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Via email: leah.anderson@fin.gc.ca

Leah Anderson
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L'Esplanade Laurier
140 O'Connor Street
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Dear Ms. Anderson:

**Re: Pooled Registered Pension Plans (PRPP) Regulations
Canada Gazette, Part I – August 11, 2012**

The Canadian Bar Association's National Pensions and Benefits Law Section (CBA Section) is pleased to comment on the draft PRPP regulations pre-published in Canada Gazette, Part I on August 11, 2012. The CBA Section comprises lawyers from across Canada who practise in the pensions and benefits area of law, including counsel to benefit administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

The CBA Section appreciates having the opportunity to work with Finance Canada and provide input throughout the process of establishing the framework legislation for PRPPs and these regulations. For ease of reference, our comments are organized under the seven regulatory matters addressed in the Regulatory Impact Analysis Statement.

Licensing

The CBA Section generally supports the licensing approach in section 7 of the Draft Regulations. However, we believe section 7 could be improved by having more detail in it. While the Superintendent should have the final discretion to decide whether or not to issue a licence if the prescribed conditions are not met, the content of section 7 is vague in its definition of what the prescribed conditions are. For example, rather than set minimum criteria for the financial resources of the applicant, section 7(b) simply states that the applicant must have the financial resources required for the administration of a PRPP. Likewise with the condition on risk management (section 7(c)) and operational capability (section 7(d)).

Section 7 forces the Superintendent to determine the objective standards against which the applicant must be assessed (by the Superintendent). While the Superintendent should play a very important role in the licensing process, section 7 gives the Superintendent too little guidance on

how to assess applicants and leaves potential applicants with too much uncertainty regarding the standards that will be applied to them if they apply for a licence.

Permitted Investments

The CBA Section generally supports the similarity between the permitted investment rules outlined in the Draft Regulations and Schedule III to the Regulations under the *Pension Benefits Standards Act, 1985*. In addition, we have the following specific comments.

The CBA Section believes that section 8 should also contemplate the successors or assigns of CDS and possibly other custodians (for example, CDCC, Fundserve or foreign equivalents).

Section 11 is triggered where the administrator or any person acting on its behalf “knows” that a person will become a related party. While we support the objective of the section and the requirement that actual knowledge be present to trigger the section, where the administrator is a financial institution, it may be impractical to expect that information about who will become a related party at a future date will be available to all individuals responsible for entering into transactions on behalf of the PRPP. We suggest that the person entering into the transaction on behalf of the administrator (as opposed to the administrator itself) have actual knowledge that someone will become a related party at a future date, and that knowledge be required as of the date of the transaction.

In section 13(2)(c), we think it may be appropriate to include certain foreign governments.

For section 14, we generally support the thrust of the provision which allows an administrator to hold an investment not compliant with the permitted investment rules for a period of time where the investment was acquired as a result of the circumstances listed in section 14. We think other scenarios could also be included in section 14 (for example, tender offers, mergers, etc.). However, it is not clear why such an investment would be exempted from so many of the permitted investment rules. We see the need to exempt such an investment from section 10 (30% rule), but struggle to see the justification with respect to sections 4, 5, 6, 7, 8, 9, 11, and 12. Further, the CBA Section is unclear on why the two-year period to correct any errant investment listed in subsection 14(b) would not apply equally to investments acquired under the circumstances in subsection 14(a).

Investment Options

The CBA Section supports the proposed provisions dealing with investment choices. In particular, the restriction to six investment options (including the default option) is a prudent measure that will keep the investment decision making process simpler for members. However, the CBA Section would also like to see the PRPP Regulations give better recognition to PRPPs designed with a single investment choice and protect those PRPPs from arguments that more funds are better than fewer. In the CBA Section’s view, the words “no more than six investment options” could be better stated as “no less than one and no more than six investment options”.

The CBA Section supports giving the administrator an option of offering a balanced fund or an age based portfolio as the default option. The default option rule would apply to PRPPs that offer a single investment choice as well as to those that offer more than one.

The CBA Section supports the requirement that the same investment options and same default option must apply to all members of a PRPP so long as it is clear (as it appears to be) that this rule would not prevent an administrator from operating multiple PRPPs, each of which have different investment options and default options.

Permitted Inducements

The CBA Section agrees with the permitted inducements in section 19 of the proposed PRPP Regulations. We would, however, like to comment on the use of the phrase “for the equal benefit of the employees” in section 19(a). Currently, proposed section 19(a) states:

An administrator may give, offer or agree to give or offer to an employer and an employer may demand, accept or offer or agree to accept from an administrator, as an inducement to enter into a contract with the administrator in respect of a PRPP

(a) a product or a service on more favourable terms or conditions than the administrator would otherwise offer if the inducement is for the equal benefit of the employees of that employer who are eligible to be members of the PRPP;

In our view, it is unclear whether “equal benefit” refers to the inducement benefiting the employer and the employees of the employer “equally”, or if it requires that all employees of the employer who are eligible to become members of the PRPP will benefit “equally”. Regardless, it may be difficult to quantify and compare the benefits to be received by the employer and the employees, and may not be possible to determine whether the parties benefit “equally”. If the intent is that members should benefit as much as employers from an inducement, section 19(a) could be revised to provide that the inducement is “at least as beneficial to the employees of that employer who are eligible to be members of the PRPP as it is to the employer receiving the inducement from the administrator.”

