June 30, 2004

Mr. Davin Hall
Policy Manager
CAPSA Secretariat
5160 Yonge Street
17th Floor. Box 85
North York, ON M2N 6L9

Dear Mr. Hall:

Re: PROPOSED REGULATORY PRINCIPLES FOR A MODEL PENSION LAW

On behalf of the Association of Canadian Pension Management I would like to thank the Canadian Association of Pension Supervisory Authorities for the opportunity to comment on CAPSA's Model Law Principles. We appreciate how much time and effort it must have taken to arrive at a set of Principles, even among regulators. We congratulate you for the efforts to address a number of difficult issues, and to achieve balance among interests. We also appreciate the length of the initial consultation period, which has enabled us to consult with our provincial councils and representatives across the country.

As you are aware, uniformity of pension legislation has been a significant goal in our advocacy efforts for a number of years. We are delighted to see the extent to which thinking has developed in the pension industry in this respect. Five years ago there could not have been agreement by CAPSA members as to a set of Principles, and a consultation process among stakeholders would have had little chance of success. Now there appears to be a welcome realization of just what the lack of uniformity is costing the pension industry, including the regulators, in direct costs, and in terms of coverage.

In developing our response as a national organization we established a Task Force with representatives from across Canada. The Task Force solicited and received comments from the ACPM Regional Councils in Alberta, Ontario, and Quebec, and had representative input from British Columbia and the Maritimes. The comments herein have been approved by the ACPM Board of Directors, representing employers and administrators in private and public sector pension plans. The Appendix lists members of the Task Force, the Association's Advocacy & Government Relations Committee and its 2003-2004 Board of Directors.

Part I of our submission will comment on the scope of the uniformity objective. Part II will contain our detailed comments on the Principles themselves. Part III sets out what we see as the next steps.

PART I – SCOPE OF THE UNIFORMITY INITIATIVE

We would first urge CAPSA to be actively considering now how to effectively implement the Model Law Principles, on the assumption that reasonable consensus can be achieved as to the Principles. We understand the next step that is contemplated is to have a draft statute prepared, and to urge the various governments to adopt it or substantially all of it.

We are very much concerned with the "aspiration only" nature of the Principles. We simply do not see that minor or indeed major differences in "regional priorities, interests, attitudes" are of sufficient real importance to the protection of plan members to justify their being encompassed in pension legislation. We are concerned that maintaining differences on these bases will perpetuate the current unsatisfactory patchwork of pension legislation.

There are a number of options for achieving greater uniformity and harmonization in the regulatory framework in Canada. The key models are described below, although we note that this is not an exhaustive list:

1. A national law administered by a single national regulator. We recognize that this is constitutionally and politically difficult.

2. A uniform act with a single regulator. The principal benefit of a single regulator is that not only will the law be uniform, but it will also be enforced by a single entity. We recognize that this is also politically difficult.

3. A uniform act with multiple regulators. As with Model 2, there is a uniform law, but the law is enforced by different regulators, which will likely give rise to differences among jurisdictions. Accordingly, it is less attractive than Model 2, but is better than Model 4.

4. Substantially uniform legislation with multiple regulators. Implicit in this model is considerable uniformity, but there is a recognition of local differences. There will not be uniformity either of law or of its enforcement. Even substantially uniform legislation may not result for some time while the various governments amend their legislation. We understand that this is the model that is contemplated by CAPSA. We also understand that this may be the easiest political "sell", but believe that the result might well be a legislative environment that would be significantly less favourable for the continuation of pension plan than the existing environment.

- The proposed principles do give some relief to employers and administrators from some of the more onerous aspects of pension legislation, such as partial wind ups, and the prohibition in some jurisdictions of the withdrawal of surplus from ongoing plans. They do, however, impose other more onerous provisions such as: the prohibition of the payment of surplus to an employer without member consent regardless of legal entitlement; the wide measure of discretion to pension regulators that will inevitably contribute to uncertainty and uneven application of the legislation; the sweeping powers of pension regulators, without accountability; and the new administrative standards that are more demanding than any such existing standards in Canada. We are concerned that the onerous provisions that are omitted; for example Ontario's grow-in, or Quebec's pre-retirement indexation of termination benefits, will be simply added back by the various jurisdictions.

- Apart from the differences in some significant policy issues, such as grow-in, partial wind ups, and locking-in, we are concerned that the various governments will have different views as to the balance of the competing interests of employers and plan members. Even if we are able to arrive at a careful balance among competing groups involving trade-offs through consultation, governments will to tempted to enact legislation that may be weighted to one side or the other.

- The Principles allow for each provincial pension regulatory authority to enact its own rules and policies. This could result in different rules being applied in different provinces. This results in complications for those organizations that operate on a national basis in Canada, additional complexity and expense for service providers (such as insurance companies and trust companies) and does nothing to further the ultimate goal of harmonized regulation in Canada. In view of this, all supporting rules, regulations, policy statements and other subsidiary instruments should also be harmonized.

- Even with perfect harmonization of legislation, rules and policies, differences in interpretation can lead to different conclusions and results in each province. This will, over time, lead to a divergence in provincial laws. Further, uniform rules could be undermined if pension regulatory authorities applied unwritten rules or administrative practices. Clearly, in this respect, harmonization is not the same as a single national code enforced consistently.

