibition, the permissibility of any of these activities will be determined with reference to the plan documentation and contract and trust law. Therefore, the parties to a purchase agreement should be cautious when making representations regarding the permissibility of such practices. The Kerry decision should not be interpreted to generally validate any of these practices as the decision was based largely on the wording of the plan documentation in that case. The recent amendments to the PBA regarding asset transfers appear to preserve an employer’s ability to cross-subsidize between components of the same plan. However, as will be discussed more fully below, cross-subsidization between separate plans or between components of a converted plan may be prohibited.

Often the determination of which representations and warranties are appropriate for the seller to make will come down to the allocation of risk between the parties. When the seller cannot provide the requested documents to the buyer, it is reasonable for the buyer to request representations and warranties on matters it cannot determine. The parties will also need to make a decision as to the survival of the representations and warranties. Clearly, the seller will prefer a shorter survival period, whereas a buyer will generally prefer a longer survival period.

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6 (2003), 34 C.C.P.B. 1, leave to appeal refused, [2004] S.C.C.A. No. 50 (QL) [Aegon].
7 Ibid. See also Baxter v. Ontario (Superintendent of Financial Services), [2004] O.J. No. 4909 (QL); Lennon v. Superintendent of Financial Services (2006), 51 C.C.P.B. 140 (F.S.T.) and Sutherland v. Hudson’s Bay Co., [2007] O.J. No. 2979 (S.C.J.) (QL) [Sutherland]. In the recent Sutherland decision, the Court commented that the Aegon decision’s findings regarding “merger” were unique to the facts of that case and should not be of general application.
8 Bill 236, Pension Benefits Amendment Act, 2010, S.O. 2010, c. 9, cl. 68 [enacted as s. 80 of the PBA]. At the time of writing, this provision was not yet in force.
Other Provisions in an Agreement of Purchase and Sale

In addition to the representations and warranties, the parties must pay attention to the definitions section of the agreement of purchase and sale. For example, the definition of “Plans” (or “Benefit Plans,” “Seller Plans” or “Employee Benefit Plans”) must be examined to confirm that it covers all types of plans (pension, benefit, compensation, etc.) that the parties wish to include.

In an asset-purchase agreement, the sections dealing with assumed liabilities and excluded liabilities should also be carefully examined to ensure that they reflect the business deal. The buyer may also request covenants from the seller with respect to the pension plans. Finally, the parties should also consider the indemnity provisions of an agreement.

Evaluating Options and Obligations in Complex Corporate Transactions or Restructurings

When determining what type of transaction to enter into, a buyer and a seller should evaluate the potential pension issues that may arise under each structure and their corresponding options and obligations. This section outlines the issues that a buyer and a seller can expect to encounter when entering into each type of transaction.

Pension Issues Specific to Share-Purchase Transactions

In a share-purchase transaction, the buyer essentially “steps into the shoes” of the seller. The corporation continues as the same legal entity but under the control of the new shareholder(s). Unless otherwise stipulated, all pension plan assets and liabilities remain with the corporation following its sale.

From the plan members’ perspective, a share-purchase transaction is beneficial because the employer-employee relationship continues unaltered amid the corporate change. The obligation of the purchased company to continue to provide pension and benefit plans will not be affected by the change of ownership.

From the perspective of a buyer or a seller, a share-purchase transaction is advantageous from a pensions and benefits point of view because it is much less complex and does not require regulatory approval. However, because all assets and liabilities relating to the pension and benefit plans remain owned by the corporation, they directly affect the value of the shares. Therefore, it is crucial that both parties complete the meticulous due diligence process discussed above. More specifically, the buyer must fully comprehend the nature and magnitude of the obligations it is undertaking and determine whether the plan has been administered in accordance with its terms. Similarly, the seller must understand the nature of its plans in order to provide accurate representations and warranties.\(^\text{10}\)

Pension Issues Specific to Mergers

In a merger or amalgamation, the parties may agree to merge their pension plans into a single plan through a transfer of pension plan assets from one plan to another with the consent of the Superintendent of Financial Services. This scenario may be in the best interests of the amalgamated corporation as well as the plan members for several reasons.

