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September 5, 2018

Via email: [capsa-acor@fscs.gov.on.ca](mailto:capsa-acor@fscs.gov.on.ca)

Mr. Mohammed Jaffri  
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Dear Mr. Jaffri,

**Re: Consultation on Guideline No. 8 – Defined Contribution Pension Plans Guideline**

The Canadian Bar Association Pensions and Benefits Law Section (CBA Section) is pleased to comment on CAPSA's consultation on the draft revised Guideline No. 8 – Defined Contribution (DC) Pensions Plans 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 plan administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

The CBA Section wrote to CAPSA in October 2012 on an earlier version of the Guideline, a copy of which is attached (2012 Submission). In this letter, we reiterate three general comments from our previous submission:

- The Guideline should distinguish between providing information and providing investment advice. Plan administrators should not be required to do the latter.
- Plan administrators should not be required to provide information and estimates that will not be very helpful or potentially misleading to members; and

- Plan administrators should not be required to provide information in the control of third parties, including service providers.

In this letter, we discuss disclosure generally, then address the three major areas addressed in the proposed revisions to the Guideline:

1. Assumptions used in retirement projections;
2. Disclosure of fees; and
3. Communication to members regarding variable benefits.

### **General Comments on Disclosure**

The draft Guideline makes several changes to the disclosure recommendations for plan administrators, including in:

**Section 3.0: Information for Members During Accumulation Phase**, that information about the nature and level of fees payable by the member should be provided to members at least annually, including fees for each investment option available and in the member's account.

**Section 3.3: Information and Tools Regarding Estimates of Account Balances and/or Benefits**, that plan administrators should provide members with an estimate of the value of the member's account at retirement, as well as an estimate of the benefit that may result from the value at least annually.

**Section 4.1: Information Regarding Retirement Products**, that members should be provided information regarding any unlocking options which may be available.

The suggestion is that these newly added disclosure recommendations are to be disclosed annually. The presumption is that the plan administrator will include the disclosures in members' annual statements. In our view, not all disclosures are suitable for inclusion in the annual statement. Plan members have access to other plan documentation, such as booklets, online tools and communications, which will include the suggested information.

For example, fee disclosures are normally provided using the plan's online investment tools, and can be accessed at any time by plan members. Estimates of a plan member's account balance at retirement and the resulting benefit is (or could be made) available to all members in the modelling tools set up by plan administrators and service providers. Finally, unlocking options are provided in the plan booklets and in the member's retirement/termination statements. In our view, providing these additional disclosures on an annual basis, or in the annual statement, is not the best way to communicate the information to members.

### **RECOMMENDATION**

1. **We recommend revising the Guideline to state that plan administrators should make the information *available to members*, and communicate to members how to access the information, rather than disclose on an annual basis.**

The Guideline also recommends that a termination statement should disclose fees related to specified investments outside of the plan offered by the current service provider. In addition to specific comments below on fees for specified investments, the plan administrator should not be

required to communicate any information about investments outside of the plan it administers. The plan administrator has no control over such investments, does not receive updates from the service provider about those investments and does not have the appropriate knowledge to advise members. Any communication from the plan may be reasonably relied on by a member, unfairly holding the plan administrator liable for what is said.

## RECOMMENDATION

2. **The plan administrator should not be required to disclose information related to investments outside of its plan that are offered by the service provider.**

## Retirement Projections

Pension benefits standards legislation already sets out prescriptive requirements on member information. The CBA Section therefore recommends that the Guideline continue with a principles-based approach, as opposed to a prescriptive approach, as it relates to information to be given to members, whether estimates of members' accounts at retirement, tools and assumptions used to estimate the value of a DC account at retirement or an expected periodic income stream.

As stated in the CBA Section's 2012 submission, we have concerns with the recommendation that the plan administrator provide members with annual estimates of the accumulated value of DC accounts at retirement, estimates of benefits arising from that value and the adequacy of retirement income expected to be provided by the pension plan. Information of this nature depends on individual circumstances that will change over time. This disclosure is onerous on the plan administrator and estimates, even where determined prudently, may be misleading to members. Determining "appropriate assumptions" can also be difficult where it involves, for example, projecting interest rates or rates of return many years into the future. Further, any disclosure will likely be so significantly qualified that the information will not be very helpful to a member. The CBA Section continues to believe that information of this nature relates to complex issues more suitable for qualified financial advisors.

