THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Strengthening Canadians Retirement Security (Federally Regulated Private Pension Plans)

CANADIAN BAR ASSOCIATION
PENSIONS AND BENEFITS LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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 CBA Pensions and Benefits Law Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Pensions and Benefits Law Section.

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I. INTRODUCTION

The Canadian Bar Association's Pensions and Benefits Law Section (CBA Section) is pleased to comment on Finance Canada's consultation paper *Strengthening Canadians' Retirement Security – Proposals to Support the Sustainability of and Strengthen the Framework for Federally Regulated Private Pension Plans* (consultation paper).

The CBA is a national association of 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. CBA Section members are involved in all aspects of pensions and benefits law and include 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.

II. GUIDING PRINCIPLES

As an overarching comment, the CBA Section encourages Finance Canada to adopt four guiding principles as it considers the issues raised in the consultation paper.

1. **Harmonization** – alignment with relevant measures in provinces and territories.
2. **Sustainability** – robustness with respect to changing economic conditions, including sufficient flexibility to provide necessary counterbalances to economic shifts.
3. **Clarity** – legislative and policy guidance on entitlements to and uses of plan funds, and roles and responsibilities in respect of plan sponsorship and administration.
4. **Retirement Income Security** – pension issues are of national importance and improving the funding and security of pension benefits will facilitate a reliable retirement savings system for Canadians.

These principles are drawn from CBA policy, and we have advocated for their adoption in previous consultations. We have refined our explanation of the "clarity" principle as articulated in previous submissions as we believe that some issues raised in the consultation paper require clear legislative guidance, while others are best addressed through policy.

We organize our comments following the headings in the consultation paper and the questions posed.

III. OPTIONS FOR TEMPORARY BROAD-BASED SOLVENCY FUNDING RELIEF FOR 2021

The pandemic has been devastating to some businesses and left some plan sponsors in urgent need of cashflow relief for their pension plan funding obligations. We support a short-term, targeted and multifaceted approach that, to the extent possible, balances the need for benefit security with accessible and effective relief from what may be onerous solvency special payment schedules for those experiencing severe financial strain.

Our responses to the consultation questions reflect the following considerations:

- The COVID-19 pandemic presents extraordinary circumstances.
- Not all businesses and industries are affected the same way by the pandemic, and they have differing needs. The relief "toolbox" should be as large and varied as possible to allow plan sponsors to access the kind of relief that will be most beneficial for the sustainability of their businesses.
- Temporary measures should be truly *short-term*.
- If possible, relief should be given in a way that does not dispense with principles of transparency to members and benefit security. Optimally, and to the extent possible, there should be a balance between sustainability of the employer enterprise and protection of member pensions.

1. What are your views on the potential challenges that could be facing federally regulated DB plans in 2021?

Based on our experience working with sponsors and administrators of federally regulated defined benefit (DB) pension plans, the continuing impacts of COVID-19 represent the greatest potential challenges facing DB plans in 2021.

How employers sponsoring federally regulated DB plans have been impacted by COVID-19 depends on a myriad of factors including the type of industry, business structure, location and size. The impacts on employers vary from relatively minor to devastating – the extent of which would have been difficult to fathom, let alone predict, prior to the pandemic.

The duration and impacts of the pandemic on businesses and the economy in general have proven to be impossible to forecast. The challenge most anticipated in the next year by DB plan sponsors is likely the risk of cash flow uncertainty. This is consistent with the purpose of various wage and rent subsidy programs implemented by the federal government in response to the pandemic. These programs aim to fill part of the cash flow gaps of employers

experiencing significant declines in revenue so they can continue to pay their employees and make rent payments.[1]

In our view, any temporary broad-based solvency funding relief should, at least in part, address plan sponsors' cash flow uncertainty risk in 2021.

2. Should further temporary relief options be considered? What principles or criteria should guide the consideration of the relief measures?

Yes, we believe further temporary funding relief options should be considered. Recognizing the long-term nature of DB pension plans, it is reasonable and justified for Finance Canada to implement temporary measures to assist employers overcome the effects of the pandemic and emerge with their pension plans as intact as possible.

Relief options should recognize that a wide range of employers require assistance and that the impacts of COVID-19 differ with each employer. As a result, we do not believe there is a one-size-fits-all relief measure. For example, while increased limits on letters of credit may be the preferred relief measure for some DB sponsors, it may not be appropriate or even available for others. A "more tools in the toolbox" approach is preferable to allow each DB sponsor to select the options that best address its challenges.

Further, employers should be allowed to elect more than one relief option or change relief options in the future to address situations where the actual impact of the pandemic on the employer during 2021 is different than expected.

Requiring appropriate notice to beneficiaries, particularly where the relief results in an overall reduction in security for benefits under the plan, should be required to ensure transparency.

