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CAPSA Consultation on the Draft Defined Contribution Pension Plans Guideline

**NATIONAL PENSIONS AND BENEFITS LAW SECTION
CANADIAN BAR ASSOCIATION**

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Pensions and Benefits Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Pensions and Benefits Law Section of the Canadian Bar Association.

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CAPSA Consultation on the Draft Defined Contribution Pension Plans Guideline

I. INTRODUCTION

The National Pensions and Benefits Law Section of the Canadian Bar Association (the CBA Section) is pleased to comment on the draft Defined Contribution Pension Plans Guideline (the Draft Guideline) released by Canadian Association of Pension Supervisory Authorities (CAPSA) in July 2012. The CBA Section consists of members involved in pensions and benefits law across the country, including counsel who advise pension and benefits administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

The CBA Section acknowledges CAPSA's efforts in clarifying different aspects of the administration of a defined contribution (DC) pension plan and in seeking comments from the pension industry stakeholders.

II. GENERAL COMMENTS

The CBA Section has the following principal comments:

1. A significant portion of the Draft Guideline is devoted to describing existing CAPSA guidelines. Although we agree that it is desirable to confirm and list the existing CAPSA guidelines as a reference, the level of details in the Draft Guideline may result in confusion and possible inconsistencies with the rules or principles in the actual CAPSA guidelines. In our view, significant streamlining of the Draft Guideline will enhance reader-friendliness and increase the focus of the readers on the new guidelines. The main purpose of the Draft Guideline is to supplement the guidance in the existing CAPSA guidelines on DC pension plans. The main goal can be better achieved by focusing on the new guidance.
2. The application of the Draft Guideline is not entirely clear. Guidance on investment choices is relevant to all capital accumulation plans (including DC pension plans) where members direct the investment of contributions. Information on retirement products is relevant to all DC pension plans irrespective of whether the members direct investment. Guidance on contributions and adverse amendments is relevant to pension plans which provide either Defined Benefit (DB) or DC pension benefits.

3. The Draft Guideline does not state whether it applies to pooled registered pension plans (PRPPs).

In light of these comments, the CBA Section recommends that the overall structure of the Draft Guideline be changed to:

- Clarify the applicability of the Draft Guideline, particularly in respect of PRPPs; and
- Streamline the Draft Guideline by including only the new guidance which is of particular relevance to DC pension plans.

III. COMMENTS ON SPECIFIC ASPECTS OF THE DRAFT GUIDELINE

A. Purpose

Under the “Purpose” section, we suggest the following:

- Include a statement that the guidelines are voluntary but it is CAPSA's expectation that registered pension plans with a DC component will follow the guidelines, where appropriate.
- Include a statement that the guidelines do not replace the applicable legislative and regulatory requirements that may extend beyond the scope of the Draft Guideline and all stakeholders are responsible for meeting those requirements (i.e., modify and move the second paragraph under "Application for the DC Pension Plans Guideline" to this section).

B. Existing CAPSA Guidance Related to DC Pension Plans

In our view, the primary purpose of references to existing CAPSA guidelines is to indicate that the Draft Guideline is not the only relevant guideline for DC pension plans and to assist the reader to find the other guidelines. We recommend listing the other CAPSA guidelines with a brief description of the guidance they provide, instead of the current detailed descriptions.

C. Key Players in DC Pension Plans and Responsibilities Related to DC Pension Plans

These sections define the key players in a DC pension plan context and describe their responsibilities. This description is not necessary as it is covered by Guideline No. 5. However,

if CAPSA would like to include some description, we agree with its approach of adopting the descriptions in Guideline No. 5 for consistency, subject to the following comments:

1. "Plan sponsor" is not a term used in pension legislation. The rationale for the use of this term as distinct from the term "employer" and the differences between the terms are unclear.
2. A "fund holder" can be a third party service provider in some circumstances. For example, it is typical in a DC pension plan context for an insurance company to be the fund holder and the provider of record keeping and reporting services.
3. We question the reason for omitting the performance of duties relating to the pension fund in the description of "third-party service providers". This aspect of delegation is included in the description of the term in Guideline No. 5.

The description of responsibilities in the Draft Guideline is a replication of information in other guidelines and it does not provide any additional information or new guidance which is the manifested purpose of the Draft Guideline. The CBA Section recommends that the sections describing the responsibilities of key players be removed.

D. Information For Members During Accumulation Phase

The CBA Section recommends that the description of guidance under Guideline No. 3 (the CAP guidelines) in the introduction be removed for a more focused discussion on new guidance.

If CAPSA keeps the description, the CBA Section recommends that the bullet point on factors to consider when establishing criteria for selecting service providers to provide investment advice to members under "Providing Investment Information and Decision-Making Tools for Members" be removed, as this is not a disclosure under Guideline No. 3. In addition, a plan administrator often does not make arrangements with a service provider to provide investment advice to members and it is important to distinguish between providing investment information and providing investment advice.

The Draft Guideline states that it is the responsibility of plan administrators to provide the additional information to members. However, Section 3.3 provides that a plan administrator should "consider" providing certain information. Since the Draft Guideline provides general guidance without the force of law and in view of our concern with the disclosure recommended by Section 3.3 discussed below, we recommend that this statement be removed.

