

$$F = G \frac{m_1 m_2}{d^2}$$

$$\phi(x) = \frac{1}{\sqrt{2\pi}\sigma} e^{-\frac{(x-\mu)^2}{2\sigma^2}}$$

Section 14

Transfers between retirement funds and other entities

Hannine Drake

$$\frac{dy}{dt} = \lim_{h \rightarrow 0} \frac{f(t+h) - f(t)}{h}$$

$$F - E + V = 2$$

$$i\hbar \frac{\partial}{\partial t} \psi = \hat{H} \psi$$

$$E = mc^2$$

$$dS \geq 0$$

As part of an M&A transaction, Medellin Cartel (Pty) Ltd purchases 100% of the shares of Mafia (Pty) Ltd, resulting in Mafia becoming a 100% subsidiary. From the perspective of Mafia:

PRE-MERGER



**Mafia Occupational
Pension Fund (DC)**

Employer: Mafia (Pty) Ltd

Assets (\$)



Liabilities

POST-MERGER



**Medellin Cartel Group
Occupational Pension Fund (DC)**

Employers:

(1) Medellin Cartel (Pty) Ltd

(2) Mafia (Pty) Ltd

KEY TERMS

**TRANSFEROR
FUND**



**Mafia Occupational
Pension Fund (DC)**

“TRANSFER OF BUSINESS”



**ASSETS & LIABILITIES
 (“FUND CREDITS” / “PAST SAVINGS”)**

**TRANSFEEE
FUND**



**Medellin Cartel Group Occupational
Pension Fund (DC)**

NOT:

- membership
- contributions



Section 14 – transfer of business

- Purposive interpretation NB
 - (1) **financial soundness of fund** (2) **member protections**
 - *Younghusband (OPFA): “The expression “transfer of business” is not defined in the Pension Funds Act. The term is wide enough to include every single exit and withdrawal of membership from a fund. The general policy and purpose of the provision favours some limitation recognizing that the net of regulation is aimed at transactions having a potential to impact significantly on the **financial soundness** of the fund. Generally, one may safely assume, voluntary individual withdrawals fall outside of the ambit of the provisions. Clearer guidelines and criteria in the legislation would have been helpful. Nevertheless, a common sense approach supports a finding that the section is applicable when 60% of the members of one fund move to another....”*



Transfer of business (cont.)

What is a “transfer of business”:

- S 14 does not regulate when or why transfers take place; only how
- Examples of transfers of business:
 - Members resign & join another employer who contributes to another fund
 - Section 197 LRA
 - Employer chooses to change pension funds (*Amplats*)
 - One out of many employers move
 - Single-employer fund
 - Transfer of unaccrued benefits to unclaimed benefits fund
 - Restructuring of funds



Transfer of business (cont.)

What is not a “transfer of business”?

- Payment of accrued benefits to another fund (e.g. member elects preservation fund)
- Purchase of annuity in member’s name
- Transfer of pension interest to non-member spouse
- Misc. payments like discharge of fund debts
 - *Pepkor par 284: “The business of a pension fund includes its assets. When a bulk transfer of assets is made from one pension fund to another, the transfer constitutes “the transfer of any business” within the meaning of section 14(1). I do not mean by this that every payment made by a pension fund constitutes a transfer of business. Obviously, a payment made by a pension fund in discharge of a debt would not ordinarily constitute a transfer of business”*

Transfers as strategic issues

- (1) ***Pepkor*** – s 14(1)
 - Surplus fight
- (2) ***Amplats*** – s 14(1)
 - Fights about:
 - To which fund employees (want to) belong
 - Member representation on board
- (3) ***Bophelo*** – s 14(8)
 - Fight about safeguarding of eroding orphans' money by compelling a transfer from one beneficiary fund to another beneficiary fund

Structure

1. Section 14(1) and its requirements
 - Content of “reasonable and equitable”
 - Surplus considerations
2. Conduct Standard 1 of 2019
3. Fund rules – example
4. *Pepkor* and *Amplats*
5. Section 14(8)
 - *Bophelo*



Summary – when advising...