Given the time sensitive nature of this relief, we strongly suggest relief measures that can be implemented without complicated or time-consuming approval processes. For example, requiring employers to give the Office of the Superintendent of Financial Institutions (OSFI) financial or other business-related disclosures to demonstrate the need for relief may be a disincentive to seeking relief or may result in such a delay that the relief is not available in

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1 Bank of Canada "Financial System Review – 2020: The Impact of COVID-19 on the Canadian Financial System", online.

time. The fact that the relief *will* be (and we believe *should* be) only temporary, and therefor time-limited, mitigates the need or desire for a more rigorous process.

3. If further relief measures are viewed as necessary, which potential temporary measures are best suited to address the challenges facing federally regulated DB plans?

We believe that further relief measures are necessary and endorse the four listed relief measures in the consultation paper: (i) extension of the solvency amortization period, with conditions; (ii) a one-time extension of the solvency amortization period; (iii) extension of the letter of credit limit; and (iv) offering alternative valuation methodologies.

Since sponsors of federally regulated DB plans have been impacted by COVID-19 in different ways, we support offering a variety of relief measures so each plan sponsor can elect the options that best address its challenges. Also, depending on the nature of the relief options, it may be appropriate to allow employers to elect more than one option and/or to elect different options in the future.

4. Is there one particular relief measure that is preferable, or should consideration be given to providing a suite of measures that plan sponsors could choose from?

As the COVID-19 pandemic has impacted federally regulated DB plan sponsors in different ways, we believe DB sponsors should be offered a selection of funding relief options to choose which measure (or combination of measures) best suits their plan and circumstances. Flexibility is important as a one-size-fits-all approach may not adequately address the issues or concerns of every plan sponsor.

5. For the one-time extension of the solvency amortization period (i.e. for 2021 plan year only), should consent from plan beneficiaries be required? Are there other conditions or requirements that should be considered?

For transparency, beneficiaries should, at a minimum, be given notice that the DB sponsor intends to extend the solvency amortization period for the 2021 plan year. Finance Canada should consider whether and to what extent seeking consent from plan beneficiaries furthers the goal of giving timely, temporary, targeted funding relief for DB sponsors.

Requiring employers to seek consent to use this or other relief measures may be a disincentive to seeking relief or may result in such a delay that the relief is not available in time. Businesses hardest hit by the pandemic will need immediate relief from the requirement for solvency contributions and any requirement to resume solvency payments

while working through a consent process could place a serious financial strain on the business.

If a member-approval approach is taken, we recommend that Finance Canada follow the 'negative' consent structure used in the temporary solvency funding relief regulations under the *Pension Benefits Standards Act, 1985* (PBSA) in 2006 and 2009. This would allow the plan sponsor to implement the relief measure in a timely manner. Further, if a member-approval approach is taken, in cases where some or all plan members are represented by a union, the union should be required to act on behalf of the union members.

In our view, notifying plan beneficiaries of any temporary funding relief measures implemented by the plan sponsor is likely sufficient to ensure transparency. However, if a consent component is included, we urge Finance Canada to structure it so it does not become a barrier to DB sponsors using these measures.

6. Should the qualified issuer determine the letter of credit limit, or should the limit be set by the special regulations? If the letter of credit limit is set by the special regulations, what are your views on an appropriate limit?

Currently, letters of credit are a permissible replacement of solvency special payments at up to 15% of solvency liabilities, providing funding flexibility for DB plans. If the 15% limit is lifted only temporarily, we do not believe it necessary to specify a quantitative cap. Prior to issuing a letter of credit, a qualified issuer will assess its level of exposure to the plan sponsor and consider any limitations that may be imposed by the legislation governing the issuer. As well, using a letter of credit draws on the credit available to a plan sponsor so it will also face a practical limit.

7. What are some alternative valuation methodologies that could be considered to mitigate the volatility in solvency funding contribution requirements? Which ones could be most effective at providing relief while maintaining adequate funding to protect benefits?

Alternative methods to give some relief from the volatility of solvency funding include:

i. Temporarily reducing the solvency funding target from 100% to 85% for three to five years, which would ease the cash demands for solvency funding;

ii. Deferring the requirement to file a December 31, 2020 actuarial valuation, as Quebec has done, would avoid recognizing additional losses from 2020 for another year; and

iii. Calculating the average solvency ratio over five years instead of three years would smooth some of the volatility for solvency funding.

Items (i) and (iii) would be most effective at providing near term relief from solvency volatility and, if combined with a strengthened going concern funding method as has been done on a permanent basis in other jurisdictions, would maintain reasonably adequate funding to protect benefits.

IV. METHODS TO ENHANCE PENSION PLAN GOVERNANCE AND ADMINISTRATION

1. What are your views on requiring plan member and retiree representation for all federally regulated pension plan Board of Trustees, for both single- and multi-employer pension plans?

We believe that member and retiree representation for federally regulated pension plans administered by Boards of Trustees, for both single- and multi-employer pension plans, is best considered based on the level of risk assumed by each group in the plan in question. (i.e. employer(s) and members).

