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Via email: capsa-acor@fsrao.ca

Angela Mazerolle
Chair, CAPSA CAP Guidelines
CAPSA Secretariat
25 Sheppard Avenue West, Box 21 – Suite 100
Toronto, ON M2N 6S6

Dear Ms. Mazerolle,

Re: CAPSA Guideline No. 3 - Guidelines for Capital Accumulation Plans

The Canadian Bar Association Pension and Benefits Law Section (CBA Section) is pleased to comment on the draft CAPSA Guideline No. 3 - Guidelines for Capital Accumulation Plans (Draft CAP Guidelines) released on May 13, 2022.

The CBA is a national association of over 37,000 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 and include counsel who advise pension and benefit plan administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

1. Overview

We first offer general comments on the scope and application of the Draft CAP Guidelines. We then respond to several specific areas in the Draft CAP Guidelines.

Importance of Proportionality and Flexibility

The size and design of CAPs and the expertise and resources of CAP sponsors varies greatly. In our view, proportionality and flexibility are important when articulating best practices for CAPs, and these overarching principles animate our comments below.

The best practices discussed in the Draft CAP Guidelines appear to be directed at larger CAPs (or employers) with extensive resources. Not all CAPs have these resources. In addition, many CAP sponsors that wish to help facilitate their employees' retirement security have elected to offer employees certain types of CAPs due to perceived cost efficiencies.

We are concerned that the prescriptive guidance in the Draft CAP Guidelines (and associated implementation and oversight costs), could make the offering and maintenance of a CAP less attractive to certain employers. Given the diversity of CAPs and CAP sponsors, the cost of implementing specific best practices must not outweigh their benefits and must be proportionate to the nature and type of the plan.

There is no one-size-fits-all structure for CAPs. CAPSA Guideline No. 4 - Pension Plan Governance acknowledges this and recommends principles-based guidelines for plan administrators. We encourage CAPSA to adopt a more principles-based approach to the CAP Guidelines so that plan administrators can implement processes that are appropriate, efficient and cost-effective given the type and size of the plan, complexity of the investments and resources available. Guidance should be sufficiently flexible to allow plan sponsors to tailor the administration and governance of their specific CAP.

Definition of CAP

As CAPSA has recognized, employers may offer a number of different workplace plans or arrangements for employees including defined contribution pension plans (DCPP), registered retirement savings plans (RRSP), deferred profit sharing plans (DPSP), registered education savings plans (RESP), locked-in retirement accounts (LIRA), registered retirement income funds (RRIF), life income funds (LIF), pooled retirement pension plans (PRPP), voluntary retirement savings plans (VRSP), Tax Free Savings Accounts (TFSA), and others.

While we acknowledge the breadth of plans offered, we query whether certain types of plans should be expressly referenced in the CAP Guidelines considering the focus in the Guidelines on savings and decumulation. For example, many TFSA holders use these plans for short-term savings so much of the commentary on decumulation, as an example, is not applicable. Also, the purpose of an RESP varies greatly from retirement plans and, as such, we query whether sponsors who provide employees with this plan should be subject to the same best practices as DCPP sponsors, for example.

Application of other Laws

As discussed during our June 2, 2022 CAPSA Industry Stakeholder meeting, due to the nature of many CAPs, CAP sponsors and their service providers may be subject to other laws, such as insurance and securities laws that impose certain requirements and restrictions on a CAP and help protect plan members.

Guidance must recognize other applicable laws and be careful not to overburden plans and plan sponsors, particularly where existing safeguards may already exist (e.g., as it relates to information communicated to CAP members). In this regard, the 2004 CAP Guideline was issued by the Joint Forum of Financial Market Regulators and benefited from the input of the Canadian Council of Insurance Regulators and the Canadian Securities Administrators. We would encourage a similar consultative and collaborative approach to develop Draft CAP Guidelines.

2. Fiduciary Obligations of a CAP Sponsor

Section 1.3.1 of the Draft CAP Guidelines contains a general proposition that “[...] all CAP sponsors have some level of common law fiduciary responsibility towards CAP members” and identifies certain factors that would determine the nature and degree of that responsibility.

The Supreme Court of Canada has observed that there are certain categories of per se fiduciary relationships where a fiduciary obligation has already been held by the courts to exist (between lawyers and clients, trustees and beneficiaries, agents and principals etc.). However, the categories of fiduciary relationships are never closed, and an ad hoc fiduciary relationship may be found when considering the specific circumstances and certain characteristics in relationships where a fiduciary obligation has been imposed by the courts.¹

To our knowledge, there is no reported case in Canada supporting the general proposition that all CAP sponsors have some level of common law fiduciary responsibility towards CAP members (whether a per se or ad hoc fiduciary relationship). As such, we suggest that the law is not sufficiently clear for a making a definitive statement about the existence or scope of a CAP sponsor's common law fiduciary obligations, particularly given the breadth of plans captured by the CAP definition and the fact-specific nature of a determination that such a duty exists.

In making this observation, we appreciate that it may be prudent for a CAP sponsor to carry out at least certain of its functions based on the expectation that common law fiduciary obligations could potentially be found. However, we recommend softening the current language in the Draft CAP Guidelines, both on a CAP sponsor's common law fiduciary obligations and related references to an associated "duty of care" (e.g., Section 7.1, as it pertains to inactive CAP members).

