January 28, 2021

Via email: capsa-acor@fsco.gov.on.ca

Leah Fichter, Chair, CAPSA
Jennifer Sutherland Green, Chair, CAPSA Funding Guideline Committee
Canadian Association of Pension Supervisory Authorities
16th Floor – 5160 Yonge Street
Toronto, ON M2N 6L9

Dear Ms Fichter and Ms Sutherland Green:

Re: CAPSA Guideline No. 7 – Pension Plan Funding Policy

The Canadian Bar Association Pensions and Benefits Law Section (CBA Section) is pleased to comment on draft revisions to *Guideline No. 7 – Pension Plan Funding Policy Guideline* (Guideline).

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section contributes to national policy, reviews developing pensions and benefits legislation and promotes harmonization. Our members are involved in all aspects of pensions and benefits law, including counsel who advise pension and benefit plan administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

Support for Revised Guideline

The CBA Section supports updating the Guideline to reflect new plan designs and legislative funding requirements across Canada. We also generally agree that the establishment of a funding policy by a plan sponsor (or where applicable, by a plan administrator) will help make more informed funding decisions which in turn promotes benefit security.

As a preliminary comment, we note that Finance Canada's recent consultation, *Strengthening Canadians' Retirement Security - Proposals to Support the Sustainability of and Strengthen the Framework for Federally Regulated Private Pension Plans*, specifically identified that some industry experts believe that funding policies are not needed for all plans.

In our response[1] to Finance Canada's consultation, we explained that some CBA Section members are of the view that where a plan is solely employer funded a statutory obligation to create and maintain a funding policy can add additional regulatory burden without a corresponding improvement in benefit security because the funding policy is unlikely to do more than mimic minimum standard funding requirements. At the same time, other CBA Section members endorsed the requirement for funding policies for all plans as an aid to, and valuable measure for, good governance.

Nature of Guidance

We agree with the Guideline's statements that "the funding policy will depend on the nature (characteristics and complexity) and documents of a pension plan" and that "the funding policy should fit the particular circumstances of the plan".

Given the voluntary nature of the Guideline, we suggest that the policy elements be encouraged but not required (e.g., change "should" to "could"). In fact, the Guideline recognizes that only certain jurisdictions require a funding policy to be established (or established for specific plan designs) and where the requirement does not exist, establishment of a funding policy would be a best practice, not a legal requirement.

While the Guideline clearly acknowledges that establishment of a funding policy will in many cases be permissive and its content may vary from plan to plan, the Guideline describes many features that "should" be included in a funding policy. While CAPSA's goal is to establish best practices, and the Guideline identifies standards of content that conform to them, some best practices may not be feasible for all plans. For that reason, it may be preferable to characterize some recommendations as "ideals" or "models" and state that not all plans are in a position to meet them.

Many of the new required policy elements are technical and prescriptive. Some plan sponsors (particularly of small and medium sized private sector single employer plans) may elect not to establish a funding policy because of concerns that it would not align with CAPSA recommended best practices or that there would be undue cost incurred to comply with the guidance given.

For some of the new required policy elements, CAPSA may wish to include a *softer* recommendation, consistent with the approach in the current Guideline. This may be particularly relevant in these parts of the Guideline:

- (pp. 8-9, Funding Objectives): "Plan sponsors or administrators need to take into consideration that some of these objectives may be conflicting. It may be useful to rank the funding objectives and also include considerations and examples on how possible conflicts would be resolved. Considerations should also be given to illustrate the meaning of each objective with respect to key funding decisions."
- (p. 10, Risk Appetite): "The funding policy should describe the level of risk that the various stakeholders are willing to accept commensurate with the ranking of the funding objectives. It should also describe the main funding objective and the tolerance of attaining/not attaining other objectives."
- (pp. 10-11, Mitigation of Risks): "Other information which should be included in the funding policy: … Whether deterministic projection and/or stochastic projections are to be used. … Stochastic projections can assist plan sponsors to set long term policies. On the other hand,

---

1 CBA Submission on Strengthening Canadians Retirement Security (Federally Regulated Private Pension Plans (January 2021)

deterministic projections could conceivably be easier to understand to most stakeholders and are conducive to short term decision making within the longer-term framework set with stochastic lenses."

