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The Association of Canadian Pension Management
L'Association canadienne des administrateurs de régimes de retraite

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CAPSA Secretariat
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Via email: capsa-acor@fsrao.ca

To Whom It May Concern:

RE: CAPSA Guideline No. 3 – Guidelines for Capital Accumulation Plans (CAPs)

ACPM represents plan sponsors, administrators and trustees in conjunction with their service providers. Our membership manages retirement income plans that cover millions of plan members and includes plans of all sizes and types.

We appreciate the opportunity to comment on the Draft Guidelines. Much has changed in the nearly twenty years since the CAP Guidelines were released in 2004 (the "2004 Guidelines"). We welcome their modernization and update. However, we are surprised by many of the changes that were made ***after*** the extensive work by the industry working group in which we participated.

The Draft Guidelines change the balance that exists in the 2004 Guidelines in a manner that will give many employers pause about starting or continuing CAP plans that are not Defined Contribution (DC) pension plans. We are concerned that if CAPSA finalizes the Draft Guidelines in their current form, even the sponsors of DC pension plans might rethink those plans.

CAP Sponsor as Fiduciary

As we read the 2004 Guidelines, they operationalize the obligations of the administrator of a DC pension plan and apply them to all CAPs, whether or not a DC pension plan. The Draft Guidelines go further and characterize the sponsor as a fiduciary. The administrator of a pension plan is subject to a statutory standard of care in the plan's administration and investment; some but not all legislation characterizes the administrator as a fiduciary. In some cases, the courts have considered the administrator's obligations from a fiduciary perspective.

Although pension standards legislation imposes a standard of care that is derived from the law of fiduciaries, we think that considerable caution should be exercised in characterizing all CAP sponsors as fiduciaries. There are several reasons for caution.

First, even for pension plans, the legal framework distinguishes between the non-fiduciary employer and the fiduciary administrator. As we read the Draft Guidelines, they would characterize all CAP sponsors' actions as subject to fiduciary duty.

We are not aware of any court decision that would have such an effect; similarly, we are not aware of any court decisions that articulate some of the factors in section 1.3.1[1].

Second, CAPs are conceptually similar but their legal foundations differ considerably. Among the pension regulators within CAPSA, their jurisdiction does not extend beyond pension plans, a point that the courts have confirmed. The Canada Revenue Agency's jurisdiction does not extend to fiduciary duty. While guidance is appreciated, CAPSA is not in a position to determine who is or is not a fiduciary, as determining whether a fiduciary relationship exists is a legal test that is the sole purview of the courts.

Third, CAPSA can achieve the same results without characterizing sponsors as fiduciaries. It is conceivable that a sponsor might have all of the duties that the Draft Guideline describes without being a fiduciary and, instead, being subject to a high standard of care as might be determined by the courts.

Fiduciary versus Consumer Protection

While the draft asserts that the sponsor is a fiduciary, it nonetheless seems heavily informed by a consumer protection model. We are forced to ask which of the two models – fiduciary or consumer protection – should form the basis for the Guidelines. Given that the courts determine the fiduciary status, it would be preferable for the Draft Guidelines to be grounded in a consumer protection model, and leave issues of fiduciary duty to the courts.

Plan Sponsor versus Service Provider

The Draft Guidelines direct virtually all compliance obligations to the CAP sponsor. In doing so, they follow the model of pension standards legislation with its embedded concept of an administrator that might or might not delegate its obligations to service providers.

In practice, a few large CAP sponsors may be capable of operating their CAP without external service providers. But that top-down model from the pension world need not be the model for non-pension CAPs. The vast majority of CAP sponsors rely heavily on the service provider and, in many cases, are a consultant to the plan sponsor. For those plans, the model is a three-pointed triangle among sponsor, service provider and consultant. Within that triangle, it is important to note that, fundamentally, the sponsor makes certain design choices but the CAP is operated by the service provider with the assistance of the sponsor. The service provider role is more akin to that of the administrator of a multi-employer pension plan. As such, outside of the jumbo CAP sponsors who can (and might or might not) operate their CAPs without external assistance, we wonder whether some of the guidance to plan sponsors would be more appropriately directed to service providers alone. That point is all the more pressing given the relatively few choices among service providers and the consolidated nature of their businesses, the result of which is that many CAP sponsors have little bargaining power with a provider.

