ACPM/PIAC Task Force on Defined Contribution Plan Regulation

Proposed Regulatory Principles for Capital Accumulation Plans (Discussion Paper)

Submission to the Joint Forum of Financial Market Regulators' Working Committee on Investment Disclosure Capital Accumulation Plans

ACPM
The Association of Canadian Pension Management

Pension Investment Association of Canada

October 2001

October 19, 2001

Ms. Sherallyn Miller
Superintendent of Pensions
Pension Standards Branch
Ministry of Skills, Training and Labour
360 West Georgia Street, Suite 870
Vancouver, B.C. V6B 6B2

Dear Ms. Miller:

Proposed Regulatory Principles For Capital Accumulation Plans **– Report of the Joint Forum of Financial Market Regulators**

The ACPM/PIAC Joint DC Task Force (the "Task Force") is pleased to enclose its submission to the Joint Forum of Financial Market Regulators' Working Committee on Investment Disclosure in Capital Accumulation Plans (the "Joint Forum"), in response to the Joint Forum's Discussion Paper entitled "Proposed Regulatory Principles for Capital Accumulation Plans" (the "Report"). Thank you for the opportunity to comment on the Report.

Who We Are

The Task Force was formed by the Association of Canadian Pension Management (ACPM) and the Pension Investment Association of Canada (PIAC) in 2000 and previously made a submission to the Joint Forum dated August 31, 2000, entitled *"Report on Defined Contribution Plan Regulation"*. Details of who we are are found in the report proper.

The objective of the Task Force, is to provide a considered, thoughtful and broad-based position, with respect to Capital Accumulation Plans ("CAPs"), that fairly represents all stakeholder interests in the CAP industry. CAP stakeholders include: plan sponsors/employers, plan members, plan administrators and CAP providers, among others.

The Task Force is comprised of members of the ACPM and PIAC with a broad range of industry experience. Please refer to the attached Submission for a complete list of Task Force members. This Submission is based on their collective experience as stakeholders in the CAP industry regulated by pension, insurance and securities regimes.

The Report

We commend the efforts of the Joint Forum to develop principles and rules in respect of CAPs, particularly in view of the growth of CAPs and the lack of clarity of stakeholder obligations in respect of CAPs under current legislation.

Our previous submission to the Joint Forum is evidence of our interest in the area on behalf of our respective members and all stakeholders in the CAP industry. The efforts of the Joint Forum in dealing with such CAP issues are particularly welcome as we hope that uniformity in new regulation across Canada will be more likely.

While the Task Force endorses the efforts of the Joint Forum, we do have many comments to make about the specific proposals in the Report. However, before these specific proposals can be developed, we believe that there is a need to come to an understanding of certain fundamental principles applicable to the CAP regulatory framework. These principles can be summarized as follows:

1. The CAP regulatory framework must recognize and accommodate the CAP promise. The CAP promise is to provide a cost effective and convenient vehicle for the accumulation of savings for financial needs, focussing on but not necessarily limited to retirement. The CAP promise is **not** to ensure the financial security of members in their retirement.

2. There must be better recognition of the distinct roles of the employer as Plan Sponsor and as Administrator in relation to a CAP. Currently the Report blurs the distinction between these roles which causes confusion and was the source of many objections to statements/recommendations in the Report.

3. The CAP regulatory framework must acknowledge both member responsibilities and Administrator responsibilities under a CAP. In the Report, the Joint Forum refused to provide a "safe harbour" for employers and Administrators as is found under ERISA. The Task Force believes we should move beyond the debate of the merits of ERISA-type safe harbours and focus on the key issue – a recognition and understanding that CAP members must take responsibility for their investment decisions, risk tolerances etc. Accordingly there should be an appropriate and reasonable limit to employer/Administrator liability with regard to the results of member investment decisions.

4. We question the need for a mandatory Know Your Client (KYC) rule and mandatory investment advice for all CAPs. It is our belief that predominant industry practices with respect to investment education and disclosure are more than adequate.

5. The regulatory framework for CAPs should create a "level playing field" by harmonizing pension, securities and insurance regulatory regimes without adding to the regulatory burden on CAPs. If rules are properly harmonized compliance with one regime should obviate the need for compliance with additional requirements of other regimes.

The above principles, plus other specific comments on the Report, are discussed in greater detail in our Submission.

Although we may disagree with some of the statements and recommendations made in the Report, we wish to recognize the efforts of the Joint Forum in preparing the Report and, in particular, in making the process for developing regulatory principles for CAPs an open forum to ensure a rational and fair result for all concerned. This is an important matter that needs broad discussion and debate.

The Task Force would welcome the opportunity to work with the Joint Forum in further developments on this important initiative or clarification of anything within this Submission.

Respectfully submitted on behalf of the Task Force

Keith Ambachtsheer
President, ACPM

Rudy R. Dabideen
President, PIAC

Copy: Ms. Carla Adams
c/o Financial Services Commission of Ontario
5160 Yonge Street, 17th Floor, Box 85, North York, ON M2N 6L9

Table of Contents

Introduction

The ACPM/PIAC Joint DC Task Force (the "Task Force") has prepared this submission to the Joint Forum of Financial Market Regulators' Working Committee on Investment Disclosure in Capital Accumulation Plans (the "Joint Forum"), in response to the Joint Forum's Discussion Paper entitled "Proposed Regulatory Principles for Capital Accumulation Plans" (the "Report").

Who We Are

The Task Force was formed by the ACPM and PIAC in 2000 and previously made a submission to the Joint Forum dated August 31, 2000, entitled *"Report on Defined Contribution Plan Regulation"*.

The objective of the Task Force, both in its prior submission and in the enclosed submission, is to provide a considered, thoughtful and broad-based position with respect to Capital Accumulation Plans ("CAPs"), that fairly represents all stakeholder interests in the CAP industry. CAP Stakeholders include: plan sponsors, plan members, plan administrators and CAP providers, among others.

The Task Force is comprised of senior members of the ACPM and PIAC. Please refer to Appendix "B" of this Submission for a complete list of Task Force members. This response reflects the collective experience of the Task Force members as stakeholders in the CAP industry regulated by pension, insurance and securities regimes.

The Association of Canadian Pension Management's (ACPM) mission is *"to promote the growth and health of Canada's retirement income system by championing the following principles:*

- *Clarity in pension legislation, regulation and arrangements;*
- *Good governance and administration, and*
- *Balanced consideration of stakeholder interests"*.

The Pension Investment Association of Canada (PIAC) is the representative organization for pension funds in Canada in matters relating to investment. PIAC presently represents 138 Canadian pension funds that manage over $500 billion in assets for the benefit of more than eight million Canadian beneficiaries. PIAC's mission is *"to promote the financial security of pension fund beneficiaries though sound investment policy and practices"*.

Executive Summary

Our comments on the Report stem from the Task Force members' beliefs and understandings about the nature of CAPs, what they are and how they should be regulated. We believe that the Joint Forum and the Task Force (and for that matter the CAP industry) need to come to an understanding as to certain fundamental principles applicable to the regulatory framework for CAPs before the Report can be more fully developed. These principles can be summarized as follows:

1. The CAP regulatory framework must recognize and accommodate the CAP promise. The CAP promise is to provide a cost effective and convenient vehicle for the accumulation of savings for financial needs,

focussing on but not necessarily limited to retirement. The CAP promise is **not** to ensure the financial security of Members in their retirement.

2. There must be better recognition of the distinct roles of the employer as Plan Sponsor and as Administrator in relation to a CAP. Currently the Report blurs the distinction between these roles which causes confusion and was the source of many objections to statements/recommendations in the Report.

3. The CAP regulatory framework must acknowledge both Member responsibilities and Administrator responsibilities under a CAP. In the Report, the Joint Forum refused to provide a "safe harbour" for employers and Administrators as is found under ERISA. The Task Force believes we should move beyond the debate of the merits of ERISA-type safe harbours and focus on the key issue – a recognition and understanding that CAP Members must take responsibility for their investment decisions, risk tolerances etc. Accordingly there should be an appropriate and reasonable limit to employer/Administrator liability with regard to the results of Member investment decisions.

