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

Mr. Mohammed Jaffri
Policy Manager
CAPSA/ACOR
5160 Yonge Street
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Dear Mr. Jaffri,

Re: Guideline No.9: Searching for Un-locatable Members

The Canadian Bar Association Pensions and Benefits Law Section (CBA Section) is pleased to comment on CAPSA's consultation on *Guideline No.9, Searching for Un-locatable Members of a Pension Plan* (the 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 plan administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

Unclaimed Pension Monies

Administrators of pension plans routinely face the question of how to deal with pension entitlements of former plan members who cannot be located. The Guideline must address searching for members but also offer viable solutions for unlocatable members. In most jurisdictions, including federally, there is no process for pension plan administrators to transfer these monies out of the plan. Only Alberta, British Columbia and Quebec have processes to deal with unclaimed pension monies and even these processes have their limitations.

The unclaimed pension monies issue can be particularly problematic where:

- (i) the pension plan is being wound up, in which case the wind-up may be delayed because of the inability to settle the missing members' entitlements under the plan; and
- (ii) the missing member reaches age 71 and the plan administrator is unable to comply with the *Income Tax Act* (Canada) requirement that the member's entitlements be transferred out of the pension plan no later than the end of the year in which the member reaches age 71.

The CBA Section has urged governments and pension regulators to create a mechanism to allow for missing members' entitlements to be transferred out of a pension plan while ensuring the security of those entitlements for the members' benefit, including in the 2017 Second Consultation on the Federal Financial Sector Framework¹. In 2013, the CBA urged federal, provincial and territorial governments:

- (i) to create funds for unclaimed pension monies in their jurisdictions into which pension plans may deposit pension monies which remain unclaimed after the plans have exhausted reasonable efforts in locating the persons entitled to them; and
- (ii) to establish internet based tools through which former pension plan members and beneficiaries may search for unclaimed pension monies.²

Guiding Principles

The CBA Section believes that, as a policy objective, the mandates of CAPSA's members to protect pension benefits include facilitating payment of benefits to unlocatable members, taking into consideration the interests of various stakeholders.

We urge CAPSA to consider the following principles when finalizing the draft Guideline:

- Retirement Income Security – pension issues are of national importance and improving the administration and security of pension benefits will advance the objective of facilitating a reliable retirement savings system for Canadians.
- Shared Responsibility – responsibility should be shared by pension plan stakeholders and not fall exclusively on plan administrators.
- Harmonization – any changes should align, as much as possible, with the direction taken by provinces that have implemented processes for unclaimed pension monies.

Retirement Income Security

The CBA Section urges governments to support and promote reasonable measures that facilitate security of pension benefits, including payments to plan members, and appropriately consider the impact of such measures on pension plan sponsors, pension plan members and other stakeholders.³

¹ CBA, September 29, 2017 [Submission](#) on Review of the Federal Financial Sector Framework – Second Consultation Paper.

² CBA, [Resolution 13-01-M](#), Protecting Unclaimed Pension Monies (February 17, 2013).

³ CBA, [Resolution 10-02-M](#) Funding and Security of Pension Benefits (February 13, 2010).

Shared Responsibility

The CBA Section acknowledges that pension plan administrators have primary responsibility to administer pension plans. However, plan administrators require cooperation from other stakeholders to fulfill this responsibility. Regulators, governments, employers, unions and other employee representatives, custodians and plan members and beneficiaries have duties and responsibilities that should be reflected in the Guideline.

Harmonization

All stakeholders will benefit from an efficient and effective pension regulatory system and harmonizing pension legislation is key to facilitating that system. The CBA Section has long advocated for harmonization of pension legislation across Canada.⁴ We highlight the need for, and the inherent fairness in, having rules across jurisdictions that are as harmonized as possible.

The Financial Services Commission of Ontario (FSCO) has a policy on searching for plan beneficiaries. Different processes to deal with unclaimed pension monies have been introduced in Alberta, British Columbia and Québec. If other jurisdictions adopt new approaches, it will further exacerbate this patchwork of processes.