[1] The list of factors reads: "i. whether members contribute; ii. whether facilities to hold contributions (along with any investment returns) are established by the CAP sponsor; iii. the discretionary authority of CAP sponsors to make decisions on behalf of CAP members (including what investments to make available and the level of fees that will be charged to members), along with the financial impact of these decisions on CAP members; iv. the imbalance between CAP sponsors and CAP members in their ability to negotiate terms with and access information from service providers; v. the varying levels of financial literacy among CAP members; and vi. the reliance and expectation of trust by CAP members (often including by virtue of the employment relationship) on CAP sponsors."

Section 1.3.1 iv refers to an imbalance between sponsors and members in their ability to negotiate terms with, and access information from, service providers. This is not always true. Many service providers have a fixed product that they offer in the market. Those products allow smaller employers to provide a CAP to their employees without which they would not be able to deliver. There is little difference between sponsor and member ability to negotiate and access information.

That section also suggests that the CAP sponsor "should be continuously engaged in fostering the achievement of the intended member outcomes". If the sole activity of the sponsor is operating the CAP, we agree. But such a sponsor is rare. For all other employers, it is important to recognize that continuous engagement is not possible. It is for that reason that employers hire service providers and consultants; engagement – but not continuous engagement - falls to them. Similarly, section 3 refers to "ongoing member education". It would be helpful if CAPSA would articulate what it sees as acceptable examples of ongoing member education and continuous engagement bearing in mind that CAPs are voluntary employer-sponsored arrangements for employees. CAPSA may also wish to account for the various ways member education can be delivered (e.g., virtually, in-person, print).

Section 1.3.2 states that service providers should follow these guidelines. It seems to us important that service providers be bound to the guidelines to the same extent that sponsors are. However, it is not clear whether CAPSA is suggesting that service providers should follow the guidelines irrespective of any statutory or contractual obligation to do so. While CAP Guidelines may apply to service providers, service providers will always need to follow applicable legal requirements. These requirements may be explicitly or implicitly incorporated into service agreements negotiated between service providers and CAP sponsors.

On a related point, it is not clear if a sponsor is responsible for monitoring the service provider's extra-contractual obligations. Many plan sponsors would not be in a position to do so, such that any requirement to do so would act to dissuade employers from providing CAPs. The regulatory burden of being plan sponsor would encourage the employer to increase employee compensation and leave the employees to save and invest as they see fit**.**

Governance

Section 2.1.2 refers to the sponsor establishing a risk management framework and a dispute resolution process. We would be interested in CAPSA expanding its views on these points, as risk management is inherent in fund selection, but the kinds of issues that might be in dispute in a CAP (such as whether a member enrolled or elected a particular contribution rate) are far simpler than they are in defined benefit pension plans. CAPSA may also wish to account for provinces that may require defined contribution pension plans to have governance policies, as governance frameworks would need to comply with these requirements.

The requirements outlined in section 2.1.2 may cause small CAP sponsors to rethink their CAP offerings and disincentivize the establishment of new CAPs due to cost and added burden. CAPSA may wish to reconsider the requirements in this section or adopt wording that accounts for the size and complexity of the CAP to reduce the burden on smaller CAPs.

Consideration should also be given to the establishment of a governance framework for smaller plan sponsors as the framework as presented may be too burdensome and discourage plan sponsors from providing a CAP.

Automatic Features

We are interested in learning more about CAPSA's view of default elections at termination of employment and retirement - in particular, what it considers to be appropriate defaults or what factors would determine appropriate defaults.

Section 2.1.3 refers to automatic escalation of member contributions but does not refer to automatic contributions. We understand that the industry working group proposed automatic contribution rates in which a member would have a higher contribution rate as the default subject to the member's right to elect a lower contribution rate. Given the research concerning the success of well-considered defaults in creating positive outcomes, we think CAPSA should confirm the acceptability of automatic contribution rates and, indeed, encourage them.

Maintenance and Retention of Records

Records are another area in which CAPs fundamentally differ from pension plans. In many cases, CAP records are created and held by the service provider from the outset. Some service providers take the position that even though the records are created on delegation from the plan sponsor, the records are not the plan sponsor's and are not to be made generally available to the plan sponsor and, instead, the sponsor may request a piece of particular information. That model presents various difficulties, including the service provider's own records retention schedule and willingness to make records available to the sponsor or a replacement service provider at the end of the provider's retention schedule. Because CAPs have more uniformity across plans than do pension plans, we think it would be appropriate for CAPSA to articulate what records in its view should be retained, and that who retains them should be determined by who creates them, with further input from CAPSA as to how long they should be retained and by whom they should be accessible.