4. We question the need for a mandatory Know Your Client (KYC) rule and mandatory investment advice for all CAPs. It is our belief that predominant industry practices with respect to investment education and disclosure are more than adequate.

5. The regulatory framework for CAPs should create a "level playing field" by harmonizing pension, securities and insurance regulatory regimes without adding to the regulatory burden on CAPs. If rules are properly harmonized compliance with one regime should obviate the need for compliance with additional requirements of other regimes.

With respect to the questions raised by the Joint Forum, we believe that the statements made in the Report about the existing regulatory environment are for the most part accurate with some points of clarification required, as described in further detail in this Submission.

With respect to the proposed regulatory principles and their appropriateness and adequacy to address the needs of CAP Members, Administrators, employers and regulators, we have a number of detailed comments, highlights of which are as follows:

- The Report needs to distinguish more clearly between an Administrator's duties and an employer's duties as Plan Sponsor.

- We agree that the Items listed under *Initial Disclosure* and *Continuous Disclosure* are properly the responsibility of the Administrator, but certain items require clarification and elaboration.

- The Report needs to better acknowledge predominant industry practices in meeting the Administrator's duties with respect to investment disclosure.

- The Administrator's "investment monitoring" responsibilities should extend only to the CAP as a whole, not to suitability of investments for individual Members.

With respect to implementation, we believe that the best method of implementing the finalized regulatory principles for CAPs would be accomplished through the development of harmonized best practice guidelines.

Working with the representatives from the CAP industry, the goal of a joint industry/regulator solution would be to clarify and standardize requirements for CAPs through best practice guidelines.

We are reluctant to encourage further regulations for this industry (other than necessary conforming amendments to legislation and any necessary changes to clarify the exemptions available under securities laws) believing that sufficient regulatory infrastructure already exists and believe that communication of best practices through the industry is a better starting point which should be followed by regulation only if unsuccessful.

Fundamental Principles Applicable to CAPs

In order to better explain our response to the Report, we thought it important to articulate, at the outset, a number of fundamental principles that we believe should apply to the regulatory framework for CAPs. Understanding these principles will help to explain many of the points of departure and differing viewpoints between the statements and recommendations of the Report and those made in this Submission.

In the Report, the Joint Forum asked for feedback on (i) the accuracy of statements made in the Report, (ii) the adequacy of the proposed regulatory principles (iii) the best means of implementing the proposed regulatory principles, and (iv) the anticipated costs of implementing the proposed regulatory principles. Our response to these four questions and our more specific comments on the contents of the Report are set forth in Part D of this Submission.

We believe that unless the Joint Forum and the Task Force are able to reach a common understanding of the fundamental principles underlying CAPs, it would be virtually impossible to develop a mutually acceptable industry/regulatory solution to the proper regulatory principles for CAPs. In this regard, we believe that there are five fundamental principles underlying the regulatory framework for CAPs:

1. Understanding the CAP promise;
2. Recognizing the different roles (and duties) of the Administrator and the employer under a CAP;
3. Recognizing both Member and Administrator responsibilities under a CAP;
4. Obviating the need to impose the "know your client" rule and investment advice on all CAPs; and
5. Ensuring a "level playing field" among insurance, securities and pension regulatory regimes.

We have addressed each of these principles separately below.

1. Understanding the CAP Promise

First and foremost, any rules developed for CAPs must be consistent with the benefits promised under the CAP. Since CAPs are voluntary arrangements for employers, effective regulation of CAPs should enhance the chances of delivering the promised benefits, it should not change (increase or decrease) the amount or nature of the benefits promised.

The Report attempts to articulate the CAP promise by stating that CAP's are *"primarily intended to ensure the financial security of members in their retirement"*. This promise is a defined benefit pension promise (and we believe it even overstates that promise), **not** the CAP promise.

We articulate the CAP promise as follows:

> *"As a part of an employee's total compensation, to provide a cost-effective and convenient vehicle for the accumulation of savings for financial needs, focussing on but not necessarily limited to retirement."*

The provision of CAPs and other retirement benefits is typically an employer decision, where such plans are but one part of the total compensation employment offering to employees. The result has been that there is great variety in the number and type of retirement/savings plans made available to employees (CAPs being one type). Given that CAPS are discretionary, not mandatory, and given this variety of possible retirement/savings plan arrangements, we think it is most useful to understand CAPs and the CAP promise as being part of a continuum of retirement/savings plans.

We have attached as Appendix "A", a chart that displays this continuum. The continuum ranges from defined benefit ("DB") arrangements at one end (provided for completeness only as a DB plan is not a CAP arrangement), where the level of retirement income is defined, all the way to cash arrangements which are invested in retail products at the other end. In these "cash arrangements", the employer's involvement is limited to paying the employee compensation for investment, or depositing the money to an account of the employee's choice (discount or full service and tax-deferred or non-tax-deferred).

Between these two ends of the continuum lie CAPs which range from those where the employer directs the entire investment program and delivers an accumulated balance at retirement, through a variety of employee investment choice arrangements that can offer a set of investment choices selected by the employer/sponsor, to unlimited investment choice arrangements.[1] We refer to these in Appendix "A" as "Employer Directed DC Plans", "Selected Option DC or Savings Plans", and "Window Savings Plans" respectively. Selected Option DC Plans can offer three or four investment options, a dozen or so, or even 30 to 50 options selected by the employer/sponsor or their agent. Contributions can be employer-only, employee-only or employer-employee, and where employee contributions may be mandatory or voluntary. The diversity of options among CAPs alone is apparent.

We offer the following observations as to this continuum of retirement/savings plans:

- The choice of which, if any, arrangement along this continuum an employer chooses to make available to its employees depends on a whole range of factors, including labour negotiations, work force demographics, competitive pressures, culture, taxation, and the total compensation and benefits philosophy of the owners and/or management.
- Member cost is highest in cash arrangements due to the higher management-expense ratios of retail products. Without the group purchasing power of an employer, higher costs reduce the ultimate level of retirement income to members.
- The Administrator's investment responsibilities under a CAP (if a set of options is provided as part of the plan design determined by the employer) include: providing a reasonable range of investment options; prudent management of these options; and provision of reasonable investment information to assist Members in their investment decision-making responsibilities.

1 In our view, employer Direct DC Plans should also be considered as CAPs, although for the balance of this Submission we shall use the term "CAPs" to refer only to DC plans allowing investment selection by Members, which is comparable to the definition of CAPs used in the Report.

- The Members' investment responsibilities under a CAP include: educating themselves by reading all the information provided by the employer, Administrator or CAP Providers; augmenting this information (depending on their investment knowledge); determining their asset allocation (the biggest determinant of ultimate retirement balances); choosing the funds appropriate for them; and monitoring their investments to ensure they continue to meet their individual risk and return investment objectives that are unique to each members' risk tolerance and lifestyle objectives.
- In the current "group" market (which is very competitive), in a large majority of cases CAP Providers ensure that Members receive overall information on plan design and how the plan works, investment disclosure, profiles of the investment options, articulation of what decisions are required by members, decision-making tools, and performance commentaries.

We strongly encourage the Joint Forum to review and consider this continuum. This continuum is useful to understand the CAP promise and how it differs from the benefit promise under other types of retirement/savings plans.

We stress throughout this Submission that if the regulatory burden of offering CAPs becomes too onerous or unclear, employers will move to arrangements on this continuum that will minimize or clarify the burden. We see this as a factor in the choice of Group RRSPs over DC pension plans. Certainly small employers, who offer the bulk of the Group RRSPs, are not in a position to bear an increased cost and liability burden.

We believe that there is a high value on strengthening the retirement income system by encouraging the growth of low cost group plans, including CAPs Plan members save with the lower cost of group arrangements. Certainty in the obligations of employers and Administrators will strengthen the system; lack of clarity and/or the addition of costly obligations will weaken it.