## RECOMMENDATIONS

3. **Sections 3.0 and 3.3 currently say that plan administrators *should consider providing* members with information and tools at key intervals to assist them in determining their retirement needs and goals, how they may achieve their goals, and to help them understand and estimate their plan benefits on retirement. The proposed revisions adopt a prescriptive approach by removing the discretion of the plan administrator and state that plan administrators *should provide* members with such information. We recommend that the language remain as contained in the current version.**
4. **Section 3.3 also currently says that plan administrators *should consider providing* members periodically with an estimate or a general illustration of the accumulated value of the member's account at retirement, as well as an estimate or example of the benefit that may result from the accumulated value. The proposed revisions adopt a prescriptive approach by removing the discretion of the plan administrator and state that plan administrators *should provide* members *at least annually* with an estimate of the accumulated value of the member's account at retirement, as well as an estimate of the benefit that may**

result from the accumulated value. We recommend that the language remain as contained in the current version.

5. **We recommend that the guidance in Section 3.3 on assumptions used to estimate the value of a DC account at retirement or an expected periodic income stream should indicate that such guidance *applies only if* the plan administrator chooses to provide members an estimate of the value of a DC account at retirement or an expected periodic income stream.**
6. **We recommend that it should be made explicit in the Guideline that it is the responsibility of each plan member to plan for their retirement, including projecting their income at retirement, and that each plan member should seek whatever financial advice they deem appropriate, including from financial advisors. It should also be made explicit that the plan sponsor and plan administrator's role is not to give such financial advice, and each member should consider seeking financial advice from a third party in respect of retirement planning.**

## **Fees**

The revised Guideline puts a new emphasis on disclosure of fees, both during active membership and on a plan member's termination or retirement.

Section 3.1 sets out that plan administrators should, at least annually, provide information to members about the nature and level of direct and indirect fees payable by the member, including asset based fees payable with respect to each investment option. Similarly, Section 4.1 sets out that, along with a retirement statement, plan administrators should provide a member with information about the level of fees the member is directly and indirectly paying for each investment held in the member's account.

We presume that these disclosure requirements are intended to apply only to capital accumulation plans with member-elected investment options, or to DC plans where investments are solely in target date funds based on the member's age. The basis for this presumption is that the fee disclosure requirements are likely to create legal issues for DC plans collectively invested in the same manner as defined benefit plans. Where pension funds are invested collectively, the investment management agreements that the plan administrator has entered into typically impose confidentiality obligations on the plan administrator, including about disclosure of the level of fees charged. In these cases, the plan administrator still has the obligation to select investment managers diligently and prudently, which includes giving due consideration to fees in relation to investment returns.

## **RECOMMENDATION**

7. **We recommend clarifying that the detailed fee disclosure requirements in the Guideline do not apply to DC plans that are collectively invested.**

Section 3.1 of the draft Guideline also says that, if terminating members have an option to move funds out of the pension plan and into "specified investments" with the current service provider, the fees related to those specified investments should also be disclosed in the termination statement. Section 4.1 sets out a parallel disclosure obligation for a member at retirement.

We presume that a specified investment is some kind of a pooled investment product provided outside of the pension plan by the plan's current fund holder. However, the Guideline does not make this clear as there is no definition or explanation of a "specified investment".

In addition, if the specified investment has been selected by the plan administrator, we agree there may be a corresponding fee disclosure obligation. However, if the plan administrator has not itself selected the specified investment, the plan administrator should not be required to make any disclosure respecting the specified investment's fees, or monitor that fund. In the latter case, the plan administrator may wish to explicitly communicate to plan members that it has not selected the specified investment, or assessed its fees, and that it does not monitor specified investments offered outside of the plan.

#### **RECOMMENDATION**

- 8. We recommend that the Guideline define or further explain what constitutes a "specified investment". We also recommend that the Guideline clarify that fee disclosure obligations related to specified investments do not apply when the plan administrator has not itself selected and offered the fund.**

#### **Variable Benefits**

The Section commends CAPSA for incorporating into the Guideline recognition of variable benefit products. As an increasing number of jurisdictions amend their pension standards legislation to permit money purchase plans to offer variable benefit payments, the need for guidance about these arrangements is even more important.

The Section supports the Guideline setting out responsibilities of members participating in variable benefit products. In our view, it is important for members of capital accumulation plans, including those with variable benefit options, to understand that they have a role to play in the administration of the plan. We agree with the variable benefit product member responsibilities included in Section 2.6 of the Guideline.