- Transferor Funds
- Transferee Funds
- Employers
- Members whose assets & liabilities are being transferred
- Beneficiary Funds
- Other members of any fund



Section 14(1) – key aspects

- Key requirements for a transfer of business into s 14(1)
 - Both funds must consent
 - Both fund's rules must permit
 - Registrar approval required
 - No member consent required!
 - Only required to:
 - (1) provide information to members and
 - (2) give members an opportunity to object



Section 14(1) - text

1. Amalgamations and transfers.—(1) Subject to subsection (8), no transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund, shall be of any force or effect unless—

(a) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar within a prescribed period of the effective date of the transaction;

(b) the registrar has been furnished with such additional particulars or such a special report by a valuator, as he may deem necessary for the purposes of this subsection;



Section 14(1) – text (cont.)

(c) the registrar is satisfied that the scheme referred to in paragraph (a) is **reasonable and equitable** and accords full recognition—

(i) to the **rights and reasonable benefit expectations** of the members transferring in terms of the rules of a fund [where such rights and reasonable benefit expectations relate to service prior to the date of transfer]*;

(ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and

(iii) to the payment of minimum benefits referred to in section 14A,

and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory

*Added after *Tek*

Section 14(1) – text (cont.)

(d) the registrar has been furnished with such evidence as he may require that the provisions of the said scheme and the provisions, in so far as they are applicable, of the rules of every registered fund which is a party to the transaction, have been carried out or that adequate arrangements have been made to carry out such provisions at such times as may be required by the said scheme;

(e) the registrar has forwarded a certificate to the principal officer of every such fund to the effect that all the requirements of this subsection have been satisfied.

Section 14(1) – in other words:

Transfers must comply with the following to obtain a certificate:

(1) The prescribed “paperwork” (see further Conduct Std 1 of 2019), including:

- Scheme of transaction
- Actuarial documents
- Additional information “deemed necessary” by FSCA
- Transaction authorised by & complies with fund rules

(2) NB: Registrar is satisfied that scheme is “reasonable and equitable”, and specifically “accords full recognition to”:

- Members “rights and reasonable benefit expectations” are met
- “additional benefits” re. past service which have become “established practice”
- Payment of 14A minimum benefits
- Transaction will not render fund unable to meet PFA requirements, or in an unsound financial condition



What is “reasonable & equitable”?

- Registrar exercises wide discretion / value judgment
- *Dawood* – decisional referents or guidelines, failing which use the purpose
- “*equal, fair, impartial and even handed*” – *Adriaens*
- Also s 7C
- Amount, size, number etc suitable to purpose
- *Adriaens* (OPFA 2000) 16 – 17:

“Section 14 imposes a disclosure and reporting obligation on any fund involved in an amalgamation or a transfer of business, and invests the Registrar, in his supervisory and regulatory capacity, with a significant authority to protect member rights and interests and to allow for equitable adjustment. [...] Hence, the provision requires a full and proper investigation by the Registrar to determine the legality, reasonableness, equity, financial soundness and actuarial prudence of any scheme. The reporting and disclosure requirements of the provision are geared towards facilitating the investigation and determination by the Registrar.”

What is “reasonable & equitable”?

- *Sidumo* at par 79:

“To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.”

- Considerations include:

- Accurate financial information as of date of transfer provided to both registrar and affected members
- Changed circumstances taken into account
- Minimum benefits 14A
- No threat to financial soundness of fund
- No right to **surplus** but fair opportunity to be considered for it?

- DB considerations?

What is “reasonable & equitable”?

- *surplus considerations*

- **Adriaens** p 23:

“As observed in Stannard, while the transferring members do not have a legal right to participate directly in the surplus, they do have a right to be the beneficiaries of a transfer scheme which is reasonable and equitable. They are entitled to a fair and proper opportunity at the moment of transfer to assess the likelihood, should they remain in the fund, of receiving some benefit from the surplus in the future, in the form of increased pensions or other benefits. The failure of the actuary and the fund to disclose the actual market value of the surplus at the date of transfer has denied the Complainants and other pensioners this opportunity. Hence, the scheme fails to live up to the standard of reasonableness and protection now captured in [section 7C](#) and [7D](#) of the Act. Moreover, the board has fallen short of its duty to act with due care, diligence and in good faith. There is no getting away from the fact that had the pensioners known that 75% of the surplus was to remain behind in the fund, many might very well not have transferred.”

What is “reasonable & equitable”?