Roles and Responsibilities of Pension Plan Stakeholders

The CBA Section agrees that pension plan administrators are responsible for taking reasonable measures to ensure that they maintain accurate plan records. However, the Guideline omits any discussion of the roles and responsibilities of other stakeholders. The Guideline could be read to suggest that administrators bear the sole responsibility for ensuring that member and beneficiary contact information is up-to-date. In the CBA Section's view, this is not the case. On the contrary, other plan stakeholders often have either an explicitly legislated or other meaningful part to play:

- **Members and Beneficiaries:** Members and beneficiaries are best situated to ensure that the plan administrator has current contact information. When a member's or beneficiary's contact details change, the member should update the administrator (and/or their employer or union, when this organization acts as intermediary between the member and the administrator). In some jurisdictions, pension standards legislation entitles the administrator to rely on the latest information in its records, including for the purposes of paying pensions or pension benefits and/or for discharging its notice or other disclosure requirements, unless the administrator receives actual notice to the contrary. Even in jurisdictions without these statutory provisions, it may be reasonable to conclude that it is an implicit term of participation (and perhaps a contractual term in the plan text) that a member or other beneficiary notifies the plan administrator of any changes to their contact information. Accordingly, the CBA Section believes that the Guideline could go much further than it currently does in setting CAPSA's expectations that members and beneficiaries report changes to their contact information as soon as they can.
- **Employers:** The Guideline does not distinguish between different kinds of pension plans. For multi-employer pension plans, the administrator's line of sight to current member data tends to be further removed than it would be under a single-employer plan. In a multi-employer plan, participating employers will typically have more ready access to members' current contact information. For example, because employers must send employees a T4 slip every year, they may have more current information than the administrator (whose sole proactive annual communication obligation for active members may be to provide an annual member statement). In some jurisdictions, pension standards legislation explicitly

⁴ See for example, CBA, [Resolution 10-01-M](#) Harmonization of Pension Laws (February 13, 2010).

requires employers to give the administrator all information that the administrator requires to administer the plan and to comply with pension legislation. A participating employer in a multi-employer pension plan may also have a contractual obligation to give the plan administrator changes to member contact information (for example, under the terms of a participation agreement). Whether or not the employer's information-sharing obligation is explicit in a statute, the Guideline should encourage coordination and information-sharing by employers.

- **Bargaining Agents:** In some cases (in particular, for multi-employer plans sponsored by or affiliated with one or more bargaining agents, often in the trades), a union or other bargaining agent (rather than the employer) may be the organization closest to members' most current contact information. As above, whether or not applicable pension legislation imposes an explicit information-sharing requirement, the Guideline should recognize that there could be a part for bargaining agents to play. For unlocatable retired members, where an independent retiree association is in place, it could fulfill the role that the bargaining agent fulfills for active members.
- **Custodians and Other Payroll Service Providers:** For retirees or other beneficiaries receiving periodic benefits, the plan custodian (or, if different, a third-party payroll service provider) is often engaged as the administrator's agent to process pension payouts. In some cases, the agent may also prepare and distribute tax reporting slips (such as the T4A). When retirees' or other recipients' contact information is out of date in the administrator's records, but they are still receiving pension payments, the custodian or payroll service provider has a role to play in sharing information about recipients' last known contact information. It is possible that the agent's records will be more current. The Guideline could do more to recognize the responsibility of the administrator's agents to assist the administrator in keeping its records up to date. Finally, administrators can encounter practical difficulties when asking service providers for contact information for plan members and beneficiaries. While we are aware of no general prohibition in applicable privacy legislation on this information-sharing (and many privacy statutes make explicit exceptions for purposes of the administration of pension plans), we understand anecdotally that some administrators have been told that "privacy laws" are the reason that their own agents cannot disclose benefit recipient contact information. It would help the industry if CAPSA documented in the Guideline its expectations that, unless prohibited by a statute, information-sharing between administrators and their payroll agents is an additional method to ensure retiree and other beneficiary contact information stays up to date.

Reasons that Members and Beneficiaries go "Missing"

The draft Guideline states: "Inadequate record keeping may result in loss of member and beneficiary information." While this is true, focusing only on "inadequate record keeping" and "loss" of information may suggest that administrator error is the primary reason that member and beneficiary contact information goes out of date.

In practice, members and beneficiaries often become unlocatable not because the administrator's record-keeping practices are sloppy (or more drastically, because paper or electronic records are lost), but because either members, beneficiaries or other stakeholders have not given the administrator changes to contact information in a timely way. For example, when a former member terminates plan membership in her 20s, many situations can arise in the decades between her termination date and the date she comes forward (if she comes forward) to begin her pension. She could move from the country or pass away, for example, without the administrator learning about it. The result may be that she becomes unlocatable from the administrator's perspective, but not

necessarily because of anything the administrator has done or failed to do. The Guideline should recognize that members may become unlocatable for reasons beyond an administrator's control.