2. Recognizing the Different Roles (and Duties) of the Administrator and the Employer/Sponsor under a CAP

In our view, the Report in some instances fails to properly recognize the different roles and responsibilities of various CAP Stakeholders. We have attempted to articulate some of the differences in roles and responsibilities, as any proposals for the regulation of CAPs must take these into account.

We use the term "Administrator" to refer to the entity with the legal responsibility for the administration (not the design) of the CAP. For example, in the case of RPPs, the entity legally responsible for plan administration and compliance is the Administrator, who is often also the employer. However, the legal responsibility of an Administrator is separate and distinct from the role an employer plays in its capacity as plan sponsor responsible for the plan design.

We use the term "employer" to refer to the employer in its capacity as Plan Sponsor throughout this Submission and the term "Plan Sponsor" has a corresponding meaning.

CAPs are usually offered through insurers, trust companies or securities dealers. The insurer, trust company or securities dealer as the case may be, is referred to herein as the "CAP Provider".

The Report makes references to fiduciary duties of employers and Administrators to employees and CAP Members throughout. We are concerned about the accuracy of those references and wish to clarify them. For example:

- The Report states that the Administrator has an overriding fiduciary duty **to the plan members** with respect to the administration of the plan and investment of the fund. In law, however, the Administrator has a fiduciary duty to all CAP Stakeholders (which includes the employer).
- The legal duty of the Administrator under pension legislation is a statutory duty of care, not a fiduciary duty. Fiduciary duties arise at common law and are fact specific – whether or not a fiduciary duty exists depends on facts such as the relationship of the parties and their reasonable expectations.
- With regard to non-RPP CAPs, there is no legislation and no certainty under common law as to the duty of employers, and we have serious concerns with the Joint Forum's simple assumption of that a fiduciary duty exists in all cases and in all circumstances. If there is such a duty, it is a common law duty and therefore will differ somewhat from the legislated duty of Administrators under pension legislation. We hope that some clarity to resolve this uncertainty will be an integral part of any final report of the Joint Forum.
- There is ample case law supporting the proposition that the employer/employee relationship is not *per se* fiduciary. Nor does an employer have any fiduciary duty with respect to the establishment or maintenance of a DC Plan (or any other CAP). If it did, it could never make an adverse amendment, could never terminate a plan, and would always have to give the maximum contribution under a CAP because the employer would have a duty to act in the best interests of the plan members. This is clearly not the case and pension legislation and jurisprudence (both Canadian and American) recognizes the dual role of the employer as Administrator and as Plan Sponsor, and recognizes the employer's ability to act in its own self-interest in areas such as plan design and plan amendments.
- There is no clarity in the law as to the duty of an agent of the employer/Administrator except in pension legislation, where the agents have the same standard of care as the Administrator. This duty is even more unclear in the case of non-RPP CAPs where the employer does nothing more than establish the plan and remit contributions.
- The assumption in the Report appears to be that the employer is always the Administrator. This is not always the case. For example, with respect to group RRSPs the employer is seldom more than the agent of the employees in establishing the plan and it appears more likely that the CAP Provider is the Administrator.

We believe the state of the law as to fiduciary duty or standard of care as it applies to CAP Providers, employers (as Plan Sponsors), Administrators and their agents should be considered carefully before assumptions are made and obligations imposed on the basis of those assumptions. In short, the Report would benefit from greater clarity in this area.

In our view, the role of the Administrator should be to:

- Select and monitor the CAP Provider and other service providers to the CAP.

- Select and provide a reasonable range of investment options (if the CAP has been designed by the employer to provide such options).
- Establish the frequency and cost of switching among investment options (convenience and low cost should be factors in these decisions).
- Monitor the investment options offered for continued appropriateness for the CAP as a whole. We submit that this monitoring should include:
  - taking reasonable steps to ensure compliance with applicable laws and regulations;
  - organizational and investment process/philosophy developments within the investment management firm; and
  - CAP Members' servicing requirements (as established by the employer).

  In the Report, the monitoring requirement appears to focus on investment performance alone, which we believe is misguided. While investment performance needs to be tracked, it is the end product of the investment people and process of a firm. Often investment people and process developments deteriorate before investment performance. Undue focus on performance results to the exclusion of the people/process causal factors is inappropriate monitoring. We urge the Joint Forum to change the singular focus on investment performance in the Report to the causal factors of investment performance.

  We further note that a focus on the causal factors of performance (such as investment strategy, people and processes) is more consistent with the current method of regulating pension and trust investments under "prudent person" rules. Under such rules, prudence is a test of the decision making or conduct process, not of ultimate performance or results.

- Ensure that easily accessible (initial and ongoing) disclosure as to the investment options is made available to the Members.
- Ensure the members receive basic information as to the nature of the CAP, the different type of investments, risk/reward strategies, and investment terminology. All communications should be in a user-friendly form and be of a frequency appropriate for CAP Members.
- Establish the default investment option for CAP Members. This applies to Members who do not make a choice for investment of their contributions. This is one area missing in the Report that we believe should be addressed, i.e. the right of the Administrator to select a default option and to not be responsible for the investment performance of that option if it is not suitable for the individual investor's needs.

  Current practices for default options range from money market funds or GIC's to balanced portfolio investment funds. The choice of the default option depends on a number of factors, including: whether the CAP is mandatory or voluntary, the CAP Members' investment knowledge, employer vs employee contributions, and the paternalism of the employer. The choice of money market or GIC's as the default option might indicate that it is the Administrator's view that investment decisions are the sole responsibility of the Members and that Administrators do not have a place in those decisions. Conversely, a choice of balanced fund might indicate a more paternalistic Administrator view that wishes to protect those Members where, for whatever reason, they do not make an investment decision.

> We do not recommend the Joint Forum mandate one default investment option as right for all situations but do believe the Joint Forum should consider it as an Administrator's responsibility and provide some protection to Administrators who prudently select default options.

We also believe that the employer (as Plan Sponsor) may **choose** to make investment advice or financial planning/ tools in these matters available to employees to assist them in their decision-making process. Generally accepted practices in the pension industry are developing in this direction. We believe strongly, however, that such services should not be mandatory.

In particular, no employer can or should assume responsibility for addressing the individual financial circumstances of employees. If addressing the individual financial circumstances of employees is or should be an employer responsibility, there is no logical reason why it should be restricted to employers who offer CAPs. If it is an obligation assumed only where a CAP is available to the employees, no prudent employer would offer a CAP.

3. Recognizing both Member and Administrator Responsibilities under a CAP

The Report concentrates on the obligations of employers (as Plan Sponsors and Administrators) under CAPs and does not acknowledge that the Members also have responsibilities. Unlike DB pension plans, where the employer bears all the risk and the responsibility of investment performance, under CAPs the Member bears the risk and the responsibility of directing his or her investments (see discussion under *Understanding the CAP Promise* in Section 1 above). Members of CAPs and indeed all employees, do and must take responsibility for major financial decisions in their lives, including the level of savings and their risk tolerance. In our view, a major shortcoming of the Report is that it fails to acknowledge Members' responsibilities under a CAP.

To illustrate our concerns in this area, the Report expressly states (at page 27) that "it is not proposed that plan administrators and employers would be held harmless for investment losses of members…." We do not understand the rationale behind this decision. It would be appropriate and most helpful to provide greater clarity as to where the liability of an employer or Administrator begins and ends.

In the Report, the Joint Forum indicated that it was **not** prepared to endorse a "safe harbour" for employers/Administrators in respect of CAPs, similar to that provided under ERISA. We suggest moving beyond a debate over the merits of ERISA-type "safe harbours" and instead focusing on the key issue – that being a recognition that Members have responsibility for their own individual investment decisions. We strongly believe that it is important to clearly articulate that **both** CAP Members and the Plan Sponsor/Administrator have different legal responsibilities under the CAP. Such clarity would effectively provide that the Plan Sponsor/Administrator would not have any liability for outcomes based on Member responsibilities (investment decisions).

The key point is that it is necessary to clarify the current uncertainty of the circumstances under which an employer or Administrator should be liable for investment losses incurred by Members, or for the failure of their investments to meet their expectations.