From the plan members’ perspective, in the case of a defined benefit plan, a merger is generally preferable because most Canadian defined benefit plans use years of service as part of the formula to calculate employee entitlement. If the plans are not merged, the combined pension that a plan member collects on retirement will likely be reduced.\(^\text{11}\)

\(^{10}\) Aegon, supra note 6.

\(^{11}\) Frazer, supra note 5 at 2.
From the amalgamated corporation’s perspective, merging pension plans can ensure uniform benefits among all employees, reduce plan administration costs and streamline regulatory compliance obligations. In addition, plan mergers are very attractive to amalgamated corporations when one of the pre-merger plans is underfunded and the other has excess funding. In certain situations, plan sponsors may be able to use the surplus in one plan to offset their contributions to the other. However, recent jurisprudence (discussed above) has cast doubt over whether plan mergers of this sort continue to be legally permissible. Further, recent changes to the PBA, once proclaimed into force, will place new restrictions on asset transfers, including the requirement that any transfer involving an underfunded plan satisfy additional requirements to be prescribed.\(^\text{12}\)

Despite the noted advantages, merging pension plans is not a simple process. Before the plans can merge, the amalgamated corporation must undertake a complex review of plan documents, legislation, regulatory policies and case law. Additionally, the applicable funding agreements must be analyzed to ensure that a merger is permitted and, if so, to determine the parameters under which a merger can occur. Moreover, if the plan is subject to a trust, a more extensive review must be conducted since case law is unsettled in this area.\(^\text{13}\)

As noted above, a pension plan merger requires the consent of the Superintendent of Financial Services. Under the current regime, the Superintendent may refuse consent for a proposed plan merger if the merger does not protect the pension benefits and any other benefits of the members and former members of the original pension plans.\(^\text{14}\) However, under recently enacted (but not yet in force) legislative amendments, the Superintendent will not have the same broad power and must consent to the merger if certain criteria are satisfied.\(^\text{15}\)

Regulations will be enacted to prescribe additional requirements for asset transfers from a defined benefit plan and transfers between defined contribution plans. The recent amendments to the PBA require that defined benefit plan assets be used to provide defined benefits after the transfer.\(^\text{16}\) It is not clear if the forthcoming regulations will allow any exceptions to this general rule.

**Pension Issues Specific to Asset-Purchase Transactions**

In an asset-purchase transaction, the seller’s pension plan is not necessarily transferred to the buyer. If the buyer decides to offer a pension plan, it has several options including assuming the seller’s pension plan or having the transferred employees participate in a new or previously existing pension plan offered by the buyer. Because the parties to this type of transaction have many alternatives, the resulting arrangements are often complex. Five general options for dealing with pension plans in an asset-purchase transaction are discussed below.

**Buyer Does Not Offer a Pension Plan**

The buyer may not want to offer a pension plan to the transferred employees. Although this may seem like an attractive option for the buyer, since it reduces costs and limits exposure to risk, it has several negative implications.

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\(^\text{12}\) Bill 236, cl. 66(1) [enacted as s. 79.2 of the PBA].

\(^\text{13}\) Some mergers have been recognized while others have been denied. Mergers that have been recognized include *Schmidt; Bueschau; Re National Trust Co. and Sulpetro Ltd.* (1990), 66 D.L.R. (4th) 271 (Alta. C.A.); and *Re Heilig v. Dominion Securities Pittfield Ltd.* (1989), 59 D.L.R. (4th) 394 (Ont. C.A.).

\(^\text{14}\) PBA, s. 81(5).

\(^\text{15}\) See Bill 236, cl. 70 (4), 80(2) [enacted as s. 80.6(6) of the PBA].

\(^\text{16}\) *Ibid.*, cl. 66(1) [enacted as s. 79.2(4) of the PBA]. At the time of writing, this provision was not yet in force.
First, this option is generally unattractive from the seller’s perspective since a full or partial windup of the seller’s pension plan may be ordered.\textsuperscript{17} This is also generally not in the seller’s best interest because the seller must deal with any surplus\textsuperscript{18} or deficit\textsuperscript{19} issues as of the windup date. In addition, a plan windup will trigger certain rights of the affected employees, which may be costly to the seller.\textsuperscript{20} Recent amendments to the PBA that are expected to come into force on July 1, 2012, will eliminate partial windups in Ontario.\textsuperscript{21}