If the foregoing comments appear negative, that is only because we believe that CAPSA's objectives should be more ambitious. In the ACPM's view, a national law administered by a single national regulator (Model 1 above) would best achieve uniformity. We recognize that a national law with a national regulator is a constitutionally and politically difficult proposal. However, such a model would minimize the potential for divergence between the provinces that could result from the application of different provincial rules and regulations or from differences in interpretation between provincial regulators. The model that we suspect is more achievable is that of uniform legislation enacted by each jurisdiction, with the present multiple regulators (Model 3 above). To be effective, that model requires uniform drafting of both legislation and regulations, as well as agreement in principle. The recently released Wise Persons Report on Securities Legislation makes a number of very good points in respect of this model of uniformity in the context of securities legislation that have applicability in the pension legislation context. We urge CAPSA to consider this Report in setting its future course of action.

PART II – DETAILED COMMENTS

We believe the Model Law Principles provide a good opportunity for all stakeholders to consider their views on a number of difficult issues. The following comments set out the official ACPM viewpoint at this time. We recognize that agreement on the Principles will necessarily involve compromise and balancing among stakeholders, and our comments should be considered in that light, subject to our concerns as to the uneven incorporation of the Principles into legislation as set out above. We do recognize that there are other points of view in respect of many of our comments. If and to the extent that a management bias is perceived in our comments, it is because we are concerned with the health of the pension industry. The health and survival of that industry largely depends on employers' providing pension plans

Threshold Comments

As threshold comments we observe that there are some provisions that are missing and badly needed:

These include:

- ***A provision in the statute setting out the purposes of the statute.*** The objective of the encouragement of the establishment and maintenance of pension plans should be included and be articulated in the statute. There must be a balance between protecting the rights and

benefits of plan members and the recognition that pension plans are voluntary. Keeping those objectives in balance should inform regulations, rules, policies, and regulatory actions.

With this objective in mind, there are a number of potentially onerous provisions of pension legislation that might be acceptable in a negotiated environment but that we believe should not be mandatory for all employers; for example the "grow-in" rights that currently exist in Ontario and Nova Scotia pension legislation. There are other provisions that are complex and costly to administer, such as phased retirement or deferred settlement on spousal relationship breakdown. Some employers might well be willing to grant such rights, but they should not burden all employers.

There are other provisions that are philosophically objectionable to many employers, such as mandatory pension committees, or overly liberal pension unlocking provisions. These also should not be mandated.

- ***An over all provision giving the statutory provisions a general and inclusive trust override that would substitute legislative provisions for classic trust law as it applies to pension trusts***. Our view is that pension plans are an element of compensation. As such they are contractual in concept. It follows that employers should be able to amend their plans, in the same way other elements of compensation can be changed.

  We note that there is a trust override in Principle #33, which deals with surplus. We urge that it be extended in view of recent judicial decisions, including Monsanto, TecSyn, Transamerica, and Buschau. These decisions have created huge if not insurmountable barriers to many aspects of plan administration, including the payment of expenses from the plan, asset transfers on sale of business and plan mergers, as well as the payment of surplus from the plan. We believe that the reaction of employers to the current line of judicial decisions will play itself out in reduced coverage, a reduced level of benefits, especially early retirement benefits, and certainly reduced funding of pension plans, unless there are legislated solutions that are acceptable to employers.

  Defined Contribution Plans. The Principles, like current pension standards legislation, are not well suited to defined contribution pension plans. The recently adopted Capital Accumulation Plan Guidelines provide some welcome clarity as to the regulatory expectations for these types of plans. The industry feels strongly that these expectations should remain as guidelines and not be enshrined in legislation. We suggest as well that CAPSA give strong consideration to the simplification of the standards applicable to defined contribution plans. For example,

restrictions on portability should be minimized, and specific exemptions be given for provisions that are simply not relevant, such as deferred pensions.

Other threshold comments:

Powers of Regulatory Authority. The powers of inspection, orders, imposition of fees and charges are incredibly broad. We suggest they be reviewed against similar powers in other provincial regulatory statutes.

Retroactivity. The cost of retroactivity can be unacceptably high. As an example we refer to pre-retirement death benefits. We suggest that retroactivity should not be mandated where it imposes an additional cost on the employer. Plan administrators should be able to weigh the cost of more complex administration against the cost of the additional benefits and make their own decisions as to retroactivity. We make an important exception in respect of the final location approach in Principle #2 (Application of the Act). This Principle must be retroactive in view of the almost universal practice in the pension industry, and it cannot be overturned or left in doubt

Pension Benefits Guarantee Fund. The absence of provisions relating to contributions to or coverage by a guarantee fund leads us to assume that CAPSA does not support the expansion of the concept of a guarantee fund into jurisdictions without such a fund. The temptation for governments is to use such a fund to rescue the businesses of insolvent employers, which we believe is inappropriate. Such a use is at the expense of other employers, some of whom may actually be competitors of the rescued employer. We are on record as urging the Ontario government to reconsider the purpose and use of the Ontario PBGF.