Section 1.3.1 of the Draft CAP Guideline also sets out a list of factors relevant for determining the nature and degree of a CAP sponsor's responsibility. As some CAPs are made available to employees on a completely voluntary basis with no employer contributions, we recommend including the following factors in the list: (i) whether member contributions are voluntary or mandatory; and (ii) whether the employer contributes.

3. Role and Oversight of Service Providers

Section 1.3.2 of the Draft CAP Guidelines states: "To the extent that the tasks or functions within the areas of responsibility of the CAP sponsor are performed by a service provider, the service provider should follow these guidelines."

This implies the existence of an obligation for a service provider to carry out certain functions that the service provider may not be required to perform under the Income Tax Act (Canada) (e.g., as the issuer or carrier of a CAP) or pursuant to a contractual arrangement it has entered into with the CAP sponsor. The source of this type of legal obligation is unclear to us and we suggest deleting language suggestive of an obligation by the service provider to follow the CAP guidelines. However, presumably the CAP Guidelines may help inform the scope and nature of delegation from a CAP sponsor to the service provider (and hence, the service provider's contractual obligations) and section 1.3.2 could be amended to give such a recommendation.

Similarly, section 1.3.1 of the Draft CAP Guideline indicates that: "Even where CAP sponsors have delegated certain tasks or functions to service providers, it is important to note that the CAP sponsor retains the ultimate responsibility for administering and overseeing the CAP [...]."

The indication that a CAP sponsor retains "ultimate responsibility" in respect of a CAP would appear to apply a fiduciary lens to the performance of all CAP functions. However, as recognized by the Draft CAP Guidelines, the nature and degree of any fiduciary responsibility of the CAP sponsor would depend on the circumstances. Further, the term "Service Provider" is defined broadly in the

¹ *Frame v. Smith*, [1987] 2 S.C.R. 99.

Draft CAP Guidelines and would, for example, appear to capture the issuer of an RRSP or a carrier of an RRIF who itself is subject to certain obligations for the issuance and maintenance of the CAP under the Income Tax Act (Canada) and its regulations (collectively, ITA obligations).

It is not clear if the Draft CAP Guidelines were intended to suggest that a CAP sponsor is responsible for monitoring the service provider's compliance with its CAP-related ITA obligations. In our experience, there may be practical limitations on the ability for a CAP sponsor to do so and this may not accord with the commercial expectations of the CAP sponsor.

4. Investment Options

Section 2.2 of the Draft CAP Guidelines covers investment options, including selecting funds, transfers among investment options and default options. These sections address risks and potential returns associated with options, fees and liquidity. The liquidity section could also more explicitly include considerations associated with withdrawal from an investment option, including vesting, fees, caps, suspensions and penalties.

The CBA Section recommends adding the following text to the reference to liquidity of investment options in Section 2.21:

ix. liquidity of investment options, which may include any restrictions on withdrawal from an investment option such as vesting, fees, caps, suspensions and penalties.

5. Maintenance and Retention of Records

Section 2.3 addresses CAP sponsor responsibility for preparation and maintenance of CAP records, including a document retention policy. We suggest that this section could also include recognition of the duty to maintain accurate records, including members' responsibility to notify the CAP sponsor and their service provider, if applicable, of any changes to their information or circumstances, such as contact information, marital status and beneficiary designations.

In addition, CAPSA should consider giving guidance on retention periods, while recognizing that individual regulators may also mandate or recommend specific retention periods applicable to certain documentation.

The CBA Section recommends amending Section 2.3 as follows:

The CAP sponsor should prepare and maintain the CAP records, either internally or through a service provider. The CAP sponsor should consider controls necessary to secure CAP members' personal data.

The CAP sponsor should also establish a document retention policy for the plan. The contents of a document retention policy include:

- a description of the types of documents to be retained;
- how the documents will be retained and secured; and
- how long various types of documents should be retained, bearing in mind any applicable regulatory guidance in the applicable jurisdiction.

The CAP sponsor, its service providers, and CAP members, as applicable, are also responsible for maintaining accuracy of records. CAP members should notify the CAP sponsor and the service provider, if applicable, of any changes in their information or circumstances, such as contact information, marital status and beneficiary designations.

6. Decumulation

The introduction to the Draft CAP Guidelines notes that many of the administration, investment and communication principles in the guidance apply equally in the accumulation and the decumulation phases. With the continuing development of novel ways for CAP sponsors to offer retirement income options under a CAP (including variable benefits for registered pension plans), CAP sponsors who offer such a retirement income option may face unique administration, investment and communication issues during the decumulation stage that may be very different from the accumulation stage.

CAPSA's Guideline No. 8 - Defined Contribution Pension Plans Guideline recognizes these unique decumulation considerations when, for example, discussing a plan administrator's communication obligations during the payout phase.

We suggest that the Draft CAP Guidelines similarly acknowledge that certain unique administration, investment and communication considerations may apply during the decumulation stage vis-à-vis the accumulation stage, which will necessarily depend on the type and design of the retirement income option available under the CAP.

7. Conclusion

The CBA Section appreciates the opportunity to offer these comments. We trust they are helpful, and we would be pleased to offer further details if necessary.

Yours truly,

(original letter signed by Marc-André O'Rourke for Level Yau Yan Chan)

Level Yau Yan Chan
Chair, Pensions and Benefits Law Section