Second, for the buyer, the initial impression of advantage may be outweighed by the prospect of dissatisfaction among the transferred employees. In addition, wrongful dismissal or constructive dismissal issues can arise if the buyer does not offer employment on terms (including pensions and benefits) similar to those provided by the seller. Generally the seller is responsible for termination or severance costs in respect of any employees who do not accept the buyer’s offer of employment. Accordingly, the seller will generally require the buyer to offer employment to any non-unionized transferred employees on terms that are substantially similar to those provided by the seller.\textsuperscript{22} If the buyer does not agree, the parties may negotiate that any termination or severance costs will be the buyer’s responsibility.

Third, from the employees’ perspective, this is clearly not an attractive option since they would no longer be members of a pension plan and would likely lose the largest component of their retirement savings.

**Seller Retains Past-Service Liability and Buyer Offers a Plan for Future Service Only**

Another option is for the seller to retain responsibility for past service related to the transferred employees and for the buyer to either establish a new pension plan for the transferred employees or permit these employees to participate in an existing pension plan. In this situation, the seller remains responsible for all accrued liabilities of the transferred employees in its pension plan until the closing date of the transaction. At that point, the transferred employees become members of either an existing plan or a new plan sponsored by the buyer, which is responsible for their benefits as of the closing date.\textsuperscript{23}

From the buyer’s point of view, this option may be preferable, especially if the seller’s pension plan is underfunded, because the buyer assumes no accrued pension liability for the transferred employees. Furthermore, because this option does not require a transfer of assets, regulatory approval is not necessary. However, if there is a collective agreement in place that references a specific pension plan, this option may not be available.

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\textsuperscript{17} PBA, s. 69(1)(f) provides that the Superintendent of Financial Services, by order, may require the windup of a pension plan in whole or in part if “all or part of the employer’s business or all or part of the assets of the employer’s business are sold, assigned or otherwise disposed of and the person who acquires the business or assets does not provide a pension plan for the members of the employer’s pension plan who become employees of the person.”

\textsuperscript{18} Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) (2004), 242 D.L.R. (4th) 193.

\textsuperscript{19} PBA, s. 75.

\textsuperscript{20} See, for example, ibid., s. 73 (immediate vesting) and s. 74 (grow-in rights).

\textsuperscript{21} Bill 236, cl. 51 [enacted as s. 69.1 of the PBA].

\textsuperscript{22} Unionized employees are transferred by operation of law when an employer sells its business and the purchaser is bound by the collective agreement as if the purchaser had been a party to the collective agreement under to section 69 of the Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A.

\textsuperscript{23} PBA, s. 80 governs this type of arrangement and states that a transferred employee who becomes a member of a pension plan provided by the buyer is entitled to (i) the benefits provided under the seller’s plan to the effective date of the sale; (ii) credit in the pension plan of the buyer for the period of membership in the seller’s plan for the purposes of determining eligibility for membership in and entitlement to benefits under the buyer’s plan; and (iii) credit in the seller’s pension plan for the period of employment with the buyer for the purposes of determining entitlement to benefits under the seller’s plan.
From the seller’s perspective, this option may address the potential windup concern. As the buyer provides a pension plan for the transferred employees, their employment will be deemed not to be terminated. However, the seller should consider requesting a covenant that the successor plan be retained by the buyer for a fixed period. This covenant may help protect the seller from being considered an employer after the transaction closes; as an employer, the seller could be responsible for liabilities arising from the windup of the buyer’s pension plans. This was the case in *GenCorp Canada Inc. v. Superintendent of Pensions for Ontario*, in which the Ontario Court of Appeal found that GenCorp Canada Inc. was caught by the definition of “employer” in the PBA and was subject to a windup order even though the affected employees had been transferred four years before the windup. However, it is not clear how long a covenant a seller should request to avoid this situation.

The buyer should also be careful to communicate plan amendments clearly and accurately to employees. The Ontario Court of Appeal’s decision in *Kerry (Canada) Inc. v. DCA Employees Pension Committee* held that an employer gave inadequate notice to employees about a one-time opportunity to convert from a defined benefit to a defined contribution arrangement.