Comment by Principle

1. Minimum Standards

This Principle seems obvious and necessary. It does not preclude special rights and benefits for plan members.

2. Application of the Act

We strongly support this Principle as embodying the “final location” principle, i.e. that benefits are determined in accordance with the laws of the location of employment of the member at the time when the entitling event (termination, retirement, death, and plan wind up) occurs. This Principle should be fully retroactive. Very few if any plans have been or are administered in accordance with a checkerboarding approach and the industry cannot sustain a successful judicial challenge to the final location approach in any jurisdiction.

3. Registration of Pension Plans

This Principle is practical and necessary administratively and from a regulatory perspective**.**

4. Plan Amendments

The requirements for notice to members of plan amendments require some detail to ensure that they are reasonable. Our principles would be:

- Accrued benefits and those for which members have met the eligibility criteria cannot be reduced, except where registration under the Income Tax Act is subject to being revoked.

- Normally notice should be given within a fairly short time frame after the effective date of the amendment (not the date of filing). However, members must be given notice of amendments that would reduce their entitlements or rights (adverse amendments) going forward ***before*** the effective date of such amendments.

- Notice of housekeeping or non-material amendments, whether or not adverse, may be given in members' annual statements.

- When an amendment that directly affects only a class or category of members is made, only members in that class or category need be given notice. Notice of all amendments made to the plan during the preceding year should be given to all members in a summary of amendments made during the year in the members' annual statements. Amendments of provisions relating to surplus or funding would be considered to affect all members, including retirees.

- Whether or not amendments can be made for individuals or special groups (e.g. early retirement windows, special provisions for executives) needs to be clarified, as well as whether there are additional immediate funding and/or notice requirements. We support as much flexibility as possible in respect of the ability to amend on an individual or selected group basis.

- What constitutes a class needs to be defined. Members hired after a certain date should constitute a permissible class, as should a new group of employees as a result of an acquisition of a business.

- Freezing the final average in a final average defined benefit plan should not constitute a void amendment. This needs to be clarified.

- Timing issues need to be clarified. Notice provisions should relate to the effective date of the amendment rather than the filing date.

5. Plan Administrators

A number of aspects of the provisions in this Principle and the next are highly problematic to employers and administrators, as well as in some cases being impractical and a departure from current best practices**.**

We are concerned that the requirement for a pension committee with mandatory member representation could by itself capsize efforts for uniformity.

There are many models for plan governance. A desirable model of governance for multi-employer plans may be different from that for a private sector employer-sponsored plan. Public sector plans generally have different governance structures than private sector employer-sponsored pension plans. Governance for defined contribution plans might be appropriately different than for defined benefit plans. Governance of a plan sponsored by a small employer will be different from governance of a plan of a large national employer. One size does not fit all. Further, we recognize that there are models of plan governance, such as jointly trusteed plans, where the mandate confers authority to make decisions that go beyond plan and fund administration in dealing with issues such as plan design, and funding.

We have taken the opportunity afforded by the Model Law Principles to consider the Quebec experience. In this exercise we have listened to our Quebec Council, the members of which have direct experience with pension committees in Quebec. There are sound reasons for rethinking Quebec's approach:

- The members are exposed to personal liability, as we are beginning to see in current litigation. The exposure is highest in respect to the investment of the pension assets. In the experience of our members, insurance is not an answer. Insurance is costly and coverage restrictive. Indemnities from the plan may not be appropriate; indemnities from the employer may be worth little.

- There is an unacceptable and illogical disconnect between the responsibility to fund the plan, which is the employer's, with the responsibility and power to invest the assets of the plan, which is the administrator's. Matching assets and liabilities is a highly sophisticated exercise. Further, the discipline of prudence can easily be lost if the investor is not also the one who must fund. This disconnect exists in all Canadian pension legislation of course, but it is usually addressed by having senior and knowledgeable officers of the employer sit on pension committees or head investment subcommittees.

- Employers often object to member representation on pension committees because of a concern that the committee will try to expand its role beyond matters of administration to areas that are the province of the employer; for example plan design or funding policy.

- The experience in Quebec has yielded mixed results. Many committees have uploaded their responsibilities to the employer . Some committees have experienced difficulties in recruiting member representatives. Recent liability concerns could make such recruitment efforts even more difficult in the future.

The purpose of having member involvement in pension committees needs further discussion.

- If it is, as CAPSA's commentary suggests, to provide supervisory oversight of plan administration to ease the role of regulators, we do not believe it is appropriate or realistic to place this responsibility on plan members, who are not well equipped to deal with it. Moreover, it would tend to create an adversarial atmosphere on pension committees that would be antithetical to the free sharing of information.

- If it is to improve communication to members, there are other ways of achieving this goal, including a comprehensive annual report to members.

- If it is to obtain input from members, an advisory committee with clearer rules as to formation and powers than in existing legislation could work very well.

- If it is to obtain member involvement in investment decisions, we do not believe members should bear the responsibility for this highly sophisticated area in defined benefit plans.

- If it is to give plan members decision- making power in the areas of plan design, funding and the use of surplus, we point out that these areas are employer responsibilities in most plans (exceptions may be jointly trusteed plans and public sector plans).