We submit that the scope of Plan Sponsor/Administrator legal responsibility can and should be determined by basic legal principles, in particular the concept that a party must be liable for damages resulting from the breach of a legal duty owed to another person. Consequently, it is critical to determine the scope of the legal duties owed by an employer and/or Administrator to CAP Members. This is an issue that the Report clearly identifies (again, at page 27) with the statement: "These principles are designed to meet the legitimate concerns of employers and administrators that their responsibilities are currently unclear…". We agree that this is a very real concern of employers and Administrators, and we applaud the Joint Forum's attempt to clarify this area. We have set out under **Recognizing the Different Roles (and Duties) of the Employer and the Administrator under a CAP** (Section 2 above) what we believe should be the scope of the responsibilities of the employer/Administrator.

We submit that, as a general matter, **employers** (as Plan Sponsors) should **not** be responsible for the investment performance of a CAP, in particular for investment losses of Members. In our view, there is no sound legal basis or any legitimate policy consideration for such liability. The nature of the "CAP promise" does not extend to a general guarantee of investment returns or an indemnity against investment losses by the employer.

Further, the role of the employer in a CAP is not and ought not to be of a nature that implies liability for Member investment losses or failure to meet Member expectations. Clearly, there is no legal basis for the employer to have such liability in cases where an employee invests his or her income in a self-directed retirement plan (or other "external" vehicle), and we see no legitimate basis to create such liability simply because the employer (as Administrator) has taken it upon itself to provide some additional services to employees through the establishment of a CAP.

As with all other regulatory issues, the question of liability with respect to CAPs must be considered in the context of similar and substitute products (see Appendix "A"). It is important that employers or Administrators not acquire so much potential liability in connection with a CAP as to make the CAP a relatively unattractive alternative.

If the Joint Forum has ruled out an ERISA-type "safe harbour" in respect of CAPs, we believe it should, at a minimum, clarify that both Members and Administrators have responsibilities in relation to CAPs, which would (in effect) provide the Administrator with a defence against individual Member claims in respect of actions that are "Member responsibilities". The Joint Forum should also consider recommending a type of statutory "due diligence" defence for Administrators (similar to that which exists under corporate statutes). This defence would be predicated on and consistent with modern notions of prudence and would provide that, where the Administrator has acted in accordance with a statutory standard of care (i.e. has exercised due diligence in decision making) the Administrator would not be liable for the investment performance of the fund or of individual Member accounts. The basis for this defense would require compliance with requirements that are clear and specific, and any legislation should contain an express limitation on liability where the legislated standard of care is met.

We also note the Report needs to deal in more depth with the duty and liability of CAP Providers and investment managers (as agents of the Administrator or CAP Provider). To increase the potential liability of the employer or Administrator (with no statutory defence of due diligence) and accordingly increase the potential liability of agents is, in our view, tantamount to raising the fees charged by the agents, and to invite legal arguments as to limitation of liability and indemnity provisions in contracts with such agents.

Nothing in our position should be interpreted as advocating that CAP laws regulate CAP Members. But all CAP Stakeholders, including CAP Members, are subject to legislative requirements (much the same way as pension plan members are subject to pension standards legislation) and would benefit from clarifying their respective legal responsibilities in relation to a CAP. We believe the way to recognize CAP Members' responsibilities for their investment decisions is to develop a regime that provides clear communication of Member vs employer/Administrator responsibilities and that provides a reasonable limit on employer/Administrator liability based on a statutory standard of care.

Accordingly, we submit that the Joint Forum advocate a regime that ensures:

- clear communication to CAP Members of their legal responsibilities and the legal responsibilities of the employer and the Administrator; and
- that there is a recognized limit on the liability of the employer/Administrator/CAP Provider (as applicable) and their agents where their legal responsibilities are fulfilled.

4. The "Know Your Client" Rule and Investment Advice

We are puzzled by what we perceive to be a recommendation in the Report for a mandatory know your client ("KYC") rule, either through a registrant under provincial securities legislation or as a direct employer/Administrator responsibility. From a "level playing field" perspective, we note that there currently is an ability for discount brokers to gain an exemption from the KYC rule under securities laws.

The Report also appears to advocate that an advisor relationship is required in order for an individual Member to make an investment decision (or the employer/Administrator must ensure that appropriate assistance is provided so that Members may make investment decisions). The KYC profile is cited as a tool that could be used to help Administrators assess the appropriateness of each Member's investment choice.

The concern this raises for the Task Force is the apparent lack of recognition of how current practices in the CAP market have evolved and will continue to evolve in the absence of regulation. This evolution, in many cases, equals if not surpasses the requirements of the KYC model, such that Members have excellent information to devise an appropriate investment strategy without the mandated imposition of an investment advisor. We support and advocate these predominant industry practices in the CAP market.

The investment choices available in a typical CAP are assessed and chosen by the Administrator. They are chosen for their suitability for the particular CAP given its design (eg. long-term retirement savings vehicle) and typically cover a broad cross-section of asset classes but rarely stray into the realm of the highly volatile (in a relative sense).

Further, current practices have evolved in the CAP marketplace where various combinations of the following are available to Members:

- models are available that ask a series of questions of the Member to ensure that their investment choices do not stray outside the risk tolerance (which is also established by the model based on Member feedback);

- material describing the investment options provided;
- explanations of basic investment concepts;
- telephone and internet access to their accounts; and
- access to ongoing education.

This process allows the Member to develop a strategy that takes into account his/her total financial situation. While KYC may be required under securities legislation, where the advisor profits from the individual's investment decisions, no pecuniary gain flows to the employer/Administrator under a CAP and thus KYC is not required since there is no impetus for the employer/Administrator (the latter having a legal duty of care to act in the Member's best interests) to suggest investments that are unsuitable for the Member.

Although we acknowledge the value of investment advisors, we do not believe an employer should be required to provide them to CAP Members. Some employers do provide such support (in a variety of forms) regardless of the nature of the CAP offered to its employees, if any. The fact that an employer chooses to offer a CAP should not carry with it the obligation to also provide investment advisors for its employees.

Also, the Report does not clearly define what is meant by “Investment Advice” and what the Joint Forum would intend to require of Administrators in providing Investment Advice.

For instance, Investment Advice could mean the provision of information of a general nature, not specific to the Member (one-on-one or over the phone) about the risk and reward characteristics of each fund, the investment management team managing each fund, the performance history of each fund, the fees and expenses of each fund, the investment style or strategy used by the investment management team for a fund, the monitoring practices of the Administrator for each fund, and the factors that an individual might normally consider in choosing one or more funds.

Investment Advice could also mean the provision of information specific to the Member: applying the KYC requirement to consider the Member's other assets and income, the assets and income of the Member's spouse, the Member's intended retirement date, the number and ages of the Member's dependants and the Member's tax status. We believe it is reasonable to require a CAP Administrator or Provider to be able to respond to questions of a general nature about the plan and its operation; we do not believe it is reasonable to require a CAP to provide customized advice specific to an individual Member.

In addition, if the advisor provides the “wrong” advice, who bears the liability is a critical question that would have to be addressed in adopting any mandatory “investment advice” model.

Last, but certainly not least, is the cost in providing mandated advice to members. Who will bear this cost? If Members bear the cost:

- with flat-rate fees those members with smaller balances will pay a higher dollar amount relative to their account balances; and
- with the cost charged to the fund similar to a management expense ratio, those members that do not want the service will have to pay for it regardless. Any mandated requirement will result in certain

members calling for an "opt out" provision in the event they already have an advisor relationship or have educated themselves sufficiently to make appropriate decisions of their own.

If employers bear the cost this removes a significant amount of money from the total compensation pool available for other compensation and benefits. If the choice is between requiring individual investment advice with its associated costs as a condition of offering a CAP and not offering a CAP without such obligations, the choice for the employer does not favour CAPs.

