THE CANADIAN BAR ASSOCIATION
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Via email: capsa-acor@fsco.gov.on.ca

Mr. Mohammed Jaffri
Policy Manager
CAPSA/ACOR
16th Floor
5160 Yonge Street
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Dear Mr. Jaffri:

Re: Consultation on Guideline No. 2 – Electronic Communication in the Pension Industry

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. 2 – Electronic Communication in the Pension Industry (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. The CBA Section comprises lawyers from across Canada who practice in pensions and benefits law, including as counsel to benefit administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefits consultants, investment managers and advisors.

We support the use of electronic communication and CAPSA's efforts in facilitating its implementation. The Guideline marks a significant step forward in clarifying requirements for using electronic communication. However, certain points require additional clarification or modification in the interest of practicality.

In this submission, we discuss the Guideline and highlight areas that could be further improved, with suggestions on how those improvements might be accomplished.

1. E-communication

The CBA Section supports e-communication as the default communication option. We also support CAPSA's recognition of "deemed consent" in jurisdictions where legislation does not prohibit it.

That said, the concept of e-communication, including how those in the industry understand the term, remains nebulous. We urge CAPSA to precisely define "e-communication", considering:

- **Member-Initiated Communications:** The Guideline should recognize that e-communications include communications that a recipient initiates, not just those an administrator or sponsor initiates.

- **"Plan Administrator" Terminology:** The Guideline should use consistent terminology throughout. In places, such as paragraph 1.1, it refers to "a pension plan sponsor and/or pension plan administrator". Elsewhere, such as in paragraph 2.1, it refers only to a "plan administrator".

- **Applicability to "Any" Communication:** While the Guideline states that it "is intended to apply to any communications *required* under pension legislation" (emphasis added), paragraph 1.1 sets out a broader definition of e-communication, which includes "any communication" by electronic means.

Further, while certain communications are obviously "required", such as regular member statements, it is unclear whether CAPSA views other kinds of communication as "required" within the meaning of the Guideline. For example, if a member makes a one-off inquiry, the administrator's statutory fiduciary duty arguably requires it to respond, which would make the response a "required" communication. The Guideline's scope in this regard is unclear and should be buttressed.

Finally, the requirements of paragraph 1.2 assume that e-communications will be limited to particular kinds of visual technology, such as e-mails and electronic documents. However, given that the definition of "e-communication" reads broadly enough to include other technologies, such as audio (telephone, Skype) and video (live webinar), which cannot be "viewed" or "printed", the Guideline should emphasize that electronic versions of prescribed statements and communications where the recipient has provided an e-signature should be capable of being "reproduced", without specifying the method or technology to do so. Other e-communications, such as routine live chat sessions, could be reproducible or not, at the administrator's or sponsor's reasonable discretion.

2. Consent

Paragraph 2.2 of the Guideline states that where pension legislation permits deemed consent, the plan administrator can accept deemed consent if a recipient designates an information system to the plan administrator. The CBA Section believes that, as expressed in paragraph 3.1 of current Guideline No. 2, if a recipient designates an information system, consent should be deemed to have been provided. In other words, the designation by the recipient of an information system should be viewed as implied consent. Paragraph 2.2 should be revised to indicate that where pension legislation permits deemed consent, the designation to the plan administrator or sponsor by a recipient of an information system is deemed to be consent by the recipient to e-communication.

In paragraph 2.3 of the Guideline, the required timing for the plan administrator or sponsor to give the recipient notice that the member's consent may be revoked is not clear. Presumably, when

express consent is being sought, this information should be provided when the plan administrator or sponsor is seeking the express consent. However, for deemed consent, there is no indication of when and how this information should be provided. The CBA Section believes that the best way to deal with this is, where possible, to advise the recipient of this right following the recipient designating an information system.

3. Requirement for information to be in writing

The CBA Section believes that the Guideline should provide more flexibility to administrators and sponsors so that they are not expected to automatically produce unnecessary and perhaps unwanted hard-copy written communications. Specifically:

- **Clarification about "required communication":** Paragraph 3.2 of the Guideline states that recipients may request that "any e-communication" be provided in writing rather than "any required communication", as stated in paragraph 3.3. Similar to our feedback on paragraph 1.1 of the Guideline, this can become problematic for any e-communications created in a format and technology that does not lend itself to being transferred into writing. We understand the intent of this requirement was to be limited to things like member statements.

- **Requirement to provide a paper copy:** Paragraph 3.3 should more closely align with a recipient's consent to e-communication by clarifying that the administrator need provide a paper version of any required communication only

  (a) when such communication is reasonably capable of being produced in paper form, such as a member statement; and

  (b) when the administrator has received notice that all electronic delivery options have failed. For example, if the recipient has designated an information system (e.g., a personal email address) and the administrator's initial e-communication attempt bounces back as "undeliverable", the administrator should first have the opportunity to contact the recipient (e.g., including by phone or by an alternative email address on file, such as a work email) to confirm the recipient's new designated information system for e-delivery. This additional flexibility would still allow a recipient to request a paper version of a required communication at any time.

The CBA Section agrees that pension administrators and sponsors, where applicable, are responsible for taking reasonable measures to ensure that any e-communications are delivered to the intended recipient. However, the Guideline should explicitly recognize recipients' obligations to keep their contact information, including e-contact information, up to date. This could be done much in the same way that CAPSA's Capital Accumulation Plan (CAP) Guideline (No. 3) contains a separate section setting out CAP members' obligations vis-à-vis the plan and the administrator.