On the whole we believe existing models of plan governance work well, and can be and are adapted to different pension "deals", especially as they may exist in the public sector or quasi-public sector (e.g. universities) areas. Generally, members will benefit by as much transparency as possible, and the meaningful opportunity to give input. We would emphasize that any individual involved in plan administration, whether representing management or plan members, will benefit by education and training.

6. Plan Administrators – Duties

a) If the administrator has a legislated fiduciary duty, the persons to whom that duty is owed should be all those who might have a stake in the pension plan, including the employer. The employer has a huge financial stake in the plan, being responsible for funding it. We believe it would be far better to leave the concept of fiduciary duty out of legislation and to use the concept of standard of care. The implications of a common law fiduciary duty (no personal benefit, no conflict of interest, equal treatment of all beneficiaries) would, if strictly adhered to, preclude the usual administration of a pension plan.

b) Since the strict application of trust law has caused havoc in the pension industry, we are strongly opposed to enshrining it in legislation. On the contrary, the legislation should override trust law. If, notwithstanding this comment, plan assets are to be held in trust, the employer must be one of the beneficiaries.

c) The administrator, defined as the members of a pension committee, is held to an impossibly high standard of knowledge and expertise; including the duty to be informed, to collectively possess skills rather than retaining expert help, along with a high standard of care and fiduciary duty if this concept is retained, especially for non-management members of pension committees.

d) The conflict of interest provision would seem to preclude management from membership on a pension committee. This is unacceptable to employers, and would deprive the committee of valuable knowledge and expertise.

e) A legislated standard of care for professional advisors, in place of a contractual standard, is problematic and will lead to higher costs. It is not clear whether a fiduciary duty is included or implied, and whether it would apply to legal counsel.

7. Plan Records

a) At present plan sponsors/administrators are advised to maintain pension records for extremely long periods, long after the final termination under the plan. It would be very helpful to have a reasonable legislated time period for keeping records. We suggest that this time period should correspond to a limitation period for bringing civil or administrative proceedings against the employer or administrator in respect of the plan. Unfortunately limitation periods are not uniform across Canada.

b) We submit that the administrator should be able to call for information relating ***to the administration of the plan only***, not more generally for information relating to the plan. Legal opinions or actuarial valuations or plan design materials provided to and paid for by employer should not be available as of right to the administrator. We also observe that in some circumstances, it is not appropriate for an administrator to require another person to supply information; for example, where that other person is a service provider whose fees have not been paid.

8. Funding of Pension Plans

a) The requirements should deal with contributory plans, and negotiated cost plans as well as employer- funded plans.

b) Some of our members have questioned the value of providing contribution schedules to the fundholder. We are not sure that this requirement in Ontario has achieved a useful result in view of the practical problems, not the least to which is Form 7 itself. Relying on the fund holder can be dangerous. We submit that the onus should be on the administrator to monitor funding.

c) Clearly the requirements for the taking of contribution holidays need to be set forth. They need to be reasonable. Contribution holidays should not be permitted unless the plan is in surplus on both an ongoing and wind up basis.

d) We suggest that CAPSA urge the tax authorities to raise the amount of excess surplus a plan may have before being compelled to take contribution holidays. If the ceiling is raised, many employers will prefer to fund more conservatively than is now possible.

9. Investments

We will want an opportunity to review the regulations. These should deal clearly with member choice defined contribution plans, as well as defined benefit plans. We are on record as supporting the prudent person approach to pension fund investments, with a minimum of quantitative restrictions. If there is an intention to adopt the existing federal rules, the flaws in these rules that we have pointed out in our joint submission to the CAPSA Investment Committee should be addressed.

10. Interest

We will want an opportunity to comment on the regulations.

11. Pension Fund Assets

a) Keeping monies due or owing to a plan segregated and apart from other assets of the employer will be difficult administratively, and unnecessary, given a deemed trust. Generally once the obligation comes into existence, the monies are not held but are paid into the plan.

b) Insolvency issues need to be given more careful consideration. If the deemed trust is intended to encompass the entire wind up deficiency in insolvency situations, there would be a significant and unacceptable impact on banking and credit arrangements.

12. Provision of Information

a) The provision of individual statements to members when there is a change that affects an individual's benefit entitlement, which presumably means giving individual numbers, is extremely onerous.

b) It would be helpful if electronic communications with appropriate consent provisions were addressed in the regulations.

c) We believe that a spouse's ability to obtain pension information as to a member should be restricted to the member's death or a marriage breakdown situation.

d) We note the substantial cost of providing extensive information to plan members without charge.

e) We will want the opportunity to comment on any regulations relating to this Principle.