In some jurisdictions (as the Guideline notes), pension standards legislation requires the administrator to provide periodic statements to former and retired members. These statements can help to alert administrators more quickly that member contact information has become stale. At that point, however, the administrator's role is reactive: to find the member to the best of its ability. There may not be any record-keeping practice or records retention policy (even one that speaks to how the administrator will retain contact with former and retired members) that would have prevented these common situations from arising. The Guideline should recognize these realities to give administrators assurance that it is not the fact that members go missing in the first place that might attract scrutiny or liability, but rather, that the processes administrators put in place, including record-keeping, and the steps they follow to find un-locatable members will generally be important from a regulatory and fiduciary perspective.

Searching for Unlocatable Members

The draft Guideline states that where a plan administrator is unable to contact plan members through their last known address, it is the administrator's responsibility to conduct a search for these members. The draft Guideline also recognizes that most pension jurisdictions do not have a legislative framework or standardized process associated with searching for unlocatable members.

Our observations and suggestions on these statements are:

- to the extent possible, the Guideline should encourage a standard approach across jurisdictions. Without a legislative framework, a standard set of guidelines adopted by pension regulators would promote consistency and be particularly helpful for multi-jurisdictional plans.
- FSCO, for example, has promulgated a policy (Policy A300-900 – Searching for Plan Beneficiaries) with the Ontario's pension regulator's expectations of administrators for ensuring up-to-date member information, and searching for members if they cannot confirm the information. It is a suitable standard, coupled with a regulatory obligation (subsection 27(2) of the PBA) to provide biennial benefit statements to former members and retired members aimed at – among other things – maintaining up-to-date contact information with individuals no longer accruing benefits in a plan. Subsection 27(3) of the PBA permits dispensation from this obligation if there are reasonable and probable grounds to believe a former member is missing.
- Standardization would be particularly beneficial for a common understanding of what constitutes a missing member. When or at what point in a process can a pension plan member be considered missing or unlocatable? Are they missing if they haven't responded to a certain number of communications, and if so, what is that number? Does it matter if the plan's records show they are pension-eligible and haven't responded to communications related to that eligibility? What if they have reached age 71 and must start their pension? In our view, the appropriate administrative response and process will differ with the context. It would be useful if the Guideline articulated the kinds of circumstances in which a plan member is most likely to be considered missing (e.g. deferred vested members) and recognized the validity of a staggered or more nuanced approach:
 - For regular pension plan communications, it would be common for a member to ignore a mailing from the plan administrator. Failing to respond to a letter does not necessarily indicate that the member is missing as the member may still reside at the last known mailing address, but simply not respond. Unless there are consequences for the lack of reply beyond keeping records up-to-date, the required

administrative action should take into account the objectives of the communication and the consequences of a lack of response.

- For communications that will affect the individual– such as imminent pension eligibility, a time-limited opportunity to obtain a particular benefit, or the member reaching age 71, the consequences of an absence of, or failure to respond is more critical, as is the need for a workable solution. In those circumstances a more concerted approach is warranted.
- For a plan wind-up, the absence of a member response and inability to otherwise locate a member creates a difficult situation for both the affected plan and the missing member. The plan administrator should be required to take whatever steps are available to locate the member, in ascending order of cost. However, if the search is ultimately unsuccessful, a solution beyond keeping the plan open to hold the member(s)' benefits should be encouraged and explored.
- As a related point, the draft Guideline encourages plan administrators to use all possible methods to locate plan members. However, the size of the plan and resources available should be part of the considerations in determining the steps to be taken. It would be preferable to refer to all “reasonable” steps rather than all possible steps.
- It is also important to consider the order of steps a plan administrator should take in locating a missing member. While it is reasonable to expect plan administrators to first send a letter (or letters) to the last known address of the member, call the member by phone or send an email communication where possible (all inexpensive and easy to implement), expensive searches and hiring a private search organization should be considered relatively extraordinary and as a last resort. Included among the first steps should be administrator contact with known entities that may have a connection with the member, such as a former employer or the union that represented the member while working.