5. Ensuring a "Level Playing Field" among Insurance, Securities and Pension Regulatory Regimes

As acknowledged in the Report, CAPs are currently regulated under several different regimes: securities laws, insurance laws, and pension laws. The choice of which regulatory regime that CAP is governed by depends more on the CAP Provider than it does on the nature of the CAP. We agree that harmonization of regulatory requirements (such that similar principles are applicable to CAPs irrespective of who the CAP Provider is) can be a legitimate and laudable goal. However, any efforts to harmonize these regulatory regimes should make sense and should not add to the regulatory burden by requiring compliance with the differing rules of each of the foregoing regimes. Instead, it would be preferable if regulatory harmonization (or better still, uniformity) could be achieved through compliance with the rules of any one of the above regimes. In other words, compliance with one regime would be compliance with all regimes.

We recognize that securities regulation effectively regulates publicly traded mutual funds, and is continuously trying to improve such regulation. And a "pure" securities regulatory regime currently regulates some CAPs (eg. group RRSPs) **in lieu of** a pension regulatory regime. We do not, however, believe that a combination of securities and pension regulatory requirements (with additional requirements currently found in neither regime) is likely to produce an appropriate regulatory regime for CAPs and a level playing field for different CAP products or providers. The businesses are very different in nature.

CAPs typically offer a manageable number of relatively conservative pooled funds as investment options, and provide investment education to various extents. Members are protected in the selection and monitoring of funds by the statutory or common law standard of care placed on the Administrator. The management fees are relatively low because of the employer's buying power, and the employer typically bears a portion of the cost of administration. If certain securities law requirements were applicable to investments through CAPs, as well as the requirements of pension legislation (and any additional regulatory requirements arising from the recommendations of the Joint Forum), the playing field between the mutual fund investor and the CAP Member would **not** be level.

We submit that compliance with multiple regimes and/or additional regulation would have costs. If it is not accompanied with clarity on limitation of employer/Administrator legal responsibility, the playing field would be tilted towards simply providing employees additional compensation so that members can invest (or choose not to invest) in the universe of publicly traded mutual funds with no intervention or assistance by the employer. The higher cost retail model would, in our view, not be in the best interests of CAP Members, since the lower cost structure of CAPs increase their final retirement balances and ultimately their level of retirement income.

Consultation Process

In the report, the Joint Forum invited written comments and suggestions on any aspect of the Report. In particular, the Joint Forum asked for feedback on four specific questions. This section of the Submission provides specific feedback, comments and suggestions in response to the four questions asked in the Report.

1. **Are the statements in the paper about the existing regulatory environment accurate, in your experience?**

   We believe the Report (in Sections IV(ii) and (iii)) contains an accurate statement of Canadian securities and insurance laws, as currently applicable to CAPs.

   Also, for the most part, Section IV (i) of the Report accurately describes the existing regulatory environment in relation to pension plans. We would, however, like this section of the Report clarified to take account of a number of important facets of pension regulation.

   First, it is worth noting that pension laws are much different in nature than securities laws, having different goals and objectives. Unlike securities laws, where the regulators' interpretation of the law provides very strong guidance as to what is legally correct, this is not the case with pension plans where the courts have not hesitated to go against the rulings of the regulators and where regulatory policy has not been recognized as having the force of law.

   Second, the statement is made (on **page 10, of the Report**) that "pension standards are intended to ensure a minimum level of protection for members and other beneficiaries of pension plans by setting out a comprehensive set of rules governing the operation of pension plans, and establishing a regulator who has the duty and remedial authority to enforce compliance with these rules." We believe that the use of the word "comprehensive" is an overstatement. Pension legislation is by no means "comprehensive" — particularly in relation to DC pension plans. There is a significant large body of case law covering the duties and responsibilities of both plan sponsors and plan members which is entirely outside of pension standards legislation. Moreover, many rules and protections are based upon contractual rights (i.e. the terms of a pension plan) and trust law rights.

   Third, this Section fails to mention a very important point; namely, that the current pension rules are directed almost exclusively at DB plans and that there is a noticeable lack of rules directed at DC plans, as well as a great deal of uncertainty surrounding how the rules are applied to DC plans. It is not that the disclosure obligations need to be "modified", it is that there are currently no meaningful disclosure obligations for members of DC pension plans. This is left up to Administrators' best practices. It is continually stated throughout this Section that "minimum standards regarding pension funds also apply to ECDCPP's". But this fails to acknowledge that how such standards apply is often unclear owing to the fact that pension standards legislation was drafted with DB pension plans in mind.

   Finally, some items which are not covered in this section but should be referred to in a discussion of the pension regulatory regime:

- pension plans are also subject to a detailed level of regulation under the *Income Tax Act* (Canada); and
- pension plans are voluntary arrangements for employers and employers also have rights under pension plans and pension legislation.

We would also like to comment on the "Market Reality" outlined in Section III of the Report. The data from Benefits Canada (Page 7 of the Report) is dated. The 2000 numbers are much higher. As of June 2000, the industry experienced an overall increase in assets of 31%. The 1999 numbers have total assets at $46 billion while the 2000 numbers are over $60 billion.

The CAP market now represents nearly 50,000 plan sponsors and 3 million participants, or 10% of the total Canadian population.

The accuracy of the information on Page 8 of the Report is also of concern to the Task Force. With the merger activity in the DC industry (eg. Clarica Life purchased Royal Trust's Group Services and Canada Life purchased Canada Trust's Group Services businesses), there is no longer any significant trust company CAP Provider business remaining.

Finally the information on Page 9 of the Report represents a limited sample versus the universe (206 plan sponsors, and all Mercer clients, from the universe of 50,000 plan sponsors). There is heavy skewing towards money purchase pension plans (60% of the survey) even though the industry administers more Group RRSPs than money purchase pension plans, both in terms of assets and numbers of sponsors. The experience of insurance companies (administering 95% of CAPs) contradicts the last point on Page 9 concerning investment education to members. Plus the Task Force believes that the statement that 50% of CAPs "offer individual counselling for members generally through securities registrants" is unrealistic and misleading given current practices.

We urge the Joint Forum to use the information with caution as we understand that there were few controls in the survey and the questions may not always have been understood.

2. Are the proposed regulatory principles appropriate and adequate to address the needs of CAP members, plan administrators, employers and regulators?

We considered each of the four proposed regulatory principles set forth in the Report, in detail. We have a number of comments and questions concerning these principles, which we have set forth below under headings which correspond to those used in the Report.

We are concerned about the terminology employed by the Joint Forum in this Section of the Report. We submit that the Joint Forum should consider the definitions of such terms as "fiduciary", "administrator", "employer" and "plan sponsor" as set forth in our Submission (see **Appendix "C" –** *Terminology*). Clarity of these terms (and others) could alleviate some of the concerns and questions that follow.

(i) *Plan Administrators' or Employers' Fiduciary Duties Regarding the Establishment and Maintenance of a CAP*

The Joint Forum's use of the term "fiduciary" to describe the relationship between an employer and its employees is inaccurate and inappropriate. The relationship is a contractual one and as such influences decisions the employer makes with respect to the **establishment** of the CAP. For example, the employer decides what kind of CAP to implement, the contribution level and whether or not investment choice will be made available to the members. The Administrator will be responsible for the **maintenance** of the CAP. This would include such responsibilities as the selection of the investment options (if choice is available to the members), initial and continuous disclosure and ensuring that investment decision-making tools are made available to CAP members. Delegation of these duties is a choice available to either the employer or the Administrator, although they do not abdicate their overall responsibility.

With respect to non-pension CAPs, the distinction between the duty of the employer in its capacity as Plan Sponsor and in its capacity as Administrator is less clear. Nonetheless, employers must be able to establish and wind up CAPs and set out their basic terms, as matters of contract between their employees and themselves.