It is common for a plan administrator to delegate the responsibility of providing information to members in a DC pension plan context to a third-party service provider. We recommend that the concept of delegation be referred to in the Draft Guideline section discussing disclosure of information to members.

The CBA Section recommends that Section 3.1 be removed since it does not supplement the guidance in Guideline No. 3.

Section 3.2 deals with disclosure regarding contributions. The CBA Section is pleased to see guidance in this regard since it is not dealt with in detail in other CAPSA guidelines. We have the following comments on Section 3.2:

- The first paragraph is unnecessary in view of the overriding statement regarding legislative and regulatory requirements under "Purpose".
- The inclusive list of information to be provided is the same as that in the Draft Disclosure Guideline for Defined Contribution Pension Plans of the Office of the Superintendent of Financial Institutions (OSFI). We question the need to include the list, especially when the draft OSFI guideline is adopted, in view of the overriding statement regarding compliance with legislative and regulatory requirements under "Purpose".
- The CBA Section recommends that the disclosure of the following information is also helpful to members:
 - how interest and earnings on contributions are to be applied; and
 - how and in what circumstances contributions can be withdrawn.

The CBA Section has concerns with the recommendation that the administrator provide members with annual estimates of accumulated value of DC accounts at retirement and estimates of benefits arising from that value and the adequacy of retirement income expected to be provided by the pension plan. Information of this nature depends on individual circumstances which may change over time. This disclosure is onerous on the pension plan administrator and the estimates may be misleading to members. The disclosure will likely be so significantly qualified that the information will not be very helpful to a member. The CBA Section is of the view that information of this nature relates to complex issues that are more suitable for qualified financial advisors.

E. Information for Members Who Are Approaching the Payout Phase and During Payout Phase

The CBA Section recommends that the description of Guideline No. 3 and the paragraph on the administrator's responsibility to provide information in addition to legislative requirements be removed.

Sections 4.1 and 5.1 outline the information to be provided to a member approaching retirement and during retirement respectively. The CBA Section is pleased to see attention given to this area of the retirement spectrum and the brief synopsis of each product in Sections 4.1.1 to 4.1.6. It would be useful for a member to have information described in Section 4.1 and Appendices A and B. However, the CBA Section does not believe it is reasonable to place the responsibility on the plan administrator for the retirement vehicles chosen by a plan member and impose the obligation on the plan administrator to explain what members may do with their DC accounts after they leave the pension plan exposing the administrator to potential liability if the explanation is insufficient or incorrect.

The range of retirement vehicles, particularly annuity products, is continually increasing. The appropriate choice of retirement vehicles for a member requires an understanding not only of the available vehicles but also of the member's personal financial and family circumstances, risk tolerance, life expectancy and health, as well as individual tax implications. These are complex issues for financial advisors to consider, and not employers or administrators.

A DC pension plan allows a member to accumulate savings on a tax-sheltered basis and to ultimately use those savings to provide retirement income. However, by virtue of its design, the DC pension plan is not intended to deliver the retirement income itself nor is payment of retirement income part of the benefits promised under a DC pension plan.

The CBA Section recommends that the Draft Guideline not impose the obligation to provide information on payout options on the plan administrator. There are other possible sources for the desired information. For example, it could be prepared by CAPSA, or by the providers in the business of offering the payout vehicles. In most cases, the third party providers who serve the market for DC pension plans by offering their services as record keepers are the same parties who benefit from marketing the payout vehicles to members transferring money out of

a DC pension plan. As a result, these providers are well placed to explain the payout vehicles and they are also the parties who benefit directly.

Information about retirement planning is important. If CAPSA retains the concept that a plan administrator should be responsible to provide the information, the administrator would likely engage a service provider to prepare generic information. This would not be sufficient or as effective as advice from financial advisors on an individual basis, but may serve well as a start for individual retirement planning. Regardless of who provides information on the regulated retirement products, the information should also include the tax implications for each product.

Variable benefits are part of a DC pension plan. Therefore, it is appropriate for the plan administrator to be responsible for providing information on the variable benefit as described in Section 5.1.

F. Adverse Amendment

The given examples of adverse amendments are obvious and straightforward and they apply equally to DB pension plans. The CBA Section believes that a discussion of the circumstances in which a plan conversion from a DB to a DC pension plan is or is not considered an adverse amendment will be helpful.

The reminder to administrators and employers in Section 6.2 of the categories of individuals to whom notice should be given is helpful. However, the category of "spouse or common-law partner" is missing and should be included in this list.

IV. CONCLUSION

The CBA Section acknowledges CAPSA's efforts in addressing different aspects of DC pension plans.

In light of our comments, the CBA Section questions whether the new guidance in the Draft Guideline warrants a separate guideline or can be incorporated into an existing CAPSA guideline. As an alternative, all relevant guidance relating to DC pension plans in the Draft Guideline and the other CAPSA guidelines can be consolidated into one guideline so that

stakeholders only need to refer to one source for guidance. This alternative approach will require a lot more work of CAPSA.

We trust that our comments are helpful and we look forward to the opportunity for our continued participation in CAPSA's strategic initiative of reviewing current and alternative approaches to regulating and supervising DC pension plans.