4. Providing information in a specific form

Paragraph 4 of the Guideline seems to suggest that the information provided must not vary regardless of the means by which it is communicated, whether in paper or e-communication format. It also appears to contemplate unwritten communications. If the intent is to restrict this to written communication where there is a paper equivalent, the paragraph should be revised to say

that where written information is available as an e-communication as well as in paper format, the e-communication must be identical in content to the paper version.

5. Electronic signature

In some jurisdictions there is some uncertainty as to whether beneficiary designations may be made electronically. Ontario has recently released Bill 57 which proposes to amend the *Pension Benefits Act* (Ontario) to expressly permit electronic beneficiary designations. Given the uncertainty on this point, the CBA Section recommends that paragraph 5.1 of the Guideline be tempered by a qualifier such as "where there is a requirement under pension legislation for a signature, and subject to any other applicable law governing electronic signatures ...".

The intent of paragraph 5.2 – that "an electronic signature should be able to identify the recipient" – is unclear. If this is intended to mean that an electronic signature should be given in a way that the recipient of the e-communication with the signature will be able to identify the signatory, it would be clearer to revise the paragraph to say that an electronic signature should be given so the recipient of the e-communication with that signature is able to identify the signatory and associate the signature with the e-communication.

6. Providing originals

Given the uncertainty noted under "Electronic signature" as to whether in certain circumstances beneficiary designations may be made electronically, the CBA Section is of the view that paragraph 6.1 could be clarified, perhaps by a cross reference to paragraph 5, noting that where the document contains a signature, consideration should be given to any other applicable law.

7. Retaining e-communication

Paragraph 7.3 of the Guideline is unclear whether a plan member has any obligation to retain the information or if the obligation rests solely with the plan administrator or sponsor. It is also unclear if these elements include the identities of the sender and recipient. For clarity, the CBA Section suggests redrafting this paragraph to read as follows: "The plan administrator or sponsor who sends or receives e-communication should retain information that identifies its sender or other origin, its recipient or other destination of the e-communication, and the date and time it was sent or received."

8. Sending and receiving e-communication

In paragraph 8, with a presumption of delivery of an e-communication to the designated information system, the sender will have no way of knowing if the delivery has failed (since the intended recipient will not be able to advise of the failure). This should be clarified. The CBA Section also suggests clarifying whether this paragraph should acknowledge situations where e-communications may have been delivered but the recipient might not be immediately aware (or ever aware) of them. This paragraph should acknowledge that there should be an onus on a recipient to notify the administrator if an expected e-communication was not in fact received or if the address for e-communication changes.

9. Data security

The CBA Section agrees that plan administrators must consider data protection and data security when using e-communication. However, data security cannot be the sole responsibility of the plan administrator in all circumstances. Despite taking all reasonable efforts to protect the security of information that it sends from, and retains in, its own information system, there may be little that can be done by a plan administrator to safeguard e-communications accessed on the recipient plan member's or beneficiary's information system. By using electronic means to communicate with plan administrators, plan members must be understood to accept responsibility for the data protection and data security of their own information systems. The limitations of plan administrators' responsibilities in this regard should be recognized in the final Guideline.

The CBA Section also agrees that plan administrators should have protocols in place for data that is sent and retained, and to retrieve lost or corrupted data. However, paragraph 9.1 of the Guideline should be revised to more clearly reflect how often plan administrators are to consider and implement the protocols. The Guideline currently states that data security protocols must be considered and implemented on an ongoing basis. Practically, how often and to what degree plan administrators consider protocols will vary depending on the complexity of the systems and applications used to support e-communications, plan administrators' operational capacities, and external developments such as new computing standards, forms of malware, or other methods of cyberattack. A more flexible expectation, such as "as often as is reasonable and as new methods of transmitting e-communication are developed", would be appropriate.

It is unclear whether paragraph 9.2 of the Guideline requires a single layer or multiple layers of authentication for the intended recipient(s) of an e-communication to access the document. Most, if not all, pensions-related e-communications will contain confidential information and should be protected from unwanted access or disclosure. However, in most circumstances, a single layer of authentication will be a reasonable level of protection. For example, an e-communication sent to a plan member via email can be password protected. In most cases, it would be unnecessary to password protect an e-communication that is pushed out to a plan member or beneficiary through an application or other information system that already requires some form of authentication to access. Requiring more than a single layer of authentication would be onerous for plan administrators from an information technology perspective and could be cumbersome for the intended recipients of e-communications.

10. Use of website or other electronic technology

Plan administrators will continue to adopt new technologies that change how they communicate with plan members and beneficiaries. Plan administrators are likely to announce the adoption of new communication technologies through one or more methods, including by informing plan members and beneficiaries through existing information systems. In our view, paragraph 10 of the Guideline would benefit from explicit guidance that express, implied or deemed consent given in respect of an existing information system, continues to apply to newly designated information systems unless an individual opts out of communicating via the new system. This is the most efficient approach to facilitating communications between plan administrators and plan members and beneficiaries as means of communication continue to develop at a rapid pace.

11. Other requirements

The CBA Section has no comments on this paragraph of the Guideline.

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 Gaylene Schellenberg for Sonia Mak)

Sonia Mak
Chair, CBA Pensions and Benefits Law Section