The draft Guideline lists search tools that can be implemented by plan administrators in attempting to locate missing members. Our comments are:

1. Registered letters to the last known address are likely not helpful in many circumstances prior to the individual being considered missing, as most plan administrators will have sent more than one letter to the last known address. In addition, many individuals are unlikely to retrieve registered letters.
2. Newspaper advertisements are not likely to be as successful as some other mechanisms available in the current technological era.
3. Important tools are missing from the list, including sending to the last known email address of the member. In addition, the custodians of pension plans have been found to be a valuable resource in locating members in the past and the list of search tools should include checking with any other professionals associated with the plan, including the custodian.
4. Financial institutions and banks will sometimes be willing to forward correspondence to their account holders, if plan administrators explain the difficulty in locating the members. However, this is on a case-by-case basis, as many banks have cited privacy concerns and may be unwilling to assist with this approach. This is also specific to the circumstances, as the plan administrator may not have the current banking information for a member (if the pension benefits are not yet in pay, for example). Again, having information-sharing (unless prohibited by statute) documented in the Guideline would help plan administrators.
5. Privacy concerns associated with some of the search tools are listed in the Guideline. In particular, many associations are not willing to share information even when it is for the benefit of the member. Unions and associations such as those listed in the Guideline have

privacy policies in place which prohibit them from sharing any personal information even between affiliated organizations and funds. For example, for a collectively bargained plan, while the union contact may have interest in cooperating with the pension plan to ensure its members receive the necessary benefits, the contact may be prohibited from doing so by privacy legislation or privacy policies.

In addition, social media channels listed in the Guideline raise privacy implications given that it can be difficult to ascertain on social media whether the individual's profile represents the member being searched, even if names are the same.

Steps after Unsuccessful Search

The Guideline suggests that, even after an unsuccessful search, plan administrators must pursue other avenues to find members. Understanding that this is an issue for governments to address, we believe that the preferred approach following an unsuccessful search is for a legislative framework and central registry to be in place to house the information. We urge the federal government to create a consolidated financial registry of all retirement buckets, including provincial registered pension plan entitlements, RRSP entitlements, and so on. Consolidating all retirement fund information centrally would give the federal government a more accurate picture of Canadian's entitlement to supplemental retirement income from the OAS and facilitate the remittance of federal income tax. As the CBA Section stated in its 2017 Submission⁵, this could be accomplished by transferring unlocatable members' entitlements to the Bank of Canada.

In addition, we suggest the following steps:

1. The Guideline should clarify that, where the administrator is able to fit within and use a legislatively sanctioned solution (such as a statutory registry or deposit regime), it is no longer required to take further steps to locate the unlocated members. Because other initiatives are in place and under consideration, the intersection between this Guideline and legislative regimes in general should be more explicit. Specifically, there should be no ambiguity that once the administrator has complied with a legislative registry/deposit, no further steps are needed under the Guideline.
2. Establishing a missing member registry by each plan administrator or employer (as opposed to a central mechanism) is not feasible for most plan administrators, given the enormous cost and complexity of establishing a registry. However, CAPSA may wish to promote joint plan administrator/member accountability for maintaining accurate records, such as by incorporating the following suggestions into the Guideline or, where legislative change is required, encouraging the change:
 - Plan administrators with websites should establish easy ways for members to update their contact information online;
 - Pension standards legislation requirements for former members should be streamlined with a focus on personal information updates. This is the most important reason to communicate with former members – it reminds them of their entitlements and encourages updates of personal information (e.g. address, marital status, beneficiary designation), reducing the pool of unlocatable members. Perhaps CAPSA could encourage jurisdictions to harmonize legislative requirements for the content of any former member statements. For example, in Ontario, the requirement to provide transfer ratio information and general information about the plan may

⁵ *Supra*, note 1.

not promote the key objective for former members, to ensure that they keep their contact information up to date.

- Consider encouraging plan sponsors, administrators and insurers that provide annuities to connect with members when there is a corporate restructuring that results in new contact information.
3. We agree with the statement in the Guideline that plan administrators may use flexibility to customize search parameters based on the nature of the business and the size and demographics of the pension plan. However, it may be helpful to include some detail or examples. As well, and related to paragraph 1 above, the Guideline should indicate whether the search parameters depend on the jurisdiction of the plan. In circumstances where the province has an unclaimed personal property fund, the expectation on the plan administrator should be considered met if the administrator uses the fund.

The CBA Section appreciates the opportunity to comment on the consultation. We trust that our comments are helpful and would be pleased to offer any further clarification.

Yours truly,

(original letter signed by Sarah MacKenzie for Elizabeth Brown)

Elizabeth Brown
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