As a general proposition, in cases where risk is borne in part by members (e.g., multi-employer negotiated contribution plans where benefits can be reduced) joint governance – with member and retiree representation on the Board of Trustees – is appropriate.

2. What other approaches could be considered to increase plan member and retiree representation in plan governance?

There is no consensus within the CBA Section on whether a plan's governance structure should be tied to the level of risk assumed by the employer. Some CBA Section members believe that member representation in the "administrator role" should be required for transparency even where the funding risk is borne entirely by the employer. The Quebec *Supplemental Pension Plan Act* is a model for this approach.

Other CBA Section members believe that member representation in the "administrator role" should not be required where the employer bears the entire funding risk. In this approach, transparency with member and retiree groups can be achieved by establishing a pension council in accordance with section 7.2 of the PBSA.

In our view, any new requirements on greater member and retiree representation should include an exemption for small pension plans, determined based on the number of members

and/or assets of these plans. For example, Quebec has an exemption for plans with less than 25 members where these plans can continue to be administered by an employer.

Across Canada, plan member and retiree representation in pension plan governance is achieved through joint governance models (e.g., the joint pension committee model in Manitoba and Quebec, MEPP model in various provinces, the jointly sponsored pension plan model in Ontario) or consultative committees (e.g., pension council under the PBSA). Harmonization[2] is important for governance models and we believe that a different pension governance model should not be imposed by virtue of where the majority of plan members reside for a multi-jurisdictional plan.

3. Would it be appropriate to require all federally regulated pension plans to establish a governance policy with the minimum prescribed content? If yes, should the prescribed content align with the CAPSA Governance Guideline?

We support a requirement for all federally regulated pension plans to establish a governance policy with minimum prescribed content. We agree that the minimum prescribed content should align with the CAPSA Governance Guideline. The minimum prescribed content should conform with a principles-based approach, which allows for flexibility and tailoring for each specific pension plan, rather than a prescriptive-based approach which could be inflexible and create unintended difficulties for plan administrators.

The CBA Section has consistently supported harmonization of pension legislative requirements across Canada and recommends that consideration be given to the prescribed content in section 42(1) of the *Pension Benefits Standards Act* (British Columbia), section 50 of the *Pension Benefits Standards Regulation, BC Reg. 71/2015* (British Columbia), section 42(1) of the *Employment Pension Plans Act* (Alberta), and section 53 of the *Employment Pension Plans Regulation, Alta Reg 154/2014* (Alberta).

4. To encourage a strategic and transparent approach to funding, should single-employer and non-NC multi-employer DB plans be required to establish and maintain a funding policy?

Funding policies are critical governance tools for certain types of plans, including multi-employer negotiated contribution plans.

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2 Harmonization of Pension Laws: Canadian Bar Association Resolution 10-01-M.

The consultation paper notes that a funding policy may not be necessary for single-employer DB plans where benefits are guaranteed, and employers are required to make special payments to address funding deficits. Some CBA Section members agree with this approach noting that in jurisdictions where funding policies are currently required (e.g., Alberta and British Columbia), funding policies for single-employer DB plans where the employer is responsible for funding deficits typically only mimic the minimum standards funding requirements. As such, for single-employer DB plans where employers bear the responsibility for funding deficits a funding policy is an additional regulatory burden which does not necessarily offer a benefit from a governance perspective. Other CBA Section members endorse a requirement for funding policies for all plans as an aid to, and valuable measure for, good governance.

5. In light of the growing international focus on ESG factors in investing, what would be an appropriate approach to encourage pension plans to consider ESG factors?

The CBA Section acknowledges that the consideration of ESG factors extends beyond the pension sector and remains a developing area for those responsible for investment decisions. In Ontario and other jurisdictions around the world, legislators and regulators have focused on the disclosure of how pension plan administrators consider ESG factors when allocating the fund's investments. This position is also reflected in the final report of the Canadian Expert Panel on Sustainable Finance – *Mobilizing Finance for Sustainable Growth* – and the United Nations Sustainable Stock Exchanges Initiative's *Model Guidance on reporting ESG Information to Investors.*

Harmonization is a guiding principle of the CBA Section because it helps reduce unnecessary regulatory burden and lessens administrative costs, especially for multi-jurisdictional plans. As such, we favour rules that conform, to the greatest extent possible, with those of other jurisdictions.

The CBA Section supports the approach in the Ontario PBA and the recommendations of the Canadian Expert Panel, as well as other international groups, to require plan administrators to disclose whether ESG factors are incorporated into the pension plan's investment strategy and, if so, how. We believe this level of disclosure encourages pension plan administrators to consider ESG factors without forcing specific action.

As recognized in other jurisdictions, the pension sector's understanding is still evolving, and it is premature for pension legislation to require specific action on ESG factors. In recognition

of this and the goal of harmonization, we believe the simple disclosure approach is appropriate to encourage federally regulated pension plans to consider ESG factors.