- (p. 15, Target Benefit Management): "Also, the issues related to utilization of excess assets which can be used to restore previously reduced benefits or provide additional benefits should be discussed."
- (p. 17, Stress Testing and Projections): "The funding policy should articulate the stress testing and projections to be performed, including their frequency and how these should be modeled."
- (p. 17, Stress Testing and Projections): "Plan stakeholders must think ahead and come to an agreement respecting the costs they believe to be acceptable, the risks they agree to take, and the degree of intergenerational risk they determine to be fair."

Encouraging Informed but Flexible Approach to Plan Funding

The Guideline includes guidance that could predetermine the outcome of funding decisions rather than inform the process by which those decisions are made.

For example, it suggests that "it may be useful to rank the funding objectives and also include considerations and examples of how possible conflicts would be resolved". Some CBA Section members are concerned that ranking funding objectives may reduce the flexibility to respond to the particular funding circumstances faced by a plan (or its sponsors) and could, in many cases, result in the priority being to fund the plan in accordance with minimum funding requirements under applicable pension legislation. As such, these CBA Section members would endorse a softening of the Guidelines comments on ranking.

Distinguishing between Administrator and Sponsor Functions

The Guideline seeks to distinguish between the roles of a plan sponsor and plan administrator and addresses circumstances where an employer has dual roles. We agree with CAPSA's characterization of plan sponsor functions as non-fiduciary in nature, with plan administration functions fiduciary in nature and believe this distinction is of paramount importance.

The CBA Section believes that in some sections of the Guideline these distinct roles may be conflated or, it is not clear which *hat* an employer with dual roles would be wearing. For example:

- At p. 5 (Role of the Plan Sponsor), the Guideline notes "In the course of activities related to the establishment of a funding policy, where the plan administrator is not the plan sponsor, then the plan sponsor is not held to a fiduciary standard of care". This seems to imply that where an employer has dual roles, it may have fiduciary obligations when establishing a funding policy. We do not believe this is consistent with the fact that, subject to complying with minimum funding requirements under applicable pension legislation and any other funding requirements (e.g., terms of a collective bargaining agreements), funding decisions and establishing a funding policy would be a plan sponsor (i.e., non-fiduciary) function.
- At p. 11 (Funding Volatility Factors and Management/Mitigation of Risks), the Guideline states that the funding policy should "articulate what risk mitigation plans or tools are available to the plan sponsors." "Investment strategies" is included in the description of available tools. As a plan administrator is responsible for the prudent investment of plan assets, it is not clear what *investment strategies* the Guideline envisions would be adopted by a plan sponsor.

- At p. 3 (Context), the Guideline states "in the case of a multi-employer or target pension arrangement, the funding policy or benefits policy would be the responsibility of the administrator, which is usually the board of trustees". There are exceptions to this rule that may warrant a softer statement of the proposition. For example, under the shared risk plan framework in New Brunswick, the plan administrator is responsible for administering the funding policy, but the funding policy parameters are typically set by the plan sponsors and are generally unable to be amended by the plan administrator.

Disclosure to Plan Beneficiaries

While transparency is important, some CBA Section members noted that plan sponsors (dependent on the plan design) might be reluctant to disclose the contents of a permissive policy on funding matters with plan beneficiaries out of concern that it would create enforceable legal obligations for the exercise of non-fiduciary functions.

At p. 9 (Funding Objectives), the Guideline states: "Contributions in excess of the legislative minimum may be used to build a reserve that may help attain secondary objectives or maintain a level of contributions in excess of the legislative minimum while complying with limits in the *Income Tax Act* and *Regulations*."

The reference to a "reserve" may be misconstrued and suggest that contributions in excess of minimum standard requirements can be treated differently than any other contributions to the plan fund. Absent express legislative authority to create a reserve (which does exist, for example, in certain target benefit plan legislation), there may not be an ability to set aside plan assets in a reserve to be used for a particular purpose. As such, we recommend using terminology other than "reserve", such as buffer.

We appreciate the opportunity to comment on the draft revisions to the Guideline. We trust our comments are helpful and would be pleased to provide further clarification.

Yours truly,

(original letter signed by Marc-Andre O'Rourke for Jeff Sommers)

Jeff Sommers
Chair, CBA Pensions and Benefits Law Section