On another point, it is important to note that members have a role concerning the accuracy of records. The Draft Guidelines should be revised to specify that members are required to inform the plan sponsor and service provider of communications errors, and to provide notice when their personal information changes, as set out in Guideline Number 8.

Fees and Expenses

The Draft Guideline notes that fee disclosure should include the impact fees have on account balances and potential retirement income (e.g., section 3.4). The academic literature shows that all other things being equal, lower fees mean higher returns. But that statement does not tell the entire story.

Investing is never free; even the lowest cost investors are subject to various fees and expenses. What is sometimes advertised as "free" investing has many hidden costs that are not explained to the user. Some discounted fees have other risks attached to them, such as the risks of securities lending, in which case the relevant issue is whether the "owner" is advised of or aware of the securities lending and participates in the upside of those risks.

Most fees in CAPs are bundled to some extent. As CAPSA acknowledged, member engagement is highly relevant to the success of a plan. Part of that engagement depends on the service provider, e.g., whether its website is easy to use, tools are intuitive and offer meaningful output, phone line is answered quickly etc. Developing and maintaining that engagement costs money, and the provider rightly looks to fees to recover the related costs and make a reasonable profit.

Required disclosure that itemizes each type of fee in section 3.4 could be overwhelming. In our view, with the exception of fees for discrete transactions, it would be preferable if all fees are reported to members as a single amount or percentage on a bundled basis. The components of the bundle should be set out and explained but they should not be the focus of the disclosure. Conversely, the breakdown of those fees is important for the sponsor in order for it to understand what it is agreeing to and what it is asking members to pay for.

Throughout the draft, CAPSA focuses on whether fees come with justifiable tangible benefits for members. We think that looking to what is being provided in exchange for fees is appropriate. But the meaning of "tangible benefits" is not clear, particularly as it is not feasible for any sponsor to continuously review the offerings of possible service providers. We are interested in CAPSA's views of relevant metrics. For example, should fee benchmarking be against plans with similar numbers of members and assets, against the lowest fees from the provider, against the lowest fees for that product in the market, against retail fees for similar products, etc.?

Decision-making Tools and Investment Advice

Tools and investment advice are two other areas in which much of the work is done by service providers. Calculators and projection tools are of particular note. A plan sponsor that has used the same service provider for a long time is inevitably in the hands of the service provider as the provider adds new calculators and projection tools. Few sponsors are in a position to assess the appropriateness of assumptions or to review them. We agree that assumptions should be disclosed and clarified that different assumptions will affect results. Indeed, some sensitivity analysis might be helpful, such as the impact of a 1% change in investment returns. Similarly, sponsors cannot assess the quality of asset allocation or financial planning models. The burden of assessing the tools is placed on the wrong entity. Section 6.3 notes that CAP sponsors should periodically review the performance of its service providers, including those providing financial planning or investment advice. This section might be interpreted as applying only to recordkeepers. We believe the requirements of this section should apply to all intermediaries that provide support to the plan since members may pay fees for their services.

Ongoing Communication to CAP Members

Some of the information that you identify in section 5 for inclusion on member statements is not amenable to your description of "clear, first-page content". In particular, it may be overly ambitious to fit all of items iii. to vi. and ix. in periodic statements. We think that much of that information is better articulated in other communications to members or information that is available on demand by members.

With respect to reports on material changes in section 5.2.2, we agree that changes to investment options should typically be provided in advance. However, that is not the case for all other changes, and we caution against an overarching statement that is stricter than the legal requirements concerning pension plan amendments in some jurisdictions.

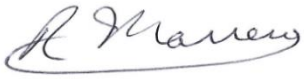
Decumulation

The review of this Guideline presented opportunities to stress the importance of decumulation and we strongly suggest that this be incorporated. For example, in section 3.1.2, which outlines the responsibilities of members, CAPSA could include responsibilities about selecting appropriate options at termination or retirement. Furthermore, section 6.1 notes that the sponsor may periodically review the CAP and its features to ensure they meet the CAP's purpose and objectives. CAPSA could reference decumulation in that section to ensure decumulation options are considered when CAP sponsors review and assess the appropriateness of plan features.

We believe the reference to "duty of care" in section 7.1 should be removed as CAPSA cannot set a duty of care. Further, the reference to a standard of care may cause plan sponsors to reconsider whether they offer decumulation options.

Thank you for the consideration of our comments and we can be available if we can be of further assistance.

Sincerely,



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