The specific "duties" listed in this section also caused us some concern, as follows:

- The first duty states "Select investment options for members which offer a reasonable range of options with different risk and return characteristics, each of which is diversified". We would point out that a single stock investment option (typically under a DPSP or an ESP), usually the employer's securities, could be one of a number of investment options available to members. Alternatively, if the plan is non-contributory, a single stock option could be the only investment available. A single stock option is not in itself "diversified" but it is a viable choice and is currently permitted as a plan design feature.
- We agree with the use of prudence in the selection of the investment manager(s). However, we suggest that the third duty stop at "… for each investment option". Prudent monitoring involves more than setting and monitoring performance against benchmarks. Any attempt at defining prudent behaviour will only allow for some aspect of prudence to be omitted. In addition, we question what constitutes "appropriate action". We would also want to know what makes for "unsatisfactory" performance. These statements have inherent problems associated with them. For example, historical performance is not indicative of future returns. Does an Administrator of a CAP terminate an investment manager with weak performance due to their investment style not being rewarded by the market?
- The inclusion of the fourth duty puzzles us. We understand that a prospectus provides a direct right of action for the purchaser of a security but would argue that the CAP Member that suffers due to "misrepresentation about the investments" will have a direct right of action against the investment manager for negligence misrepresentation or breach of fiduciary duty (if the duty can be established) or an indirect right of action through the Administrator or the employer. We also question how the Joint Forum would propose regulating the contents of a contract that is a voluntary undertaking resulting from the negotiation between the employer/Administrator and the Provider.
- The final duty requires clarification as we question the meaning of the term "penalty". GIC's often have a market value adjustment when cashed-in prior to maturity. Would this be considered a penalty? Is it reasonable to expect a heavy trader (one who buys and sells frequently) to pay some sort of fee so that overall administration costs are controlled?

(ii) *Plan Administrators' or Employers' Fiduciary Duties re: Initial and Continuous Disclosure*

We offer the following comments on *Initial Disclosure* items.

In the first item on the list of initial disclosure, the Task Force would change the term "liability" to "responsibility".

The second item should be clarified so that it is understood that "instructions" refers to the administrative process of making the investment choices (eg. whom to contact).

We suggest that Disclosure Item No. 3 is inconsistent with the final duty under Section 2(i) above, where the Report specified that there should be no penalty accompanying switching between investment options.

For Disclosure Item No. 4, we would like to see this revised to read as follows "Fees and costs borne by members for each investment option". This would then encompass any fees associated with commission payment to a third party plus any fees paid by the fund in which the member invests, including audit fees, custodial fees, etc.

We agree with the position of Disclosure Item No. 5.

We agree with Disclosure Item No. 6.

The recommendations in Disclosure Item No. 7 refer to a standardized consumer guide including a "retirement income profile" to educate members about investments. We believe the current information being provided by the group market is, in most cases, adequate in this regard and would want to ensure what the Joint Forum has in mind is not inconsistent with the current practices. We also believe the only aspect that needs to be standardized, if anything, is the general material to be covered rather than standardizing the format and media of this information. Many employers tailor their information to the unique personality of their workforce to enhance the probability of use of this information. Consequently we recommend the Report clarify this recommendation to include the material (i.e. content) requirements but not standardize the format or media used to delivery this information in. We recognize the retail environment does work under a standardized simplified prospectus model but believe the customization of content format and media is a critical component that employers value in order to service their employees.

We agree with Disclosure Item No. 8.

With respect to the *Continuous Disclosure* items, we strongly support full disclosure to Members. However with respect to the specifics in the four items set out by the Joint Forum, we have the following comments:

- We do not know exactly what the Joint Forum means by the phrase "annual operating fees for each investment option" in Item No. 1. Examples should be provided to clarify the intention.
- In Item No. 2, we question the scope of the term "material change reports". We agree there should be a general obligation of continuous disclosure of relevant information (information that could affect the price of the investment) that is accessible to Members. We assume it does not refer to material change reports (within the meaning of securities laws) which would not typically be offered to CAPs.
- Item No. 3 appears to require financial statements for each investment option as well as portfolio asset lists. Currently, this information is generally not distributed to Members. A requirement to distribute this information to Members can be costly unless items can be made available in electronic format for members to access, download and print on their own. We urge the Joint Forum to clarify that making

this information available to Members on request would meet the Report's recommendations.

- We agree with Item No. 4.

(iii) *Plan Administrators' or Employers' Fiduciary Duties to provide Appropriate Investment Decision-Making tools to CAP Members*

We offer the following comments on this regulatory principle:

- Duty No. 1 is only appropriate when the Administrator chooses the securities model for the delivery of the CAP to the Members.

- Duty No. 2 concerns us for a number of reasons. The first concern centres around a perceived change in the responsibility of the Administrator with respect to the provision of initial and continuous investment information. In the list of *Initial Disclosure* items, we interpreted the wording as placing responsibility on the Administrator to **provide** Members information about the investment choices.

  In Duty No. 2 the responsibility to provide access to information has changed to **ensuring** that Members are **provided with** information. It should not be the responsibility of the employer or the Administrator to "ensure" that Members receive this information. It is the responsibility of the Member to access the information once it is made available.

  Our second concern with the recommendations in Duty No. 2 has to do with presenting the investment information "in a manner appropriate for the member". The investment material developed will be appropriate for the typical (or targeted) group member, not customized for the individual. The member is obligated to seek help if the material is not to an appropriate level for his/her ability.

  The second part of Duty No. 2 – that Members "receive appropriate assistance with making investment decisions" – is unacceptable to the Task Force. It is not the Administrator's duty to ensure that Members receive this assistance. This effectively creates a KYC requirement on the Administrator. We do not agree with the KYC requirement in a CAP as we believe that predominant industry practices under the current model work well and would urge the Joint Forum to become more familiar with current practices in the industry. Assistance is not without associated costs and someone (the employer or the Member) will have to pay for it. The discount broker industry is moving away from a KYC model and KYC is not required under ERISA. There are potential practical issues with this requirement as members may not want to provide personal financial information to financial advisors hired by the employer.

(iv) *Investment Rules*

We endorse the essence of the principle dealing with Investment Rules, but request further clarification. We believe that there is insufficient detail to ensure there is alignment between our views on these matters and the views of the Joint Forum.

For example, we are puzzled by the references in the Report that each investment option under a CAP should comply with minimum investment rules requiring, among other things, adequate diversification of funds. A minimum diversification requirement for each investment option would effectively prohibit single stock funds (or plans) that are commonly used in the CAP industry.

Similarly, references in the Report to CAP investment options not being subject to "excessive risks" or "greater risks than investors in retail mutual funds or segregated funds" appears to be inconsistent with pension investment standards (which focus on the prudence of the portfolio of all investments in the funds, and not each single investment) and to focus on inappropriate benchmarks.

In short, we think that further detail is required in this area to clarify what "minimum investment rules" the Joint Forum has in mind.

3. What would be the most effective and appropriate method of implementing the regulatory principles that emerge from this process?

The Task Force believes the best method of implementing the finalized proposed regulatory principles as outlined in the Report would be accomplished through the development of harmonized best practices guidelines. Working with representatives from the retirement industry, the goal of a joint industry/regulator body would be to standardize the communication and education requirements for CAPs, and clarify the responsibilities of all CAP Stakeholders.

We are reluctant to encourage further regulations for the retirement industry, believing that sufficient regulatory structure exists, subject to clarification of the exemptions from securities legislation, which must be done by regulation. We believe that best practices communicated effectively to the retirement industry and reviewed regularly for applicability, would be embraced by participants of the industry.

However, legislation will undoubtedly be necessary in several areas to fix some of the technical problems identified in this Submission and in the Report, for example:

1. The exemptions under securities legislation should be clarified across the country.
2. Section 22 of the *Pension Benefits Act* (Ontario) needs to be amended to clarify the standard of care for CAPs. As it is now, arguably the Administrator is responsible for the members investment decisions.
3. Investment restrictions should be modified to be appropriate to CAPs. As it is now, they apply to the entire plan. This makes them meaningless as applied to individual members portfolios.

4. What are the anticipated short and long terms costs (in $ and in plan coverage) of implementing the proposed regulatory principles.

We undertook an informal polling of industry participants and confirmed our belief that the cost issue is one that is rife with opinions and subjectivity, partly because the range of costs is so wide depending on the CAP structure. Accordingly, making policy decisions without rigorous data can result in decision based on unknowing faulty assumptions about costs. We strongly urge the Joint Forum to conduct a comprehensive survey of the costs of CAPs so that consultation and ensuing decisions can be based upon current data and factual information.