From the employees’ perspective, this option may be unattractive because they will receive their pensions from two sources upon retirement. In addition, if the pension promised is a defined benefit based on final or career average earnings, the employees’ total pension will likely be reduced because the calculation in the seller’s plan will be based on lower earnings (assuming that employees’ salaries continue to increase during their employment). This issue can be resolved by a wraparound arrangement, discussed below.

**Wraparound Arrangement**

A wraparound arrangement is similar to option (ii), except that the buyer’s plan provides employees with a single benefit based on each employee’s final (or career) average earnings with the buyer and combined service with the buyer and the seller, with an offset for the pension benefits payable under the seller’s plan. This arrangement corrects the problem identified in option (ii) with defined benefit plans that are based on final or career average earnings and service.

If the wraparound option is used, the seller should consider requesting a covenant under which the buyer guarantees the continued existence of the successor pension plan for a fixed period.

**Carve-Out Arrangement**

*The Current Regime*

Another option is for the assets and liabilities related to the transferred employees to be carved out of the seller’s pension plan and transferred to an existing plan or a new plan offered by the buyer. The buyer

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24 See *supra* note 22. However, in the case of *AIG v. Sutton*, FST File No. PO245-2004 (September 6, 2005), the Financial Services Tribunal concluded that section 81 of the PBA does not affect the Superintendent of Financial Services’ jurisdiction to order a windup where it is appropriate to do so. Furthermore, the Tribunal noted that the Superintendent has jurisdiction under paragraph 69(1)(a) of the PBA to order a windup where there has been a “suspension or cessation of employer contributions” and it may be appropriate for the Superintendent to exercise this jurisdiction if the members are in jeopardy of losing their positions or future pension.

25 PBA, s. 80(3).

26 (1994), C.E.B. 8199 (Ont. Pension Comm.). This decision was subsequently affirmed by the courts.

27 PBA, s. 1(1) defines “employer” as follows: “in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related, and ‘employed’ and ‘employment’ have a corresponding meaning.”

28 (2007), 86 O.R. (3d) 1 [*Kerry OCA*]. This issue was not argued on its subsequent appeal to the Supreme Court of Canada.
assumes all pension liabilities related to the transferred employees for all their years of service. However, negotiating a carve-out arrangement can be quite an extensive process and obtaining regulatory consent can take years. In response to this time-consuming process, the PBA has been amended to require the Superintendent of Financial Services to consent to such carve-out arrangements if certain requirements are met. This new framework will be discussed below.

Because of the complexities of carve-out arrangements, the parties will often negotiate a separate agreement dealing only with the terms of the pension carve-out, which is incorporated by reference into the asset purchase agreement. The parties have many questions to consider, including the following:

- What is the value of the assets and liabilities to be transferred or assumed?
- What actuarial assumptions will be used to determine the amount to be transferred from the seller’s plan to the buyer’s plan?
- Who will be responsible for preparing and filing the necessary regulatory filings?
- What happens if regulatory approval for the transfer is not granted?
- Who has responsibility for the administration of the pension plan until the transfer occurs?
- How will the assets related to the transferred employees be invested in the interim period, and who will bear the risk of any investment gains or losses?

If the seller’s plan is in surplus, depending on the plan and trust terms, it may be necessary to transfer a pro rata portion of the surplus. The case of Burke v. Hudson’s Bay Company makes it clear that whether surplus must be transferred will depend on the plan and trust terms. However, the recent changes to the PBA will negate the issue of interpreting the plan documentation to determine the allocation of any surplus. Under these new rules, if a surplus exists at the time of the transfer, a portion of the surplus must be transferred. This provision is discussed more fully below.

From the employees’ perspective, the carve-out is advantageous since their pensions upon retirement will be paid from one source. However, the carve-out is generally not an attractive option for the buyer, because costs can be high and transferring assets between pension plans requires regulatory approval. In fact, the Financial Services Commission of Ontario’s current policy regarding plan transfers is a significant hurdle to the carve-out. Following the Aegon decision, the Financial Services Commission of Ontario released a policy statement about approval of asset transfers where one or more of the plans is subject to a trust. The policy essentially created a moratorium on plan transfers unless the proposed transfer fit within one of the exceptions enumerated in the policy or was otherwise satisfactorily distinguishable from Aegon. Once the new statutory requirements are proclaimed into force, the asset transfer process will be much smoother and more efficient; however, regulatory approval will still be necessary.