- *surplus considerations*

- ***Pepkor***

- Transferor fund said pre-transfer funding level was 137% (actually 151%) & post-transfer funding level of transferor fund as 137% (actually 606%)
- Because of non-disclosures and misreps, Registrar could not apply his mind properly in terms of subsection (c) –
 - Held (par 252): If actual funding levels were disclosed Registrar would have asked questions; especially as R8.8mil surplus was earmarked for executives and Registrar *“would have regarded it as an unacceptable and impermissible attempt to enrich senior executives. Indeed, they would probably have labelled it as a form of “cherry-picking”.* Legal consequences of this misrep is reviewable irregularity as Registrar precluded from applying his mind properly
 - Section 14 approval set aside.

Conduct Standard 1 of 2019

- Previously e.g. Directive PF 2; PF 6
- Key aspects:
 - Purpose (par 2): to set out FSCA requirements *“in order to ensure that funds treat members affected by transfers in terms of section 14 fairly”*
 - Emphasises board duties par 3(5): *“The boards of both the transferor and the transferee funds must take reasonable steps to ensure that the interests of members are protected at all times (both with regards to the rules of the fund and the provisions of the Pension Funds Act) and may not merely rely on a statement to this effect by the valuers.”* – cf ss 7C & 7D
 - Par 7 – board must certify s 14 requirements
 - Requires info on surplus & reserve accounts (par 4), including the funds must indicate *“the impact of any unapportioned actuarial surplus included or excluded from the transaction”* – 4(3)

Conduct Standard 1 of 2019

- Member communication (par 5) – NB:
 - Transferor fund must provide affected members with “adequate communication” to enable them to make an informed choice on whether or not to object to the transfer
 - “Adequate communication”
 - Explaining risks as a result of the transfer
 - Explaining how members’ past service benefits will be impacted by transfer
 - Whether there could be any prejudice upon transfer
 - Comparison: benefits & costs of both funds
 - Transfer value as of effective date
- Objections:
 - Members must be provided with at least 30 days
 - Objections must be included in FSCA “where the objection **has not been resolved**, together with the fund’s response and comments” – contrast with consent



Example: fund rules

9. TRANSFERS

9.1 Transfers into the FUND

9.1.1 If a MEMBER or a group of MEMBERS transfers to the FUND from a PREVIOUS FUND, the FUND shall receive from the PREVIOUS FUND the amount payable to the FUND in respect of each such MEMBER. Such amount shall be applied under the MEMBER'S FUND CREDIT.

9.1.2 If a MEMBER who is a member of any other APPROVED PROVIDENT FUND, an APPROVED PENSION FUND or an APPROVED PRESERVATION FUND chooses to transfer the benefit to which he is entitled on leaving that fund into the FUND, the amount so transferred shall be applied under the MEMBER'S FUND CREDIT.

9.1.3 The FUND may also accept transfers from another APPROVED PROVIDENT FUND, an APPROVED PENSION FUND or an APPROVED PRESERVATION FUND of an amount in respect of a MEMBER who has elected to transfer to the FUND an amount awarded to such person in terms of a court order contemplated in Section 7(8) of the Divorce Act 1979.



Example: fund rules

9.2 Transfers out of the FUND

9.2.1 If retirement benefit arrangements for employees of a PARTICIPATING EMPLOYER are restructured and in consequence MEMBERS become members of another APPROVED PROVIDENT FUND or an APPROVED PENSION FUND, then the FUND CREDIT, less such costs incurred by the ADMINISTRATOR in arranging such

transfer as may be determined by the TRUSTEES, of each MEMBER in the SERVICE of that PARTICIPATING EMPLOYER who is eligible for membership of such fund on a date determined by the TRUSTEES shall be transferred to such APPROVED PROVIDENT FUND or APPROVED PENSION FUND. On finalisation of the transfer of his benefit in terms of this Rule, and the ACT, the MEMBER shall cease to be a MEMBER of the FUND.