13. Eligibility for Membership

a) We agree that a member of a defined benefit plan for whom an annuity has been purchased by the administrator at the instance of the administrator in circumstances other than on termination of employment, retirement or plan wind-up remains a member of the plan, as an annuity purchase is essentially a funding mechanism. The purchase of an annuity with a defined contribution account of a member on termination or retirement should, however, be a final settlement of the obligation of the plan to the member.

b) The vesting and eligibility principles should work together such that the minimum standard is that an employee becomes vested after a reasonably short period of time; two years of service with the employer being an acceptable standard. Termination benefits other than the return of member contributions should not be required for employees of defined benefit plans who terminate employment before the completion of the vesting period.

c) A clarification of what is meant by "class" of employee is necessary. Employees hired after a certain date or those hired pursuant to an acquisition of a business should be permitted classes.

d) Definitions and clarification are needed as to part-time employees and full-time employees, and as to comparability of plans. We believe that employers should be permitted to provide a defined contribution plan for part-time employees where a defined benefit plan is made available to full-time employees, noting that many part-time employees prefer this approach.

e) The deeming of the status of "active" member must be considered in the light of the implications of losing status as an active member. In particular we do not support the granting of portability rights when a member becomes an inactive member but retains status of an employee.

14. Benefits

a) We support the prohibition of discretionary benefits, subject to a clear definition of what is meant by the term. The conferring of such benefits, even if only at the instance of the employer, is not only uncertain, but it also places the administrator in a position of not treating all members equally.

b) Plan amendments for individuals should be permitted. See comments under #4 (Plan Amendments).

15. Vesting of Benefits

We are not opposed to immediate vesting of defined contribution accounts. For defined benefit plans or provisions please see comments under # 13 (Eligibility for Membership) above.

16. Entitlement to Pension Benefit

a) The CPP/QPP offset should be of a pro rata share of the maximum CPP/QPP benefit estimated as of the date of termination of employment, assuming a salary level as of that date, not of the actual amount of the benefit payable to the member coinciding with the member's service under

the plan. The latter is administratively impossible to determine. The pro rata share should be based on the ratio (not to exceed one) of the member's pensionable service under the plan to 35 years.

b) The pension payable on delayed retirement should be either alternative mentioned in the sixth bullet, at the option of the employer. The alternative chosen should be included as a provision under the plan.

17. Phased Retirement

a) Existing Quebec and Alberta rules are not satisfactory although we endorse phased retirement in principle. We tentatively prefer the approach of the payment of an early pension with respect of the proportion of time the member is no longer working, and the continued accrual for the proportion time the member is employed.

b) We note that the income tax rules need amendment so that artificial means are not sought in circumventing them.

c) We believe that the employer should not be required to provide special pension arrangements for employees who have taken some kind of phased retirement. Phased retirement is the subject of negotiation between the member and the employer, and neither party should be discouraged from the arrangement because of the complexity of the legislation. We observe that where the employer chooses to offer some payment of pension on phased retirement, the administrator must provide a substantial amount of education and explanation.

18. 50 Per Cent Rule

Application limited to periods of contributory service is administratively problematic, and arguably unreasonable. A member's pension should be viewed in its entirety.

19. Joint and Survivor Pension Benefit

a) We understand that this Principle precludes the possibility of a reduction in the member's pension on the death of the non-member spouse. This is consistent with actual practice.

b) We urge uniformity in the definition of spouse. We favour the approach of Alberta and British Columbia giving a two or three year period of time before a legally married spouse loses survivor rights in order to give the spouses the opportunity to seek advice as to the splitting of their assets, including their pension assets.

c) Provision needs to be made for survivor benefits in respect of the portion of the pension that is in pay in cases of phased retirement.

d) Whether the survivor benefit applies to bridge benefits should be clarified.

e) We are concerned that a non-member spouse may not fully understand the implications of a waiver of a survivor benefit. This is a right that currently exists in all pension legislation across Canada, but it places a heavy burden on the administrator. We suggest that the administrator be protected from liability with respect to spousal waivers wherever they are permitted or required if prescribed information is given to the spouse or the prescribed waiver is used.

20. Pre-retirement Death Benefit

a) Please see comments on the definition of spouse in comments under #19 (Joint and Survivor Pension Benefit).

b) Provision must be made for death benefits in respect of the portion of the pension that is not yet in pay in cases of phased retirement.

c) See comments on spousal waivers under #19 (Joint and Survivor Pension Benefit) above. We are especially concerned about waivers given a long time in advance unless they are made pursuant to a negotiated domestic agreement with legal advice to both the member and non-member spouse.

21. Portability of Pension Benefits

We suggest that portability should be available to plan members only when the member has ceased to be an employee. In the Principle as drafted the member might be an employee but not an active member, and so entitled to portability (e. g. the member is accruing benefits under another plan of the same employer).

22. Pension Splitting on Breakdown of Spousal Relationship

a) This is a costly and complex exercise in most jurisdictions for the member and spouse, and for the plan, exacerbated by the different definitions of spouse, and the distinction between rights of property equalization and support obligations under family law. It is essential that there be clarification and uniformity, and that there be ease of administration.

Clarification and simplicity should be sought as to the share of the member's pension to which the spouse could be entitled, the date as of which the member's pension is valued, the basis of the valuation (i.e. whether member's pension is valued on a termination basis), the timing of the settlement of the rights of the spouse, the treatment of the spouse if he

or she is entitled to a pension from the plan (i.e. whether the spouse's pension is based on his or her lifetime rather than that of the member), the valuation of the share of the portion of the pension remaining with the member, and the rights of each party on the death of the other.