Reform

Bill 236 contains new provisions regarding asset transfers that are not yet in force. It’s important to note that the new provisions contemplate additional requirements for asset transfers from defined benefit

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29 The Financial Services Commission of Ontario has a policy under which parties that wish to withdraw a pending application can apply to the commission. See Financial Services Commission of Ontario Policy A700-301, “Withdrawal of Application for Consent to a Transfer of Assets,” available online: Financial Services Commission of Ontario <http://fsco.gov.on.ca>.


31 Bill 236, cl. 68 [enacted as s. 80 of the PBA].

32 PBA, s. 80(4).
plans and asset transfers between defined contribution plans. These new requirements will be set out in the associated regulations, which have not yet been released. Bill 236 also requires that assets accrued under a defined benefit plan be used to provide defined benefits following the transfer, which would prohibit the buyer from fully converting the transferred employees’ defined benefit pensions to defined contribution pensions following the transaction. It is not clear if the forthcoming regulations will allow any exceptions to this general rule. These regulations will also prescribe additional requirements that must be met when one of the plans is underfunded as of the date of the transfer.

In addition to the above requirements, parties must still obtain the consent of the Superintendent of Financial Services. However, the amendments will require the Superintendent to consent to carve-out arrangements if certain criteria are satisfied.

The PBA also contains transitional provisions that, once proclaimed into force, will be in force until July 1, 2015, to allow parties that have completed an asset purchase transaction to retroactively agree to transfer the pensions of the affected employees who remain active plan members. This provision will apply only to transactions that are completed before this section was effective and only if the plan is a “prescribed pension plan.” Importantly, the buyer’s and the seller’s plans do not have to provide the same benefits. The transfer will be allowed if the buyer and the seller enter into an agreement that meets certain criteria.

Transfer of Pension Plan

The final option is for the buyer to assume all the assets and liabilities of the seller’s pension plan. In this case, the buyer will generally take the pension plan “as is,” meaning that the buyer will assume sponsorship of the plan with a deficit or a surplus. The buyer will also assume any liabilities associated with prior plan administration. For example, if the seller had been paying plan expenses from the pension fund and this was contrary to the terms of the plan or the trust, the buyer, as the new sponsor of the plan, would likely be liable for the breach. In certain cases, a collective agreement may require that the specific plan be provided to the transferred employees, which may necessitate a plan transfer.

The main advantage of transferring the entire plan is that it is reasonably straightforward. The transfer of the pension plan’s sponsorship is done by an amendment to the plan that simply changes the plan sponsor. Like all plan amendments, the amendment must be filed with and approved by both CRA and the Financial Services Commission of Ontario; however, approval is generally not difficult to obtain. When this option is selected, the buyer or the seller may wish to negotiate a purchase price adjustment, depending on the funded status of the plan, to take into consideration the overall effects of transferring it. The parties will need to resolve various issues in the agreement, including the transfer of employee data and the question of responsibility for preparing and filing the necessary filings.

From the employees’ perspective, this is generally an attractive option because they will receive pension benefits upon retirement from only one pension plan.

Conclusion

Pension issues are usually not the first concern of the parties involved in a purchase and sale transaction. However, because of the potential effect of pension liabilities on the bottom line, companies are

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33 Bill 236, cl. 66(1) [enacted as s. 79.2(4) of the PBA].
34 Bill 236, cl. 68, and Bill 120, An Act to amend the Pension Benefits Act and the Pension Benefits Amendment Act, 2010. 3rd Sess. 39th Leg., Ontario, 2010, cl. 32(2) [enacted as s. 80(13) of the PBA]. At the time of writing, these provisions were not yet in force.
36 See Bill 236, cl. 68, 80(2) [enacted as s. 80.1 of the PBA].
increasingly concerned about pension plans in corporate transactions. As examined in this paper, pension issues can affect the amount of due diligence required, the purchase price, the representations and warranties, and the obligations of the buyer to transferred employees. The keys to dealing with pension-related concerns in a complex corporate transaction are to obtain as much information as possible about the pension plans involved and to seek expert pension advice as early as possible in the process.