Concluding Remarks

We are appreciative of the efforts of the Joint Forum in developing the Report, which is a much needed and welcome first step towards developing a proper, reasonable and harmonized regulatory framework for CAPs. We are also appreciative of the opportunity to provide comments and input to the Joint Forum as it develops rules to govern CAPs. We welcome the open process by which the CAP industry and the regulators can jointly develop a mutually acceptable solution to all CAP stakeholders.

This Submission is intended to provide detailed comments and feedback to the Joint Forum in respect of the Report. In many cases, our comments and/or feedback may seem critical of the Report and its recommendations. This should not be interpreted as the Task Force advocating that no further rules or clarification are required with respect to CAPs. To the contrary, we believe that the regulation of CAPs under pension, securities and insurance laws requires both clarification and harmonization.

We also strongly believe that, by reaching common agreement on the fundamental principles underlying the regulation of CAPs, the Report could easily be modified to provide an acceptable blueprint for the future regulation of CAPs.

The ACPM and PIAC would be pleased to work with the Joint Forum either directly or through a joint regulatory/industry committee to modify and refine the recommendations of the final Report.

Appendix A – CAP Arrangement Continuum

The intention of the continuum shown in this Appendix is to show the range and diversity of the CAP Promise under typical retirement/savings plans in the current environment. It does not purport to comment on the state of laws as they apply (or should apply) to such plans.

The attached continuum lists, for each retirement/savings plan, the following aspects:

- The nature of the promise between the sponsor and the plan member (employee);
- The applicable regulatory regime;
- The range of investment options;
- Who was responsible for selection in monitoring of investment options;
- What investment information is typically provided to plan members;
- The Administrator's investment responsibilities;
- The Member investment responsibilities; and
- The cost to plan members or retail investors of the arrangement.

CAP Arrangement Continuum

		GROUP				INDIVIDUAL	
	DEFINED BENEFIT PLANS	EMPLOYER DIRECTED DC PLANS	SELECTED OPTION DC PLANS	SELECTED OPTION SAVINGS	WINDOW SAVINGS PLANS	RETAIL	RETAIL
PROMISE	Retirement Income	**Retirement and Other Savings Assistance**					
RETIREMENT INCOME	Defined Formula	**Determined by: Contributions, Asset Allocation, Market Returns, Member Costs and Annuity Rates**					
REGULATORY REGIME	Pension	Pension	Pension Insurance Securities	Insurance Securities	Insurance Securities	Insurance Securities	Insurance Securities
INVESTMENT OPTIONS	N/A	N/A	Selected by Administrator	Selected by Administrator	Unlimited	Unlimited	Unlimited
SELECTION/ MONITORING	Administrator	Administrator	Administrator	Administrator/ Agent	Member	Investor	Investor + Advisor
INVESTMENT INFORMATION	1. SIP&P 2. Financial Statements	1. Member Statements 2. SIP&P 3. Financial Statements	1. Plan Info. 2. Concepts 3. Options Profiles 4. Decision sharing 5. Decision Tools 6. Performance Commentary	Less than or equal to DC Plans	Less than or equal to DC Plans	Prospectus	Prospectus; KYC; Registered Advisor
MEMBER COST	N/A	LOW	LOW	LOW	HIGHER	HIGHER	HIGHEST
INVESTMENT RISK/REWARD	Sponsor	Member	Member	Member	Member	Investor	Investor
ADMINISTRATOR INVESTMENT RESPONSIBILITY	Prudent Mgmt	Prudent Mgmt	Reasonable Choice Reasonable Info Prudent Monitoring	Reasonable Choice Reasonable Info Prudent Monitoring	Reasonable Info	Disclosure	Disclosure; Advice
MEMBER INVESTMENT RESPONSIBILITY	None	None	Education; Asset Allocation; Fund Choice; Rebalancing	Education; Asset Allocation; Fund Choice; Rebalancing	Education; Asset Allocation; Fund Choice; Rebalancing	Education; Asset Allocation; Fund Choice; Rebalancing	Education; Asset Allocation; Fund Choice; Rebalancing

Appendix B – Task Force Members

Gretchen Van Riesen	Senior Director, Pension and Benefits Policy, CIBC, Past President and Director, ACPM, Director PIAC, Chair ACPM/PIAC Task Force on Defined Contribution Regulation
Michael Beswick	Senior VP, Pensions, OMERS, Past President and Director ACPM
Stephen Bigsby	Executive Director, ACPM
John Denham	Manager Pension Funds Treasury, IBM Canada Ltd., Member PIAC and ACPM
Mary DePaoli	Vice President, National Sales and Marketing, Sun Life Financial, Member ACPM
Keith Douglas	General Manager, PIAC, Former President IFIC
Jeffrey Graham	Partner, Borden Ladner Gervais LLP, Past President, ACPM
Martin Guest	CFA, Vice President and Corporate Counsel, Fidelity Investments Canada Limited, Member ACPM, IFIC, CBAO
Priscilla Healy	Principal, Towers Perrin, Chair, ACPM Uniformity Task Force and Advocacy and Government Relations Committee
Neil Jacoby	Managing Partner and President, Aurion Capital Management, Past Chair PIAC, Member PIAC and ACPM
Paul Litner	Partner, Osler, Hoskin & Harcourt LLP, Member ACPM
John Poos	General Manager Law and Pensions Investment, Stelco Inc., Member PIAC and ACPM
Gemma Salamat	Financial Advisor, Sun Life Financial Services Inc., Member ACPM
Harry Satanove	FCIA, CFA, Pension and Investment Consultant, Satanove and Flood Consulting, Member ACPM
Donald Walcot	Chief Investment Officer, BIMCOR, Past Chair PIAC,
Becky West	Client Service Executive, Frank Russell Canada Limited, Member ACPM

Appendix C – Terminology

In this Submission , the following capitalized terms shall have the meanings given to them below:

CAP (or CAPs)	means Capital Accumulation Plans, as defined in the Report.
CAP Members (or Members)	means the members/participants in a CAP.
CAP Providers	means insurance companies, trust companies, securities dealers and other financial institutions authorized to offer CAPs to Members.
CAP Stakeholders	means Members, employers (as Plan Sponsors), Administrators, CAP Providers and regulators.
DB	means defined benefit (plans).
DC	means defined contribution (plans).
Employer	Employer and Plan Sponsor are used synonymously in this Submission.
Joint Forum	means the Joint Forum of Financial Market Regulators' Working Committee on Investment Disclosure on Capital Accumulation Plans.
Plan Sponsor	means the entity with authority over establishing amending and terminating the CAP and responsible for making contributions to the CAP.
RPPs	means registered pension plans.
Report	means the Discussion Paper prepared by the Joint Forum, entitled *"Proposed Regulatory Principles for Capital Accumulation Plans"*.
Submission	means this document, entitled "Submission to the Joint Forum of Financial Market Regulators' Working Committee on Investment Disclosure in Capital Accumulation Plans".
Task Force	means the ACPM/PIAC Task Force on Defined Contribution Plan Regulation, the members of which are listed in Appendix "B" to this Submission.

Certain of these terms are also defined in the text of this Submission and are reproduced here for convenience of reference.

July 30, 2001

Ms. Carla Adams
Financial Services Commission of Ontario
5160 Yonge Street, 4th Floor
P.O. Box 85
Toronto, ON M2N 6L9

VIA MAIL & EMAIL

RE: Proposed Regulatory Principals for CAPs

Dear Carla:

We are writing to provide our comments with regard to the discussion paper on the above captioned subject published by the Joint Forum of Financial Market Regulators. We would like to thank you in advance for considering our comments.

Bias

At the outset, we would like to state our bias so that our comments are received in the appropriate context. Having experience with both defined benefit registered pension plans and most types of CAPs, we have reached the basic conclusion that CAPs should be viewed as "savings plans" rather than pension plans.