#### **RECOMMENDATION**

**We suggest that the following responsibilities be added to the list in Section 2.6:**

- 9. Given that members of variable benefit products are required to annually determine the amount to withdraw from their accounts within the prescribed limits, it is important for the Guideline to recommend that these members at least consider obtaining qualified financial planning advice. Each member's unique personal circumstances, including other sources of retirement income, risk tolerance, life expectancy and income requirements, are in many cases best assessed by a professional financial advisor.**
- 10. Given the importance of the decision that variable benefit product members must make on the amount to withdraw from the plan each year, the Guideline should state that these members should carefully review the plan-related information they receive from the plan administrator and timely complete their elections as to their annual withdrawal amount.**

The CBA Section is of the view that variable benefit products should be encouraged as a means of helping address the lack of options currently available during the payout or decumulation phase under capital accumulation plans. To encourage plan sponsors to amend their plans to add variable benefit options, the expectations of the plan administrator must be clear and not overly onerous.

Section 5.1 of the Guideline indicates that plan administrators should consider providing information on “sustainable withdrawal rates” but it is unclear what “sustainable withdrawal rates” means. In our view, estimating a particular plan member’s life expectancy and future investment earnings within the plan, which would presumably be relevant factors in determining a sustainable withdrawal rate for the member, are beyond what should be expected of a plan administrator. The Guideline already suggests that plan administrators (Section 2.1) provide decision-making tools to members and suggests that plan members use those tools (Section 2.6). The CBA Section believes that providing appropriate decision-making tools, which in part allow members to calculate the impact of varying annual withdrawal rates under a variable benefit product, is the most that should be expected of a plan administrator.

### **RECOMMENDATION**

#### **11. Remove requirement to provide information on “sustainable withdrawal rates” in Section 5.1.**

The CBA Section believes that the Guideline should not suggest that plan administrators provide income estimates based on a range of investment return assumptions and withdrawal patterns (Section 5.1). The complexity of offering possible outcomes based on varying investment returns and withdrawal rates is not information that can be reasonably and usefully given by the plan administrator. Members can best obtain this information by means of income projection tools and that should be all that is suggested by the Guideline.

### **RECOMMENDATION**

#### **12. Remove requirements to provide income estimates in Section 5.1.**

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,



Sonia T. Mak  
Chair, CBA Pensions and Benefits Law Section

Encl.



THE CANADIAN  
BAR ASSOCIATION  

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L'ASSOCIATION DU  
BARREAU CANADIEN

## **CAPSA Consultation on the Draft Defined Contribution Pension Plans Guideline**

**NATIONAL PENSIONS AND BENEFITS LAW SECTION  
CANADIAN BAR ASSOCIATION**

**October 2012**

## **PREFACE**

The Canadian Bar Association is a national association representing 37,000 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 National Pensions and Benefits Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Pensions and Benefits Law Section of the Canadian Bar Association.

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# **CAPSA Consultation on the Draft Defined Contribution Pension Plans Guideline**

## **I. INTRODUCTION**

The National Pensions and Benefits Law Section of the Canadian Bar Association (the CBA Section) is pleased to comment on the draft Defined Contribution Pension Plans Guideline (the Draft Guideline) released by Canadian Association of Pension Supervisory Authorities (CAPSA) in July 2012. The CBA Section consists of members involved in pensions and benefits law across the country, including counsel who advise pension and benefits administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

The CBA Section acknowledges CAPSA's efforts in clarifying different aspects of the administration of a defined contribution (DC) pension plan and in seeking comments from the pension industry stakeholders.

## **II. GENERAL COMMENTS**

The CBA Section has the following principal comments:

1. A significant portion of the Draft Guideline is devoted to describing existing CAPSA guidelines. Although we agree that it is desirable to confirm and list the existing CAPSA guidelines as a reference, the level of details in the Draft Guideline may result in confusion and possible inconsistencies with the rules or principles in the actual CAPSA guidelines. In our view, significant streamlining of the Draft Guideline will enhance reader-friendliness and increase the focus of the readers on the new guidelines. The main purpose of the Draft Guideline is to supplement the guidance in the existing CAPSA guidelines on DC pension plans. The main goal can be better achieved by focusing on the new guidance.
2. The application of the Draft Guideline is not entirely clear. Guidance on investment choices is relevant to all capital accumulation plans (including DC pension plans) where members direct the investment of contributions. Information on retirement products is relevant to all DC pension plans irrespective of whether the members direct investment. Guidance on contributions and adverse amendments is relevant to pension plans which provide either Defined Benefit (DB) or DC pension benefits.

