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Via E-Mail capsa-acor@fsc.gov.on.ca

Davin Hall
Policy Manager (A)
CAPSA Secretariat
c/o Joint Forum Project Office
5160 Yonge Street
17th Floor, Box 85
North York, ON M2N 6L9

Dear Sirs/Mesdames:

Re: Proposed Guidelines for Capital Accumulation Plans

Bennett Jones LLP is a leading Canadian law firm with offices in Calgary, Edmonton and Toronto. We are legal counsel to a significant number of small, medium and large Canadian businesses. Bennett Jones LLP also sponsors a group registered retirement savings plan for its support staff employees.

In these capacities as a legal advisor and plan sponsor we are writing to respond to the discussion paper entitled Proposed Guidelines for Capital Accumulation Plans released by the Joint Forum of Financial Market Regulators ("Joint Forum") on April 25, 2003.

We applaud the work of the Joint Forum in attempting to rationalize and harmonize the rules applicable to capital accumulation plans ("CAPs") generally across the pension, securities and insurance regulatory regimes. We also applaud the Joint Forum's involvement of industry in the discussion and development of both the Revised Principles for Investment Disclosure in Capital Accumulation Plans as well as in the Proposed Guidelines.

Background Goals and General Concerns

The stated purposes of the Proposed Guidelines are to:

1. describe the rights and responsibilities of CAP sponsors, service providers and members;
2. ensure that CAP members have the information and assistance they need to make investment decisions in a capital accumulation plan; and



3. ensure that there is a similar regulatory result for all CAP products and services regardless of the regulatory regime that applies to them.

These are clearly legitimate and worthwhile purposes which are becoming increasingly important due to the apparent expansion in the prevalence of capital accumulation plans.

With those goals in mind, our review of the Proposed Guidelines has raised a number of concerns which we wish to express in this letter. We do not propose to make specific point-by-point commentary or express proposed wording revisions, which we understand that various others who will be submitting comments to you will have done. Rather, our comments are of a more principle-based nature, with a view to the potential implications of the implementation of the Proposed Guidelines.

Among the stated goals of the Joint Forum in developing the Principles and Guidelines for CAPs is avoidance of enactment of any new regulation while still creating certainty and clarity in the rules applicable to CAPS. We would not suggest that we favour additional regulation in the area. However, the Proposed Guidelines as drafted, while being thorough and comprehensive, lack the certainty and clarity necessary to provide proper guidance to CAP plan sponsors in addressing their implementation.

Specific Issues

The concerns this creates from our perspective include the following:

- Establishing the Guidelines as "best practices", while not having the legal authority of regulation, enunciates a standard clearly endorsed by three regulatory regimes. Without the force of regulation, this new standard will be left to be applied by the courts in any action by aggrieved plan members, with a risk of being adopted by the courts as a benchmark or minimum standard to which plan sponsors will be held;
- The implications for non-compliance by plan sponsors with each and every aspect of the Guidelines remains unclear, particularly until each of the three regulatory regimes conclusively determines the manner of implementation of the Guidelines within their sphere;
- While the Joint Forum has expressed that it did not intend to create any new or additional fiduciary obligations through the Guidelines, the courts have made it clear that the categories of fiduciary relationships continue to be expanded. The Proposed Guidelines use a great degree of "fiduciary-like" terminology, bringing the result into conflict with the stated intent. This could lead to the unintended consequence of the courts creating fiduciary duties for plan sponsors and, potentially, service providers, based on that language where either no such duties presently exist or their existence is at best arguable;
- While the Proposed Guidelines provide plan sponsors with certainty as to the various areas to be addressed by them in the administration of CAPs, the widespread use of vague and open-ended terminology (such as "prudent", "appropriate", "reasonable", "properly", and "sufficient")



provides little certainty or clarity for plan sponsors in how to actually implement the Guidelines. A plan sponsor may, in their discretion, approach the Guidelines in a manner which will ultimately be deemed insufficient because of that lack of clarity;

- Because the Guidelines provide no clear minimum standards or "safe harbours" (which we understand were specifically rejected by the Joint Forum), plan sponsors will be left to determine how to apply the Guidelines in their context while at the same time developing a "due diligence" defence to any potential claims;
- The expanding role of service providers mandated by the Guidelines will result in an inevitable reliance by plan sponsors on those providers. The Guidelines provide no clear direction on the allocation of responsibilities between sponsors and providers where the sponsor so relies. This will require that sponsors and providers expend significant energy, time and resources in developing acceptable allocations of the related risks between them, which is likely to result in higher costs for providers. Those cost increases will, either in the short term or long term, almost certainly be borne by plan sponsors and members.

Potential Implications

Ultimately, our primary concern is that the expansion of the CAP principles and guidelines into areas and types of plans where no such rules previously existed, without sufficient certainty and clarity to enable sponsors to implement the new rules in an efficient and cost effective manner, will act as a disincentive to sponsors in providing such plans. It may become much simpler and more cost effective for employers to increase cash compensation to employees and refrain from offering any such group savings vehicles. The inevitable result of this is that it will be more expensive for employees to invest as a consequence of having to do so on an individual basis. Employees will become less likely to invest for their future needs, with the resulting social policy implications.

Clearly, the implementation of the Proposed Guidelines will not result in the wholesale abolition of capital accumulation plans. However, the anecdotal commentary made by many plan sponsors with whom we have contact indicates that a large number of sponsors will consider whether it is in their organizations' best interest to continue offering such plans. They question why their organizations would subject themselves to the cost and complexity, and attendant risk, of the proposed rules simply because they choose to offer a group savings vehicle for the benefit of their employees, when other employers who offer no such advantage to their employees are not subjected to the same risks. It is clearly not to the advantage of employees to move away from group savings arrangements, nor would it be advantageous to Canadian society as a whole.

Much discussion is currently taking place in Canada, both in the area of pension benefits regulation and other areas generally, about the appropriate role of the courts in making policy decisions. The Proposed Guidelines, as drafted, leave significant areas open to interpretation by the courts. In order to encourage employers to take on the role of plan sponsor and offer group savings arrangements to their employees, the members of the Joint Forum, as the regulatory arms of the elected legislatures in Canada, have the opportunity to clearly set the policy direction for CAPs, thereby providing certainty and clarity sufficient to enable employers to make this vital decision.

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We would encourage the Joint Forum to engage in further consultation with industry, particularly plan sponsors directly involved in the provision and administration of CAPs, to develop more specific parameters within the Proposed Guidelines providing more clear direction for such sponsors. While "safe harbours" may not be appropriate in the context of non-regulation guidelines, more specific "minimum compliance" standards would at least establish a floor against which plan sponsors could evaluate whether continuing to offer a CAP to their employees is appropriate in their particular circumstances.

Thank you for the opportunity to provide the Joint Forum with our comments in respect of the Proposed Guidelines. We would be more than willing to be involved in any further discussion of the Guidelines that may occur.

Yours truly,

BENNETT JONES LLP



Christopher A. Brown

CAB/av

cc: Mr. Dennis Gartner
*Alberta Superintendent of Financial Institutions and
Assistant Deputy Minister of Pensions, Insurance and Financial Institutions*

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