6. What are your views on the relationship between ESG factors and a pension plan administrator's fiduciary duty?

In the pension context, plan administrators are fiduciaries whose duty to the beneficiaries is to provide income for employees in retirement, which includes investment of the pension fund and oversight of investment options.

The legislation, applicable cases and policy have traditionally viewed ESG factors as non-financial and therefore outside of fiduciary duties. However, growing jurisprudence and research indicate that attitudes are changing and recognize an evolution in this area. These attitudes are not restricted to the pension sector. Leading analysts in the financial sector are evaluating and encouraging the evolution of ESG factors for fiduciaries in investment decisions.

The CBA Section believes that all investment factors, including ESG, should be considered as part of an administrator's duty to invest prudently, but it is up to the administrator as fiduciary to evaluate which factors are relevant and how to take them into account. We do not support codification of ESG factors as a fiduciary responsibility of the plan administrator in the PBSA at this time because the codification of only one of many fiduciary factors is not appropriate. The preferred approach is to allow jurisprudence and policy to evolve with the changing attitudes and understanding of ESG factor in all sectors.

7. What are your views on allowing federally regulated pension plans to provide required information electronically to plan members and retirees on a deemed consent basis?

Consistent with *CAPSA Guideline No. 2 Electronic Communication in the Pension Industry*, we support electronic communication, in particular, to allow federally regulated pension plans to give required information to plan members and retirees (in certain circumstances) on a deemed consent basis. Electronic communications can allow plan administrators to communicate with plan members and retirees in an efficient and effective manner.

The CBA Section supports harmonization of pension legislative requirements across the country. We recommend harmonization with the rules on electronic communications in sections 30.1 and 112 of the *Pension Benefits Act* (Ontario). We support these rules as a

reasonable balance of the interests of administrators in using electronic communications and beneficiaries who wish to receive written hard-copy communications, including:

- plan administrators must comply with notice rules before providing the documents electronically;
- deemed consent applies to members and retirees on a going forward basis if they receive a notice from the plan administrator in accordance with the notice rules;
- express consent is required for retired members and other persons (such as spouses or other plan beneficiaries) who did not receive a notice from the plan administrator in accordance with the notice rules before becoming a retired member;
- an additional reminder notice is required upon a member becoming a retired member; and
- plan members and retirees can opt out of receiving documents electronically.

8. What are your views on the current legislative requirement to make federally regulated pension plans provide required communications to spouses and common law partners? Is it feasible for plan administrators to provide electronic communications to spouses and common-law partners on a deemed consent basis? If not, what other options could be considered?

The CBA Section supports harmonization of pension legislative requirements across the country. Where PBSA-required communications to spouses and common law partners (e.g., annual statements given to spouses as well as members) are not consistent with other jurisdictions, it creates an additional obligation for plan administrators of federally regulated pension plans and does not meet the aim of harmonization. This should be considered when reviewing the required communications to spouses and common law partners.

Under section 22 of the *Pension Benefits Standards Regulations, 1985* (PBSR) annual statements "shall be addressed to the plan member or the employee and that person's spouse or common-law partner as shown on the records of the administrator and shall be

(a) given to the plan member or the employee at the place of employment; or

(b) mailed to the residence of the plan member or employee."

In our view, delivery of this statement to a member by email but addressed to both the member and spouse would be consistent with the current PBSA regime. On this basis, the notice necessary to obtain deemed consent could similarly be given to the member, but addressed to both the member and their spouse, without defeating the purposes of, or adding additional burdens under the PBSA.

V. SOLVENCY RESERVE ACCOUNTS

1. To encourage more prudential employer funding, should consideration be given to permitting employer normal cost contributions to be made to a SRA where an employer is in a position to reduce normal cost contributions under subsection 9(5) of the PBSR?

The current funding requirements of the PBSA, including the right to reduce normal cost contributions under section 9(5) of the PBSR, should be viewed in and of themselves as *prudential.*

Some employers sponsoring DB plans might view the ability to make employer normal cost contributions to a SRA where they are in a position to reduce normal cost contributions under subsection 9(5) of the PBSR as an attractive option (and some CBA Section members would support this approach). However, there is likely a strong polarization of views on this point, especially if SRA withdrawals are permitted on an ongoing basis.

On balance, the CBA Section believes there is no need to expand SRAs to accommodate contributions other than solvency deficiency special payments, as contemplated in the consultation paper. From a harmonization standpoint, this approach would be consistent with approaches in Alberta, B.C. and likely Manitoba.

2. What would be an appropriate legal structure for SRAs – for example, establishing a SRA as a separate account of the pension fund within the same trust agreement, or under a separate trust agreement? Would different arrangements pose administrative or operational difficulties? Should employers be permitted to choose their preferred approach?

SRAs can be maintained as an account under the same trust agreement as the main pension fund assets or can be maintained under a separate trust agreement. There are pros and cons to each arrangement.