Generally we support immediate settlement, and the separation of the rights of the member and spouse so that the death of one spouse does not affect the rights of the other. We believe the parties to most relationship breakdown situations would agree. The legislation should not preclude more complex arrangements, for example deferred settlement and different rights on death, if the plan permits and the parties agree or are so ordered by a court. However, the employer should not be required to make such arrangements available under the plan.

b) We recognize that it is the role of family law legislation, and not of pension legislation, to determine the division of family assets between the parties to a spousal relationship that has broken down. There are a number of factors that the court takes into account in making this determination. However, employers provide pension plans so that their employees can retire with a reasonable income, and as a human resource tool to encourage retention of employees. Accordingly, some employers are strongly opposed to providing a non-member spouse with more than 50% of the pension credits accrued by the member during the relationship. Allowing the court flexibility in dividing pension credits, which might well extend beyond the portion of the pension accrued during the spousal relationship, but not allowing the parties to agree by way of a separation agreement, is probably an acceptable compromise.

c) We note that the CIA officially supports deferred settlement. We much prefer immediate settlement for ease of administration and finality of settlement of the issues between spouses. However, as indicated above, a deferred pension could be an option under the plan if the employer wishes to offer it and the rules are clear.

d) It is also essential that the plan itself, and by extension the other members of the plan, are not prejudiced by a division of the member's pension with his or her spouse.

23. Locking In

The ACPM has been considering this issue for some time. A survey of our members has indicated that the preponderance of those responding were opposed to unlocking any further than in the circumstances contemplated in the Principles (see Glossary). Some employers are adamantly opposed to unlocking. They want their pension plan to provide pensions. We also note the benefits of assured creditor protection. On the other hand, we appreciate that

there can be pressure from members to unlock pensions, certainly after they terminate employment, and we recognize the pressure governments and regulators are under in respect of unlocking.

It is unlikely that there will be unanimity in this matter.

24. Pension Funds Exempt from Execution, Seizure

We concur in principle. There are obviously some exceptions in the case of spousal relationship breakdown and family support obligations. We observe that the unlocking of pension plans could render this Principle, which is designed to creditor-proof pension monies, ineffective in some situations.

25. Sale of Business

a) We believe that a member should be offered portability in a sale situation whenever the member is in a pension plan and unable to accrue further benefits; i.e., where the assets and liabilities are not transferred to a purchaser's plan and the member has ceased to be an employee of the employer sponsoring the vendor's plan.

b) There must be provision for the transfer of assets and liabilities in a sale of business situation. It should be clear that the successor plan may provide benefits of equal value, and not be required to provide identical benefits. This is a further area where there may need to be a legislative override of the pension trust.

c) There seems little logic in having different rules for asset transfers on mergers of plans sponsored by a single employer or related employers and asset transfers on the sale of a business.

26. Successor Pension Plans

a) An employer should be entitled to wind up a plan and commence a new plan, as is currently permitted in Quebec. The original prohibition in Ontario, which is a product of a judicial decision, arose from the concern that an employer would wind up a plan for the sole purpose of gaining access to the surplus. Given the surplus sharing model in the Principles, and for that matter under existing legislation, there is little reason to perpetuate the prohibition.

b) Discretion in regulatory authority to wind up a plan when there are no active members is objectionable. The mandatory winding up of a plan which is either in surplus or in a deficit can be problematic. The circumstances for mandatory wind up should be set out.

c) It should be possible to amend a plan to include new members or new groups of members, notwithstanding the pension trust. Again this is an area where the legislation may need to override the common law of trusts.

27. Consolidation and Division of Pension Plans

a) More detail is required before we can make meaningful comments.

b) The second bulleted point is difficult to understand or administer. It needs clarification.

c) The ability to merge pension plans with a full consolidation of assets and liabilities is essential in certain circumstances. The current barriers to plan mergers should be removed. Legislation is needed to supersede the law of trusts in this respect. Please see our second threshold comment on page 5 of this Letter.

28. Conversion of Pension Plans

a) We would want an opportunity to comment on the regulations. The ability to freeze pension benefits at the existing level with respect to salaries as the basis for conversion should not be prohibited, nor should the administrator be precluded from purchasing annuities for those members who choose not to convert. The key to fair plan conversions is to give adequate information to members.

b) See comments on #4 (Plan Amendments).

29. Members' Benefits

a) We do not understand what is contemplated by the Principle. If it is intended for group terminations then the concept of group terminations will have to be defined, as well the benefits clarified. Presumably the terminations would be in circumstances that presently call for a partial wind up. In that case, the circumstances would have to be much more clearly defined than the current provisions.

If on the other hand the provision is intended to encompass individual terminations, is a different calculation of commuted values contemplated? Wouldn't this apply to all terminations except those for cause?

b) As to the benefits, is a substitute for grow-in intended? We are opposed to grow-in in that it is anti-competitive and discourages employers in non-bargained plans from offering early retirement benefits. We suggest that grow-in, as any special benefits on group terminations, can be negotiated in bargained plans, if the members consider it to be essential.

c) In general we do not support giving additional benefits from a pension plan on a sale of business or plan termination, apart from immediate vesting if portability is available. Severance obligations should be encompassed under employment standards legislation.