Example: fund rules

9.2.2 Notwithstanding any other provisions of these RULES, in the event of a transfer of a PARTICIPATING EMPLOYER'S business contemplated in Section 197 of the Labour Relations Act (Act 66 of 1995), no MEMBER affected by such transfer shall become entitled to a benefit in terms of Rule 7.1. The TRUSTEES shall arrange for the FUND CREDIT of such MEMBER to be transferred to an APPROVED PENSION FUND or an APPROVED PROVIDENT FUND in which his new employer participates; provided that, depending on the provisions of the agreement governing the transfer of business contemplated in Section 197 of the Labour Relations Act (Act No. 66 of 1995) and, if applicable, the terms and conditions of the MEMBER'S contract of employment with his new employer and if the MEMBER so elects, the TRUSTEES may arrange for the transfer of the MEMBER'S FUND CREDIT to:

9.2.2.1 an APPROVED RETIREMENT ANNUITY FUND; or

9.2.2.2 to an APPROVED PRESERVATION FUND.

On finalisation of the transfer of his benefit in terms of this Rule, and the ACT, the MEMBER shall cease to be a MEMBER of the FUND.

Sections 14(2) – 14(7)

- “implementation” provisions
- 14(6) – FSCA may withdraw or amend a certificate (without applying to court) if based on materially inaccurate facts or bona fide error.

Further considerations

- In what forum can you challenge the Registrar's approval of a transfer?
 - OPFA?
 - FS Tribunal?
 - High Court?
- Using what legislation?
 - PFA
 - PAJA?
 - *Pepkor*

The *Pepkor* case

- Restructure of fund resulted in most members being transferred to new fund(s) but massive surplus remained with transferor fund – part of DB to DC move
- FSB reviewed – 4 review grounds:
 - (1) “cherry-picking” scheme contrary to PFA
 - Held: On evidence, not proven that intention of transfer was cherry-picking
 - (2) Non-disclosure to FSB of intention to transfer an amount to finance enhanced benefits for senior execs – this in conflict with PFA
 - Held: Even if this cherry-picking purpose was proven (which it was not), nothing in PFA precludes transfers for this purpose.



The *Pepkor* case (cont.)

- (3) Incorrect information provided for pre- & post-transfer funding level – required info by registrar – amounts to breach of section 14(1)(b)
 - Held: No – only info needs to be given, need not be correct; correctness relevant to subsection (c)
- (4) Because of non-disclosures and misreps, Registrar could not apply his mind properly in terms of subsection (c) – applicant said pre-transfer funding level was 137% (actually 151%) & post-transfer finding level of transferor fund as 137% (actually 606%)
 - Held: (par 252) If actual finding levels were disclosed Registrar would have asked questions; especially as R8.8mil surplus was earmarked for executives and Registrar *“would have regarded it as an unacceptable and impermissible attempt to enrich senior executives. Indeed, they would probably have labelled it as a form of “cherry-picking”.* Legal consequences of this misrep is reviewable irregularity as Registrar precluded from applying his mind properly
 - Section 14 approval set aside.
- SCA: Registrar could have held that the large remaining surplus with transferor fund not “just and equitable”

The Amplats case

- Employer chose to change fund membership from Amplats Fund to Superfund
- Specific Enforcement of fund rule 9.2.4:

*“If an Employer ceases to participate in the Fund ... to establish another [fund] then the Fund Credit of each Member in Service of that Employer... **shall** be transferred to such [new fund]. The Employer shall cease to participate in the Fund on the finalisation of the transfer. On transfer of his Fund Credit in terms of this Rule, the Fund shall have no further liability in respect of such member”*

- Fund: objections not properly dealt with (included some members did not want to transfer)
- Member-appointed trustees (50%) refused to sign / progress s 14 transfers
- “statutory” right to object vs rule enforcement

The Amplats case

- The content of objections:
 - Some members did not want to transfer
 - Freedom of association complaints
 - Labour-related disputes (ongoing wage negotiations)



Section 14(8)

(8) With effect from the commencement of the Pension Funds Amendment Act, 2007, subsection (1) does not apply where the affected members were duly informed of a proposed transaction and any objection the members may have, has been resolved to the satisfaction of the board of the fund concerned, and—

(a) both transferor and transferee funds are valuation exempt;

(aA) both transferor and transferee funds are beneficiary funds; or

(b) the transferor or transferee fund is neither registered nor required to register under this Act and the other fund is valuation exempt,

and, furthermore, that—

(i) such registered funds keep proper records of all such transactions;

(ii) such registered funds comply with any further requirements as the registrar may prescribe;