Where a SRA is structured under a separate trust agreement, there are likely to be higher costs associated with implementing and maintaining the arrangement. For example, this method of setting up a SRA requires the plan administrator to enter into a new trust agreement, which will likely be sent for legal review and negotiation. In addition, we expect that the trustee/custodian will charge more fees to maintain a second trust account for the plan, and that there would be additional administration required behind the scenes so that the plan assets under both trust agreements are collectively invested.

Conversely, structuring a SRA as an account under the same trust agreement that covers the main pension fund assets requires only an amendment to the existing trust agreement, which would import a more pin-pointed legal review compared to negotiation of a new agreement. Similarly, the trustee/custodian's fees under this arrangement are likely to be lower and we would not expect to see any change to the administration of the plan investments.

At the same time, though, maintaining a SRA under a separate trust is arguably a more defined arrangement that reduces the risk of legal challenge.

Given that the pros and cons are related to a plan's costs of administration and a plan administrator's perception of legal risk, and given that there may be additional considerations unique to a particular plan administrator, plan administrators should be given flexibility to select the structure of their SRA. This flexibility would be consistent with the flexibility given to plan administrators in other Canadian jurisdictions.

As an aside, in provincial pension legislation, many institutional trustees/custodians across Canada have already developed a preferred method of setting up a SRA. While those institutions could certainly adopt new methods, whether to accommodate differences in legislation or client preferences, plan administrators are likely to be able to set up their SRAs more quickly and efficiently if their institutional trustee/custodian is able to use its existing documentation and administrative processes.

3. The proposed SRA framework would apply to single-employer DB plans. Should the SRA framework also apply to multi-employer DB plans, other than negotiated contribution plans? How might this work in practice?

SRAs encourage plan sponsors to maintain DB pension plans by helping avoid the problem of "trapped capital" within those plans. Accordingly, we believe that SRAs should be permitted in any DB pension plan arrangement where the employer or employers are required to make special payments to cover funding deficiencies in the plan. This permission would include any multi-employer plan (as defined in the PBSA) that is not a negotiated contribution plan.

Presumably, the desire to establish a SRA in a multi-employer DB plan is most likely to arise with non-collectively bargained multi-employer plans. In that case, the responsibility of a participating employer for plan contributions and special payments would typically be set out in a participation agreement between the participating employer and the plan

administrator. Matters related to surplus entitlement from a SRA could similarly be dealt with in that participation agreement.

We assume payments from a SRA would be made to the plan administrator (as that term is used in the PBSA). If a payment from a SRA was made to the plan administrator of a multi-employer plan, that administrator would then pay the funds onwards to participating employers in accordance with the Plan's governing documents (including any relevant participation agreement, funding policy, etc.).

The CBA Section also supports extending the SRA framework to multi-employer DB plans other than negotiated contribution plans on the principle of harmonization. In particular, we point to the policy statement in the Alberta Superintendent of Pensions' Interpretive Guideline #07, Solvency Reserve Account which discusses the establishment of a SRA by any or all of the participating employers in a "divisional multi-employer plan", which includes both non-collectively bargained pension plans, and collectively bargained multi-employer plans which recognize some or all of the participating employer's shares of the assets and liabilities separately as they relate to that employer's employees.

4. Would it be appropriate to set a minimum required solvency ratio threshold of 105 per cent before and after any SRA withdrawal is permitted for on-going pension plans? Should a similar threshold apply to the plan's going concern funded level?

In our view, it would be an appropriate balance between plan sponsor funding objectives and plan member security to set a minimum required solvency ratio threshold of 105% before and after any SRA withdrawal is permitted for ongoing pension plans. For harmonization, it would also be consistent with corresponding rules in Alberta and British Columbia.

A solvency ratio of 105% is required before and after normal cost contributions are reduced under section 9(5) of the PBSR. Using the same threshold for SRA withdrawals would harmonize these rules, with consistent policy objectives

The question of whether a similar threshold should apply to the plan's going concern funded level is also likely to cause further polarization of views on SRAs. While some CBA Section members are in favour of doing so, the CBA Section, on balance, is of the view that applying a similar threshold to the plan's going concern funded level would make a SRA more

complicated and less attractive to employers. It would also divert from our recommendation to harmonize the SRA rules with those in British Columbia and Alberta.

5. Would limiting annual withdrawals from a SRA to one-fifth of the eligible surplus be appropriate? This would align with the approach in Alberta and British Columbia, and would mirror the 5-year amortization period allowed for solvency deficits.

To the extent that withdrawals are permitted from SRAs in ongoing plans, we support limiting such withdrawals to one-fifth of the eligible surplus annually. In our view, the limitation is an effective means of protecting members' retirement income security while promoting pension sector sustainability by helping to address the funding risk asymmetry experienced by DB plan sponsors. The CBA Section also supports this limitation because, as indicated in the consultation paper, it aligns with the rules in British Columbia and Alberta.

