THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

December 6, 2013

Via email: Christopher.eccles@osfi-bsif.gc.ca

Mr. Christopher Eccles
Legislative and Policy Initiatives Officer
Private Pension Plans Division
Office of the Superintendent of Financial Institutions Canada
255 Albert Street
Ottawa, ON K1A 0H2

Dear Mr. Eccles:

Re: Draft Policy Advisory on Longevity Insurance and Longevity Swaps

I am writing on behalf of the Canadian Bar Association's National Pensions and Benefits Law Section (CBA Section) in response to OSFI's invitation for comments on the draft Policy Advisory on Longevity Insurance and Longevity Swaps (Draft Advisory) released on August 29, 2013.

The Canadian Bar Association is a national association of 37,500 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. 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 benefits consultants, and investment managers and advisors.

GENERAL COMMENTS

Longevity risk hedging contracts (LRHCs) can be important tools for plan administrators looking to reduce longevity risks under defined benefit pension plans. Some members of the CBA Section have been approached for advice by plan administrators in Canada who are considering entering into such arrangements. We appreciate and support OSFI's proactive approach of establishing the Draft Advisory and inviting comments from stakeholders.

Since longevity risks are associated with pension plans that provide defined benefit pension benefits, the CBA Section recommends that the title and Purpose section be made clear that the Draft Advisory is not relevant to plans providing only defined contribution pension benefits.

Since LRHCs are new to Canada, some issues may not be apparent until these contracts become more prevalent in use. The CBA Section recommends that OSFI continue its dialogue with stakeholders and revisit the Draft Advisory in a set time after implementation to consider whether modifications are needed.

SPECIFIC COMMENTS ON DRAFT ADVISORY

For ease of reference, our comments are organized under the headings in the Draft Advisory.

A. Longevity Risk Hedging Contracts

The Draft Advisory does not distinguish between longevity insurance contracts and longevity swaps. While these products may have similar economic results, they are very different products who do not share the same legal relationships or considerations. The CBA Section recommends that the Draft Advisory recognize these differences. For example, longevity insurance contracts may be eligible for exemptions available for insurance contracts under section 9 of Schedule III to the *Pension Benefits Standards Regulations, 1985* (Schedule III), but longevity swaps may not. As another example, unlike longevity insurance contracts, longevity swaps may involve posting collateral and the related regulatory compliance issues.

Further, the legal relationships created by indemnity-based contracts and index-based contracts are different and, though there may be overlaps, the risks, considerations and OSFI's expectations may differ. Recognition of the differences will assist plan administrators considering them as an option and weighing the administrative and regulatory obligations.

B. Risks for a Pension Plan

The Draft Advisory identifies risks that may arise from the use of longevity insurance contracts and longevity swaps. Although the analysis provides useful information to plan administrators, we are of the view that it would be useful to include information on how the means to assess the risks can be developed.

C. Considerations for a Plan Administrator

Paragraph (e) *Actuarial Valuation Implications* highlights some concerns a plan administrator should consider when valuing a LRHC for determining a plan’s going concern liabilities or preparing a solvency valuation.

Since OSFI views longevity insurance and longevity swaps as assets of a pension plan, we recommend that OSFI also provide guidance on:

(a) how the book value of these products is to be determined for purposes of the application of the 10% single issuer limit under section 9 of Schedule III; and

(b) how these products are to be valued and reflected in the financial statements of the pension plan.

The CBA Section also recommends that tax implications be listed in the specific considerations for a plan administrator. In circumstances where the counterparty is a non-resident of Canada (as defined in the *Income Tax Act* (Canada)), plan administrators may need to consider how payments to a pension plan (including whether any withholding tax is payable) will be treated under the ITA, particularly the Registered Pension Plans provisions.

D. OSFI Views and Expectations for Pension Plan Administrators Entering into Longevity Risk Hedging Contracts

The Draft Advisory states that OSFI's approval will not be required by plan administrators entering into these contracts. However, it also states that OSFI would have no objection if certain "conditions" are satisfied. It is unclear if this implies that OSFI may object to contracts and possibly review them to determine if conditions are sufficiently met. The CBA Section recommends that if no objection or review process is intended, the Draft Advisory not use “objection” language. Instead, we suggest OSFI use confirmatory language acknowledging that, in the event the contract is compliant, OSFI recognizes that the arrangements may be appropriate or acceptable. Alternatively, if OSFI intends to intervene and object, it would assist to set out the review and objection process and its ramifications.

The Draft Advisory does not include any disclosure requirements. The Draft Advisory should confirm that, provided the plan’s statement of investment policies and procedures appropriately provides for the use of LRHCs, no further disclosure of the use (e.g., to OSFI, plan beneficiaries or anyone else) is required.

OSFI may also wish to consider expanding the list of considerations expected of a plan administrator to include the compliance with specific applicable legislation (e.g., if a longevity insurance contract is used, the contract's compliance with the applicable insurance legislation) and the structure and nature of the arrangement.

The CBA Section trusts that our observations will assist OSFI in finalizing the Draft Advisory. We would be pleased to respond to questions and to provide further information on our observations or on the Draft Advisory.

Yours truly,

(original signed by Noah Arshinoff for Lawrence Swartz*)*

Lawrence Swartz
Chair, National Pensions and Benefits Law Section