3. The Draft Guideline does not state whether it applies to pooled registered pension plans (PRPPs).

In light of these comments, the CBA Section recommends that the overall structure of the Draft Guideline be changed to:

- Clarify the applicability of the Draft Guideline, particularly in respect of PRPPs; and
- Streamline the Draft Guideline by including only the new guidance which is of particular relevance to DC pension plans.

### **III. COMMENTS ON SPECIFIC ASPECTS OF THE DRAFT GUIDELINE**

#### **A. Purpose**

Under the “Purpose” section, we suggest the following:

- Include a statement that the guidelines are voluntary but it is CAPSA's expectation that registered pension plans with a DC component will follow the guidelines, where appropriate.
- Include a statement that the guidelines do not replace the applicable legislative and regulatory requirements that may extend beyond the scope of the Draft Guideline and all stakeholders are responsible for meeting those requirements (i.e., modify and move the second paragraph under "Application for the DC Pension Plans Guideline" to this section).

#### **B. Existing CAPSA Guidance Related to DC Pension Plans**

In our view, the primary purpose of references to existing CAPSA guidelines is to indicate that the Draft Guideline is not the only relevant guideline for DC pension plans and to assist the reader to find the other guidelines. We recommend listing the other CAPSA guidelines with a brief description of the guidance they provide, instead of the current detailed descriptions.

#### **C. Key Players in DC Pension Plans and Responsibilities Related to DC Pension Plans**

These sections define the key players in a DC pension plan context and describe their responsibilities. This description is not necessary as it is covered by Guideline No. 5. However,

if CAPSA would like to include some description, we agree with its approach of adopting the descriptions in Guideline No. 5 for consistency, subject to the following comments:

1. "Plan sponsor" is not a term used in pension legislation. The rationale for the use of this term as distinct from the term "employer" and the differences between the terms are unclear.
2. A "fund holder" can be a third party service provider in some circumstances. For example, it is typical in a DC pension plan context for an insurance company to be the fund holder and the provider of record keeping and reporting services.
3. We question the reason for omitting the performance of duties relating to the pension fund in the description of "third-party service providers". This aspect of delegation is included in the description of the term in Guideline No. 5.

The description of responsibilities in the Draft Guideline is a replication of information in other guidelines and it does not provide any additional information or new guidance which is the manifested purpose of the Draft Guideline. The CBA Section recommends that the sections describing the responsibilities of key players be removed.

#### **D. Information For Members During Accumulation Phase**

The CBA Section recommends that the description of guidance under Guideline No. 3 (the CAP guidelines) in the introduction be removed for a more focused discussion on new guidance.

If CAPSA keeps the description, the CBA Section recommends that the bullet point on factors to consider when establishing criteria for selecting service providers to provide investment advice to members under "Providing Investment Information and Decision-Making Tools for Members" be removed, as this is not a disclosure under Guideline No. 3. In addition, a plan administrator often does not make arrangements with a service provider to provide investment advice to members and it is important to distinguish between providing investment information and providing investment advice.

The Draft Guideline states that it is the responsibility of plan administrators to provide the additional information to members. However, Section 3.3 provides that a plan administrator should "consider" providing certain information. Since the Draft Guideline provides general guidance without the force of law and in view of our concern with the disclosure recommended by Section 3.3 discussed below, we recommend that this statement be removed.

It is common for a plan administrator to delegate the responsibility of providing information to members in a DC pension plan context to a third-party service provider. We recommend that the concept of delegation be referred to in the Draft Guideline section discussing disclosure of information to members.

The CBA Section recommends that Section 3.1 be removed since it does not supplement the guidance in Guideline No. 3.

Section 3.2 deals with disclosure regarding contributions. The CBA Section is pleased to see guidance in this regard since it is not dealt with in detail in other CAPSA guidelines. We have the following comments on Section 3.2:

- The first paragraph is unnecessary in view of the overriding statement regarding legislative and regulatory requirements under "Purpose".
- The inclusive list of information to be provided is the same as that in the Draft Disclosure Guideline for Defined Contribution Pension Plans of the Office of the Superintendent of Financial Institutions (OSFI). We question the need to include the list, especially when the draft OSFI guideline is adopted, in view of the overriding statement regarding compliance with legislative and regulatory requirements under "Purpose".
- The CBA Section recommends that the disclosure of the following information is also helpful to members:
  - how interest and earnings on contributions are to be applied; and
  - how and in what circumstances contributions can be withdrawn.