6. Should additional restrictions or safeguards apply to SRA withdrawals?

The CBA Section generally supports the safeguards around SRA withdrawals already in the consultation paper. In addition to limiting the maximum annual withdrawal to one-fifth of the eligible surplus, the consultation paper also proposes to prohibit employer withdrawals if they would reduce the plan's solvency funding threshold below a specified threshold or create a going concern funding deficit. These restrictions align with the rules in British Columbia and Alberta.

The plan administrator's entitlement to make a withdrawal from a SRA will be based on the most recent actuarial valuation report filed with OSFI. While this is also the rule in British Columbia and Alberta, practically it may be more restrictive at the federal level owing to the PBSA requirement to file actuarial valuations annually, rather than triennially, unless a plan has a high solvency ratio (1.20). This rule already ensures that withdrawals will not be made in years when they are not warranted by economic and financial conditions.

As a result, some CBA Section members are of the view that further restrictions would reduce legislative harmonization and fairness while not evenly balancing responsibility for pension sector sustainability between plan sponsors and plan participants. However, other CBA Section members believe that additional restrictions on SRA withdrawals would help ensure retirement income security is fully protected.

7. Should any specific disclosure requirements to plan members and beneficiaries or OSFI apply in respect of withdrawals from or payments to a SRA? Should the notice provided to plan beneficiaries be separate from their annual statement?

We support the proposal to include information about employer withdrawals from SRAs in annual statements. Annual member statement disclosure requirements in British Columbia and Alberta for SRAs are limited to the SRA account balance, the amount of eligible surplus, and the amount of the withdrawal. We encourage the adoption of similar rules to achieve harmonization.

In our view and keeping in mind our desire for harmonization, it is worth considering that there is no requirement in British Columbia or Alberta to inform members of the impact of withdrawal on the plan's funded ratio. The absence of this requirement is presumably because the information would be of limited use to members given the robustness of the rules already in place to protect benefit security, including detailed rules applicable to SRA withdrawals. Should members want more specific information about a plan's SRA they can review the actuarial valuations filed with the regulator.

To that end, the CBA Section supports the requirement to file a reconciliation of withdrawals from and payments to SRAs, and the corresponding impact on funding levels, in a plan's actuarial valuation report as described in the consultation paper. This information would support OSFI in fulfilling its supervisory functions and would be available to members should they find it helpful.

8. Should other limits or restrictions apply to SRA withdrawals to help ensure that withdrawals are based on up-to-date information (e.g., withdrawals only allowed within six months following the AVR being filed, or prohibiting SRA withdrawals if the employer had reason to believe that the plan's funded position had changed significantly to the downside)?

For harmonization and maintaining a relatively simple framework for SRAs, the CBA Section is generally not in favour of imposing other limits or restrictions to SRA withdrawals to help ensure that withdrawals are based on up-to-date information. We acknowledge, though, that previously filed valuation reports might not reflect economic reality arising from events such as, for example, a global pandemic. As such, we would support prohibiting withdrawals from a SRA if the employer had reason to believe that the plan's funded position had changed significantly to the downside.

However, some CBA Section members would prefer a regime for SRA withdrawals such as those in Alberta and British Columbia that require the consent of the Superintendent prior to withdrawal from a solvency reserve account, give the regulator discretion to request additional information from an administrator, and allow the Superintendent to withdraw consent for further withdrawals if they are of the opinion that doing so is in the best interest of securing plan benefits.

VI. VARIABLE PAYMENT LIFE ANNUITIES

The CBA Section supports variable payment life annuities (VPLAs) as a voluntary plan design feature that would, if adopted by plan sponsors, increase retirement income security by improving funding and security of pension benefits. Since the VPLA regime under the PBSA would be one of the first regimes implemented under Canadian pension standards legislation, we encourage Finance Canada to harmonize it with options available, or expected to be available, in other jurisdictions where possible. Harmonization would lessen the administrative burden for VPLAs and encourage their adoption. Consultation through CAPSA would be beneficial.

While we support giving flexibility to members, flexibility should be balanced with the administrative and financial costs associated with any requirements that are in addition to requirements under other retirement savings arrangements. More limited options and features under a VPLA would also be conducive to ensuring that retirement benefits (DC account balances) are retained for retirement income rather than administrative costs.

Reasons for plan sponsors to adopt VPLAs should also be considered. While VPLAs are beneficial for plan sponsors of defined contribution (DC) plans or pooled registered pension plans (PRPPs) who may wish to provide benefits more comparable to defined benefits, VPLAs will, however, be less attractive if they are burdensome and costly to administer. To encourage adoption of VPLAs, it will also be important to ensure that they do not place additional financial or litigation risk on employers.

1. Are there other timing requirements that could be considered for VPLA actuarial valuation reports? For example, should the frequency of required actuarial valuation reports be linked to a VPLA's chosen funding approach (i.e., PfAD)?