30. Simplified Pension Plans

We support the concept of simplified rules for certain defined contribution pension plans. Uniformity of approach will be key. We observe that Quebec's Simplified DC Plan option was in effect for several years, with limited success. The Quebec Council of the ACPM has worked with the Régie des rentes to help develop a modified version, which came into effect June 3, 2004. If this revised model attracts more interest among smaller and medium sized employers, it will be a useful model for the Model Law Principles.

Any simplified defined contribution plan must not be inconsistent with the CAP Guidelines.

31. Flexible Pension Plans

We support this Principle which appears to follow the existing CAPSA policy.

32. Plan Termination

a) We support the elimination of the concept of partial wind up for a number of reasons. First, we do not believe one group of terminated members should be advantaged vis-a-vis other terminated members, or for that matter, the ongoing members and retirees. Secondly, the uncertainty in respect of the circumstances calling for a partial wind up has given rise to much costly litigation, which has resolved very little except for the parties involved, and we are sure there will be more litigation on these matters if the Supreme Court of Canada determines that surplus must be distributed on a partial wind up in the *Monsanto* case. Thirdly, the issues as to delayed payment of benefits and the distribution of surplus can be seriously problematic for plans with either substantial deficits or substantial surpluses.

b) We are, however, concerned that Ontario and/or Nova Scotia may choose to retain the concept of grow-in. This would probably result in the retention of the concept of partial wind-up, with all its problems, including surplus, in those jurisdictions.

c) The regulator should not have the discretion to wind up a plan with no active members except in very specific circumstances; for example, where the company has ceased to carry on business in Canada. This power can be problematic if the plan is either in a substantial surplus or a substantial deficit. Moreover it should be possible to amend a plan to include new members or new groups of members.

d) The ability of a regulator to wind up a plan in respect of which there is a contravention of an Act, regulation, decision, order or direction of a regulatory authority is far too broad. We suspect that most if not all plans will likely be in contravention of some aspect of this highly regulated and complex industry, if only with respect to a time limit. Granting the regulator such broad discretion would create inequities, since it is doubtful such discretion would or could be exercised evenly.

e) We agree with full funding of plan on wind up. We caution against placing the obligation to fully fund the plan in priority to other creditors. See comments on #11 (Pension Fund Assets) above.

f) Provision for the payment of benefits of unlocatable members to a public agency would be very helpful. We also suggest that this Principle be expanded to cover all situations when a former plan member cannot be located. We assume that payment would be made to a Public Trustee. Some thought needs to go into the details as well as consultation with the offices of the various Public Trustees. Again the uniformity of approach will be key. British Columbia's approach to unclaimed property should be considered as a viable alternative.

33. Surplus

We support many aspects of this Principle, as the industry has learned to deal with surplus sharing on the basis as set out. However, we have some issues:

a) We believe that the plan text should govern entitlement to surplus. Employers, or plan members, should be entitled to the entire surplus if there is clear legal entitlement. We believe employers will require this relief from what they otherwise see as expropriation in order to gain their support of the Principles. For employers the issue is symmetry: if they have a responsibility for funding the plan, they should be entitled to the surplus.

The question then becomes whether legal entitlement is based upon the historic plan documents, or the most recently filed document. We believe that the most recent plan document in most cases reflects the intention of the employer. This is not only simpler and less costly, it also does not bind the employer in today's circumstances to decisions that may or may

not have been thoroughly thought out in the distant past, when circumstances may have been very different. If the most recently filed document governs, there must be the possibility of amending the plan to confer surplus on wind up to the employer. Given the issues with respect to locating historic plan documents, we suggest that a plan amendment relating to surplus entitlement should be permissible, providing that the plan provides for such an amendment, and providing that notice is given to all members, including retirees, before the effective date of the amendment, and that a significant percentage (perhaps 33-1/3%) do not object. The plan amendment could be restricted to dealing with surplus arising after the effective date of the plan amendment.

We observe that restricting the use of surplus by the employer not only leads logically and inevitably to underfunding, but also is a major factor in the movement away from defined benefit pension plans.

b) There are some clear improvements on the provisions in existing pension legislation, assuming that a 66-2/3% member consent regime is the right path. We strongly support the trust (or civil law equivalent) override when it comes to the distribution of surplus on the basis of member consent, to counteract the TecSyn decision.

c) Useful provisions are:

   i) The ability to withdraw surplus in an ongoing plan on the same basis as from a wound up plan. However there should be a provision for a reasonable cushion.

   ii) Flexibility as to the level of consent for non-active members. However, beneficiaries should be included with the group of inactive members. Creating a separate category for beneficiaries may put the “deal” in the hands of a few people who have little concern for members or non-active members.

   iii) The availability of arbitration for both the employer and the members is useful and fair.

   iv) The binding nature of a decision of a regulatory authority or dispute resolution board on other stakeholders is a helpful provision.

d) Members and other beneficiaries should not be deemed to own the surplus as a default. This would encourage members to delay or refuse consent as a bargaining technique. Delay should force arbitration, whoever is responsible for the delay.

e) We suggest that there be specific provisions permitting regulators to appoint representatives for negotiation as in administrative proceedings, arbitrations, court proceedings and class action lawsuits.