The CBA Section has concerns with the recommendation that the administrator provide members with annual estimates of accumulated value of DC accounts at retirement and estimates of benefits arising from that value and the adequacy of retirement income expected to be provided by the pension plan. Information of this nature depends on individual circumstances which may change over time. This disclosure is onerous on the pension plan administrator and the estimates may be misleading to members. The disclosure will likely be so significantly qualified that the information will not be very helpful to a member. The CBA Section is of the view that information of this nature relates to complex issues that are more suitable for qualified financial advisors.

## **E. Information for Members Who Are Approaching the Payout Phase and During Payout Phase**

The CBA Section recommends that the description of Guideline No. 3 and the paragraph on the administrator's responsibility to provide information in addition to legislative requirements be removed.

Sections 4.1 and 5.1 outline the information to be provided to a member approaching retirement and during retirement respectively. The CBA Section is pleased to see attention given to this area of the retirement spectrum and the brief synopsis of each product in Sections 4.1.1 to 4.1.6. It would be useful for a member to have information described in Section 4.1 and Appendices A and B. However, the CBA Section does not believe it is reasonable to place the responsibility on the plan administrator for the retirement vehicles chosen by a plan member and impose the obligation on the plan administrator to explain what members may do with their DC accounts after they leave the pension plan exposing the administrator to potential liability if the explanation is insufficient or incorrect.

The range of retirement vehicles, particularly annuity products, is continually increasing. The appropriate choice of retirement vehicles for a member requires an understanding not only of the available vehicles but also of the member's personal financial and family circumstances, risk tolerance, life expectancy and health, as well as individual tax implications. These are complex issues for financial advisors to consider, and not employers or administrators.

A DC pension plan allows a member to accumulate savings on a tax-sheltered basis and to ultimately use those savings to provide retirement income. However, by virtue of its design, the DC pension plan is not intended to deliver the retirement income itself nor is payment of retirement income part of the benefits promised under a DC pension plan.

The CBA Section recommends that the Draft Guideline not impose the obligation to provide information on payout options on the plan administrator. There are other possible sources for the desired information. For example, it could be prepared by CAPSA, or by the providers in the business of offering the payout vehicles. In most cases, the third party providers who serve the market for DC pension plans by offering their services as record keepers are the same parties who benefit from marketing the payout vehicles to members transferring money out of

a DC pension plan. As a result, these providers are well placed to explain the payout vehicles and they are also the parties who benefit directly.

Information about retirement planning is important. If CAPSA retains the concept that a plan administrator should be responsible to provide the information, the administrator would likely engage a service provider to prepare generic information. This would not be sufficient or as effective as advice from financial advisors on an individual basis, but may serve well as a start for individual retirement planning. Regardless of who provides information on the regulated retirement products, the information should also include the tax implications for each product.

Variable benefits are part of a DC pension plan. Therefore, it is appropriate for the plan administrator to be responsible for providing information on the variable benefit as described in Section 5.1.

## **F. Adverse Amendment**

The given examples of adverse amendments are obvious and straightforward and they apply equally to DB pension plans. The CBA Section believes that a discussion of the circumstances in which a plan conversion from a DB to a DC pension plan is or is not considered an adverse amendment will be helpful.

The reminder to administrators and employers in Section 6.2 of the categories of individuals to whom notice should be given is helpful. However, the category of "spouse or common-law partner" is missing and should be included in this list.

## **IV. CONCLUSION**

The CBA Section acknowledges CAPSA's efforts in addressing different aspects of DC pension plans.

In light of our comments, the CBA Section questions whether the new guidance in the Draft Guideline warrants a separate guideline or can be incorporated into an existing CAPSA guideline. As an alternative, all relevant guidance relating to DC pension plans in the Draft Guideline and the other CAPSA guidelines can be consolidated into one guideline so that

stakeholders only need to refer to one source for guidance. This alternative approach will require a lot more work of CAPSA.

We trust that our comments are helpful and we look forward to the opportunity for our continued participation in CAPSA's strategic initiative of reviewing current and alternative approaches to regulating and supervising DC pension plans.