Actuarial valuation reports will be important for VPLAs. VPLAs, by their nature, have no ability to increase funding other than by direct transfers from PRPP and DC plan member accounts. No direct employee or employer contributions may be made to the VPLAs.

In many respects, VPLAs have a similar operating framework as target benefit plans and negotiated contribution plans, but with even more restrictions in terms of having no direct contributions. We recommend that the funding framework for target benefit plans and negotiated contribution plans be considered in determining timing requirements for VPLA actuarial valuations. A similar approach would harmonize pension legislative requirements across jurisdictions and potentially reduce administrative costs for actuaries to apply a similar model as is applicable for target benefit plans and negotiated contribution plans.

We recommend that the frequency of required actuarial valuations not be excessive as this could make VPLAs more costly and complex to administer and be a deterrent for plan sponsors to choose to offer VPLAs. Nevertheless, the timing requirements for VPLAs should be clear and prescriptive, for predictability for plan administrators and beneficiaries and to potentially reduce administrative costs. The following should be considered when deciding the frequency of VPLA actuarial valuations:

- Triennial valuations should be the default valuation frequency for VPLAs, to reduce benefit volatility while limiting plan administrative burden. Generally, there should be limited variations on such triennial valuation rule.
- Examples of variations on the triennial valuation rule are:
    - The plan administrator should be required to file a valuation before adjusting benefits outside the range permitted under the most recently filed valuation.
    - The plan administrator should have discretion to file a valuation at any time.
    - OSFI should have the power to order a valuation at any time.

2. Does the proposed approach for partial annuitization, unlocking, and withdrawal from a VPLA strike an appropriate balance between providing flexibility to members while preserving the risk pooling nature of the VPLA?

The CBA Section agrees with the proposed approach for partial annuitization, unlocking and withdrawal from a VPLA. Any approach for the implementation of VPLAs must balance the consideration for maximum flexibility for members against the maintenance of reasonable costs to the plan.

At retirement, a member of a PRPP or DC plan has an account balance to direct into the appropriate vehicle for their situation. Currently, the PBSA, PBSR and the regulations under the *Pooled Registered Pension Plans Act* (PRPP Act) offer several options for members at retirement, allowing for flexibility and the combination of several strategies. Options

available to members include portability, annuity purchase, variable benefits and 50% unlocking. The addition of a VPLA is to offer another method of retirement for members.

When a member retires from a PRPP or DC plan, it is permissible to use several of the retirement options to create the optimal retirement plan for the member. That may include unlocking 50% of the account balance, using another portion to purchase a fixed-income annuity and transferring the remainder to a LIRA to draw down. A VPLA should fit within this framework, without disrupting the flexibility needed and intended to be given to members at retirement.

Accordingly, we agree with the proposal that a member be permitted to use a portion of their DC account balance to partially annuitize their retirement benefits through a VPLA. However, to protect the features of pooling risk and longevity, once the VPLA is purchased, it cannot be withdrawn. The option to withdraw would only add uncertainty to the VPLA, resulting in increased costs and increased volatility in the benefit offered to members. We believe this approach strikes the right balance between members and plan administrators.

While the addition of a VPLA to a member's retirement options gives greater flexibility and encourages a better, more appropriate retirement for members, it will only facilitate a reliable retirement savings mechanism for Canadians if the low costs realized from pooling remain low and certain.

3. To allow for earlier VPLA purchases, should members of a PRPP or DC pension plan also be able to enter a VPLA offered by the plan at any time, rather than limiting the option to enter a VPLA to only when members are at retirement?

When a member terminates or retires from a PRPP or DC plan, they are presented with several retirement options. The member must decide within the prescribed timeline. The CBA Section believes that if a VPLA is included as a retirement option for members, it must be given the same access as all other options. Otherwise, it runs the risk of being misunderstood and underutilized, thereby undermining the pooling benefits of a VPLA.

Accordingly, a member should be given the option to transfer their money to a VPLA within the prescribed timeline after termination or retirement, like the option of a transfer to a fixed income annuity. While the member is offered the option of transferring the money to the VPLA at termination, which may be prior to the early or normal retirement date, payments from the VPLA will be deferred until at least the member's early retirement date.

By offering members of a PRPP or DC plan the option to transfer funds into a VPLA at termination or retirement, the VPLA option is consistent with other retirement options offered to members. This will help members understand the VPLA, by considering it against all other options. Further, this helps members better use a VPLA in the overall retirement strategy, and the benefits of VPLAs are seen with more members and more assets.

4. Are there any other circumstances where new disclosures could be needed for VPLAs, in addition to what is being proposed?

Clear communication of the risks and benefits of VPLAs is crucial to their adoption. The CBA Section supports the proposed additional disclosure requirements for VPLAs, over and above those already prescribed for plan members and retirees under the PBSA, PRPP Act and their associated regulations. The proposed disclosure requirements are suited to the purpose of VPLAs and will help retirees understand the additional annuity options offered by a VPLA arrangement.