34. Appointment of Plan Administrator

a) This power is much too broad if an administrator can be appointed because of non-compliance. To justify invoking the power to appoint an administrator, non-compliance should have the potential to materially and adversely affect the interests of plan members or beneficiaries.

b) Insolvency needs to be defined.

c) In all cases notice should first be given to the existing administrator and the employer.

35. Powers of the Regulatory Authority

Some of the powers given are far too broad. We note that there is no direct accountability of the regulatory authorities in respect of their exercise of powers. In particular we object to:

- The unrestricted delegation of powers. There should be no delegation of policy-making or rule-making power.

- Assessment of regulated persons. This amounts to taxation without representation and without the necessity of justification. We are also unsure of who is encompassed by "regulated persons".

36. Inspections

a) We note very broad powers and the absence of accountability.

b) The Principle reads as though it would override solicitor-client privilege.

c) Power to order "any person" to pay the costs of inspections is much too broad.

37. Rules

a) The ACPM is on record as supporting a rule-making power as a way to rapidly respond to industry developments and to achieve uniformity without going through protracted political processes. However, this support is conditional on establishing an adequate consultation process and ensuring a high degree of rule-maker expertise.

b) The role of CAPSA in the process needs to be defined. Uniformity of legislation can easily and rapidly be undermined by regulatory rules and policies of individual regulators.

38. Policies

The power to make policies should require consultation and expertise, as well as reference to CAPSA. See Comments on #37 (Rules).

39. Agreements with Other Jurisdictions

This is a useful and necessary provision unless there is a uniform or single statute.

40. Reporting by Advisors

a) We are strongly opposed to mandatory whistle-blowing by advisors. This impedes the open atmosphere between clients and their advisors, and would add considerably to the cost of advisors. We believe advisors should use their best efforts to persuade their clients to comply with the law, and if they do not in a material way the advisor must resign.

The non-compliance matters that put the members at most risk are two: failure to fund, and imprudent investments. Failure to fund as required by law can be addressed by placing the responsibility squarely upon the administrator, where it belongs. It is unlikely that any but the most egregious of investments would be reported in any event, since judgment calls are involved. What needs to happen is for those individuals involved in administering the investments of the plan to be made aware of their responsibility and personal liability.

b) We question whether this provision is intended to apply to legal counsel, which would be problematic and unprecedented.

41. Directions of Compliance

The power is useful, but the provision for requiring immediate compliance is too broad. The harm to plan members or other plan beneficiaries should be restricted to circumstances where the prejudice would be significant or do irreparable harm.

42. Objections and Appeals

We generally support the existence of an expert regulatory tribunal for an appeal from a decision of the regulatory authority, on the basis of cost, speed and expertise. We stress the need for expertise on the tribunal. We appreciate that this may cause additional costs in some jurisdictions, but submit that the costs of

tribunals to the government and to litigants are less than the costs of protracted litigation through the courts, especially when the cost of delays is taken into account.

43. Appeals by Regulatory Authority

We concur that there should be rights of appeal to the courts, by the regulatory authority and by all parties to a proceeding. This may add costs to a disputed matter, but increases the chances of uniform judicial decisions**.**

44. Offences and Punishment

We strongly urge that there be a limitation period for bringing regulatory proceedings. We tentatively suggest 5 years ***after the occurrence of the event***. Employers and administrators are placed in an impossible position when regulatory proceedings are commenced years after the event, when records may no longer exist or can be located, professional advisors may have changed, and all those with any knowledge are gone from the scene. Alternatively such a provision could be related to statutes of limitation in the various jurisdictions, although that would be a less preferred solution because of lack of uniformity.

45. Regulations

This is obviously a necessary provision. ***We note that it is as important for regulations to be uniform as it is the statute if the goal of uniformity to ease administration is to be achieved.***

46. Review of the Act

We support a review of the statute and of the regulations every five years. However, there needs to be a commitment to keeping the statute and regulations uniform enshrined in the legislation, and a process established to ensure this happens. Please see our comments above in Part I.

PART III- NEXT STEPS

We believe that after CAPSA has reviewed the comments and revised the Model Law Principles, which we would hope could take place over the summer, the next steps should be to:

- Arrange for the drafting of a Model or Uniform statute, and regulations. Industry resources could be enlisted to assist legislative counsel.

- Release draft legislation for an extensive consultation period.

- Have CAPSA members brief their individual Ministers, and find a champion or champions.

- Arrange a meeting with the Ministers who are responsible for pensions in the various jurisdictions and persuade them of the need:

  - for legislated solutions to the troublesome issues facing the pension industry as a result of judicial decisions;

  - for legislation to achieve initial harmonization;

  - for agreement in principle as to how to keep the legislative and regulatory systems harmonized yet responsive to the changing needs and practices of the industry;

  - to minimize jurisdictional differences.

- Discuss with tax authorities any necessary amendments to the Income Tax Act or regulations.

We will be happy to assist in any way with the foregoing, and would, of course, be pleased to meet with CAPSA to discuss our comments and approach.

Sincerely

Priscilla H. Healy
Chair, Model Law Task Force
Association of Canadian Pension Management

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APPENDIX

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