Low Cost

The CBA Section believes that, for a PRPP to be “low cost”, the costs to the PRPP members must be at or below the cost incurred by members in other defined contribution (DC) plans. However, the CBA Section recommends that the comparator group (DC plans that provide investment options to groups of 500 or more members) not remain static. Instead, the comparator for determining whether a PRPP is “low cost” should be DC plans that provide investment options to groups of a similar number of DC plan members as PRPP members. This way, PRPPs that increase in size beyond 500 members must continue to pass on their savings from greater economies of scale. Where a PRPP has 3,000 members, for example, it should only be considered a “low cost” PRPP if the costs charged to its members are comparable to the fees charged by DC plans with a similar number of members.

Alternatively, if a comparison of the costs of PRPPs and DC plans based on the number of members in the PRPP or the DC plan is not possible, the CBA Section recommends that the comparison be made between PRPPs and DC plans of similar asset size.

In addition, it is not clear whether section 20 applies to funds which are permitted in, for example, section 9(3)(a) and section 13(2)(a) of the Draft Regulations since these funds do not seem to have their cost structure regulated. If not, the fees in these funds could become considerably high.

Contribution Rate to 0%

In previous discussions with Finance Canada, the CBA Section recommended a comprehensive outline of the terms and conditions upon which a member ought to be permitted to set their contribution rate to 0%. In addition, we outlined administrator duties that would be required in order to acknowledge and process a member’s application to reduce his or her contribution rate to 0%. Of significance, the CBA Section recommends that certain steps be required of administrators to assist employers in processing a change in contribution rate in their payroll

systems. This process includes notice from the administrator to the employer (if the member is not self-employed) when contributions are to cease, and prior to the resumption of contributions.

As previously stated, The CBA Section recommends that the regulations specify rules on the communications between the administrator and employers (where the member is not self-employed). In particular, the regulations should prescribe the timeframe in which the administrator must provide the employer with notice to discontinue deductions. Employers should be given no less than 30 days' notice, to ensure that payroll systems can be updated. The CBA Section recommends that the employer receive a copy of the confirmation from the administrator to the member advising of the date on which the contributions will cease to be deducted.

Furthermore, the CBA Section recommends that, prior to the expiration of the zero contribution rate period, the administrator be required to give notice to members of the resumption of their full contributions and the default contribution rate that will apply. In this notice, the CBA Section recommends that members be given the option of extending the period of zero for an additional period and a deadline, not later than 30 days prior to the end of the zero contribution period, by which the member must elect to extend the period. Administrators should also be required to provide employers with a copy of the notice reminding members of the resumption of contribution at least 30 days prior to the end of the zero contribution period.

Rights to Information

The CBA Section understands that PRPPs will fall under the various guidelines issued by the Canadian Association of Pension Regulatory Authorities (CAPSA) and in particular the guidelines for Capital Accumulation Plans (CAP Guidelines), the Guidelines for Electronic Communication in the Pension Industry (E-Communication Guidelines), and, when finalized, the Defined Contribution Pension Plan Guidelines (DC Guidelines) (together, the CAPSA Guidelines).

On this basis, we are satisfied that the CAPSA Guidelines, and any other regulatory guidelines relating to defined contribution pension plans, sufficiently address matters not covered in the PRPP Regulations, such as the requirement to provide more detailed information to the members and employers, disclosure and decision-making tools, and procedures relating to electronic communications.

In addition, our detailed comments on section 22 and section 23 are as follow:

We assume that the information to be provided to members and employers in section 22(a) is general information regarding the investment options available to the members. The CBA Section believes that, although such information should be available on a website, information should also be provided to the member in hard copy since there will be members without access to electronic communication. This is particularly important for information regarding PRPPs at the initial enrolment stage. Ongoing information may be delivered electronically, if the member has a means of receiving it, and has given consent to receiving the information electronically. We refer to the E-Communication Guidelines for additional guidance on electronic communication.

On the requirement to describe the degree of risk associated with an investment option, for a new fund formed for the PRPP, there may be no performance history available to describe. Accordingly, we would revise that part of the requirement in section 22(1)(a) to add, "if any". We refer to the CAP Guidelines and DC Guidelines for additional reference.

In section 23 of the Draft Regulations, the word "option" in subsection (a) should be replaced with "option or options". In subsection (b), we believe that the term "net change" should be clarified to specify whether or not this is net of fees (we assume that it is).

The CBA Section trusts these comments will assist Finance Canada in its work. We would be pleased to respond to questions and to provide further information on any of the issues addressed in this submission or on proposed PRPPs in general.

Yours truly,

(original signed by Noah Arshinoff for Michael Mazzuca)

Michael Mazzuca
Chair, National Pensions and Benefits Law Section