However, additional disclosure requirements will result in added administrative costs that may be a disincentive to adopt VPLA arrangements by new or existing pension plans. Moreover, where VPLA arrangements are adopted, the costs of disclosure may inform plan design, so features that may otherwise be desirable (more frequent funding and benefit adjustments, for example) may be not be adopted due to increased costs of disclosure and communication to members.

These increased costs may be offset by facilitating less costly means for communicating information to members, such as electronic disclosure to members through web portal or by allowing members to access registered plan documents directly from the Superintendent.

The CBA Section supports policies that facilitate communication and disclosure to plan members and retirees in an efficient and cost-effective manner. This could include permitting disclosures to be made by insurance companies or third-party administrators on behalf of the plan administrator and allowing reasonable fees and expenses for these services to be charged to the VPLA fund.

The consultation paper is silent on VPLA disclosure requirements where retirement benefits are negotiated by a union. In these circumstances, VPLA design and administration may be crucial to the negotiation of these benefits. Accordingly, proposed VPLA disclosure requirements should be extended to members' bargaining agents where appropriate.

5. What are your views on the proposed requirement for PRPP and DC plan retirees to obtain spousal consent before entering a VPLA?

The CBA Section supports the proposed spousal consent requirements for VPLA participation. The proposed requirements will harmonize well with existing consent requirements in analogous circumstances, such as locking in of retirement funds and election of variable benefits. Additionally, where a VPLA scheme allows members to elect the level of spousal entitlement to joint and survivor benefits and the member's election results in spousal entitlement to less than 60 percent of the member's retirement benefits, a waiver should be required in addition to spousal consent for VPLA participation, or in place of it, as the circumstances warrant.

6. Are there any other portability options that could be considered for VPLA retirees and beneficiaries on plan termination?

We agree that VPLA retirees and beneficiaries should have access to the commuted value of their VPLA benefits.

7. What would be an appropriate approach to the calculation of commuted values for VPLAs? For example, should plans be free to choose between different methodologies prescribed in regulation or follow a methodology proposed by the Canadian Institute of Actuaries (CIA) for target benefit arrangements?

The CBA Section has no position on an appropriate method to calculate VPLA commuted values. Actuaries are better suited to address this question.

8. What are your views on the PBSA's principles-based approach to administrator's fiduciary duty? Are additional clarifications necessary to ensure that the fiduciary duty principles apply to both the accumulation and decumulation periods?

We support the principles-based approach in the PBSA and the PRPP Act for the administrator's fiduciary duty. The principles-based approach recognizes that all pension plans are not the same, and generally gives plan administrators latitude to respond to circumstances applicable to a particular plan. Provincial pension benefits standards legislation across Canada takes the same approach. We believe that the standard of care in section 8 of the PBSA and section 22 of the PRPP Act will necessarily apply to VPLAs given the wording of these provisions. No clarification is required.

The pension industry and regulatory authorities have identified the need to improve member outcomes under DC arrangements. The establishment of the VPLA is an important step in this regard. The VPLA regime is, however, voluntary. As identified in the consultation

paper, the VPLA regime will place continued fiduciary responsibilities on the administrator when currently fiduciary duties end when DC members' benefits are transferred out of the DC plan. Clear and practical safe harbour rules for VPLAs would be an important step in encouraging employers to establish VPLAs in their pension plans.

VII. PROPOSED MINISTERIAL GUIDELINES FOR SPECIAL PENSION FUNDING RELIEF

We support the principle that companies in extreme financial straits whose DB pension plans are at risk should be able to work with Finance Canada to explore extraordinary measures not included in the PBSA or the PBSR. In fact, there is a history of intervention on behalf of certain enterprises to do just that. We also support the goals of predictability, accessibility and transparency in the process of obtaining extraordinary relief and accept that these goals underlie the Proposed Ministerial Guidelines on Special Pension Funding Relief (Guidelines).

We ask, however, whether the mere fact of having Guidelines is conducive to a less rigorous approach by enterprises to solve their own problems or invites a false sense of security that a bail-out is available and funding crises will be resolved. It may also increase exponentially the applications for extraordinary relief, increasing regulatory burden. Guidelines may send the wrong message that special funding relief is neither rare nor extraordinary. Companies who truly need assistance will find a way to obtain it whether there are Guidelines or not.

We do not have concerns with the Guidelines, but stress that the process should not appear to simply give companies a way to avoid responsible pension plan funding and administration. This point should be expressed in the Guidelines, noting that special funding relief is rare and extraordinary. The relief itself should not be a mechanism for shedding legacy liabilities or overriding contractual obligations and should ultimately be conditional on member or bargaining agent notice and support. Any measures should be time-limited and subject to meeting any conditions of the relief and regular monitoring.

VIII. CONCLUSION

The CBA Section appreciates the opportunity to comment on Finance Canada's consultation to strengthen Canadians' retirement security. We trust our comments are helpful and would be pleased to offer further details if necessary.