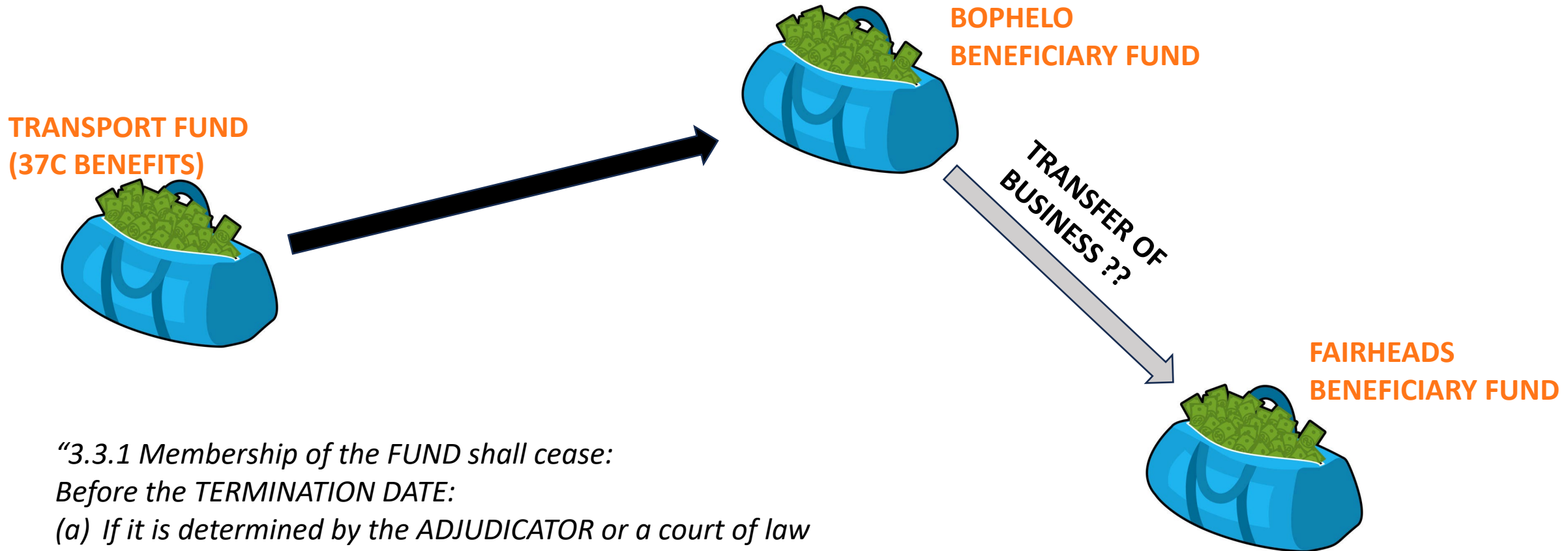
(iii) the assets and liabilities are transferred within 180 days of the effective date of transfer; and

(iv) any assets transferred must be increased or decreased with fund return from the effective date until the date of final settlement.

Section 14(8)

- Key difference: no FSCA approval needed
- Funds must still complete certain (different) prescribed forms to Conduct Std & keep on file otherwise transaction “of no force or effect” (par 16)
- Further documents that funds must keep:
 - Proof that proposed transaction has been communicated and that any objections have been addressed – what does this mean?
 - Proof of valuation exemption; and
 - Proof that 15B has been complied with (where applicable)
- Must still comply with funds’ rules

The *Bophelo* case – S 14(8)



*“3.3.1 Membership of the FUND shall cease:
Before the TERMINATION DATE:
(a) If it is determined by the ADJUDICATOR or a court of law
or other legal process that membership be terminated.”*

Summary – when advising...

- Transferor Funds
- Transferee Funds
- Employers
- Members whose assets & liabilities are being transferred
- Beneficiary Funds
- Other members of any fund

Questions / Considerations

- How would you interpret the phrase “transfer of business” in light of *Cool Ideas*?
- What is the content of the following phrases, properly interpreted, in section 14(1)(c)(i):
 - “reasonable and equitable”
 - “rights and reasonable benefit expectations”
- Should member consent not be required for a section 14(1) transfer?
- What are funds’ legal obligations to “resolve” objections?

Thank you

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