As a result, we disagree with the statement in V(iv) "…CAPs are primarily intended to be long-term savings vehicles for retirement". CAPs are often offered by employers in lieu of a pension plan, and sometimes marketed as a pension plan, but in practice, with the exception of those plans that are registered pension plans, there are few safeguards to ensure that the funds accumulated will be held until retirement or be adequate at the time of retirement.

Comments

As a general comment, we are pleased that the Joint Forum has undertaken this review and we believe that the report presented for discussion offers a clear picture of the CAP industry and the challenges for plan sponsors.

Unfortunately, the report does not provide either a "safe harbour" in terms of a minimum investment menu or investment advice and education requirements. The lack of a safe harbour will perpetuate the current confusion for employers regarding the necessity of having licensed advisors following the Know Your Client rules.

Challenge

Having heard both sides of the debate between the brokerage and insurance models, we believe that a resolution lies in one of the following two approaches:

1. A clear statement that CAP sponsors must provide members with the same advice and disclosure that would be required under individual plans. That is, full disclosure (prospectus) and advice by a licensed representative following the KYC rules; or

2. New legislation that clearly defines reduced disclosure and advice requirements for plan sponsors who meet or exceed the minimum safe harbour requirements.

Without legislation and a defined safe harbour, we believe that the current insurance model cannot survive. Since insurers currently hold the majority of the assets in employer sponsored CAPs, we understand that they have and will continue to lobby heavily to protect their territory. We suggest that it is incumbent upon this lobby group to facilitate the legislation we have proposed in 2 above.

* * * * *

Thank you for considering my comments. Should you have any questions, please give me a call.

Yours truly,
Actuarial Solutions Inc.

Joseph F. Nunes, FSA, FCIA
President

July 17, 2001

Carla Adams
c/o Financial Services Commission of Ontario
5160 Yonge Street
17th Floor, Box 85
North York, Ontario M2N 6L9

Dear Ms. Adams,

Re: (1) Proposed Regulatory Principles For Capital Accumulation Plans
(2) CAPSA Pension Governance Guidelines and Implementation Tool
(3) Proposed Regulatory Guidelines For Electronic Communication In the Pension Industry

I am writing on behalf of the Alberta Employment Pension Plan Administration Advisory Committee (EPPAAC). This Committee is a group of Alberta pension plan sponsors and administrators from across the province which acts in an advisory capacity to the Alberta Employment Pensions Branch of the Department of Finance. It meets periodically to review issues of common concern and to provide advice to the Superintendent of Pensions.

The Committee appreciates the opportunity to respond to these Reports and has the following comments:

(1) Proposed Regulatory Principles For Capital Accumulation Plans

- While we appreciate the objective of the Report, to clearly define responsibilities and duties with respect to CAPs in an approach harmonized across jurisdictions, we have concerns with some of the underlying assumptions of the Report as well as the resulting proposals.
- The Report does not recognize that the various CAPs are not all intended to be long term savings vehicles for retirement. For example, since EPSPs and other non-registered savings plans may and often do have shorter term objectives, their investment profile can appropriately differ from that of a long term vehicle.
- Even in the case of retirement arrangements, the Report indicates that these plans are intended to ensure the financial security of employees in retirement. In fact, RRSPs and defined contribution pension plans are not designed and promoted like defined benefit plans, to provide a pre-defined retirement income level that ensures some retirement security. Instead, they are intended by employers to assist employees with their own personal retirement planning as part of a total compensation package.
- As a result, we are concerned with the general theme of the Report, where all liability and responsibility is placed on the employer without an appropriate obligation placed on the employee. We believe employees are adults. If reasonable education programs and services are offered, employees should be expected to do their part in becoming educated and taking responsibility for their future.
- Accordingly, we concur with the Report's objective to establish a consistent standard of prudent practices under which all CAPs should be managed, but believe that compliance with these practices should provide protection to the employer. Otherwise, we can expect that the combination of increased cost and responsibility with no offsetting relief in liability will turn some employers away from these voluntarily provided Plans. Given the low level of employer-sponsored retirement schemes already in place in Canada, this does not bode well for the future of retirement savings in the country.
- While we recognize the challenges in Canada to achieve uniform regulation, we believe that "similar" regulatory protection regardless of the applicable legislative regime as desired by the Report's objectives is not sufficient. The inefficiencies and reduced productivity cause by having somewhat similar but ultimately different pension regulatory regimes across the

country must be avoided by any newly instituted regulation of CAPs. Only a fully harmonized, consistent legislative national structure is acceptable.

(2) CAPSA Pension Governance Guidelines and Implementation Tool

- The Committee believes that the Guidelines and Implementation Tool are well-intentioned documents, given the importance of good governance. However, our view is that the documents move beyond governance issues into the business of management (i.e., beyond strategy into tactics).
- For employer-sponsored pension plans, we believe that the Guidelines should deal with procedures pertaining to the governing body but not "senior management", i.e., to keep the discussion at the policy level.
- A good example of our concern resides in Article 7.1. We believe that the level of detail expected to be reported to the governing body (reports on changes within investment managers, on benefit calculation and payment activities, on actual and proposed communications, etc.) is far too operational. It would be more appropriate to require the governing body to set policy and establish high level monitoring processes and allow the management to operate.
- We are also concerned with the possible imposition of the pension governance Implementation Tool. Many organizations have worked hard and expended resources to implement the voluntary Governance Assessment Tool recently proposed by OSFI, ACPM and PIAC. It would be very negatively received to be required to start all over again with a new Tool, however well drafted, when the previous Tool has only recently been adopted. Resources for such activities are limited and need to be realistically and practically managed.

(3) Proposed Regulatory Guidelines For Electronic Communication In the Pension Industry

- Employers would whole-heartedly support Guidelines which would result in "lower administrative costs and better service to members" as described in the May 25, 2001 letter to stakeholders. However, we are concerned that the proposals in the discussion paper will not satisfy that objective.
- We see little value in a process where the consent of the plan member, which can be withdrawn at any time, is required before an electronic form of a required document can be provided. We believe that technology has advanced to a point that it should be acceptable to provide electronic documents to employees with an active e-mail address, reserving paper copy only for those without one.
- Furthermore, as with other regulatory proposals, we believe CAPSA should be working towards an across-Canada uniform approach to this issue rather than another onerous, unproductive patchwork of approaches that differ by jurisdiction which is so detrimental to the furtherance of employer-sponsored retirement arrangements.

Thank you for giving us an opportunity to comment on these Reports. We suggest that, before the next stage in these processes is complete, there be more involvement of employers in the discussions, for the good of the project and the future of Canada's retirement structure as a whole.

Sincerely,

Elaine Noel-Bentley

c.c. EPPAAC Members

Australia
Canada
Hong Kong
Japan
The Netherlands
United Kingdom
United States

September 26, 2001

Gerry Rocchi
Managing Director/President

Barclays Global Investors Canada Limited
BCE Place, 161 Bay Street, Suite 2500
P.O. Box 614, Toronto, Ontario M5J 2S1

Telephone 416 643 4030
gerry.rocchi @barclaysglobal.com

BARCLAYS GLOBAL INVESTORS

Carla Adams
c/o Financial Services Commission of Ontario
5160 Yonge Street
17th Floor, Box 85
North York, Ontario
M2N 6L9

Re: Joint Forum of Financial Market Regulators – Consultation Paper on Capital Accumulation Plans

We at Barclays Global Investors Canada Limited (BGI) commend the Joint Forum for its efforts in proposing appropriate regulatory principles applicable to Capital Accumulation Plans ("CAPs"). We are pleased to have an opportunity to respond to the invitation to comment on Joint Forum's Consultation Paper of April 27, 2001.

BGI is one of Canada's largest and fastest growing investment managers. We currently manage approximately $35 billion in assets for Canadian pension funds and other investors. Our affiliates are involved in similar activities in a variety of other countries and we therefore have extensive first hand experience with a wide scope of approaches to securities regulation. At BGI we believe that it is essential that securities industry participants take every opportunity to present their views and understanding of the industry to regulators. For this reason, we are one of the most active participants in the increasing dialogue between industry and regulators in the financial services area and thank you for the opportunity to comment on the Proposed Rule

GENERAL COMMENTS

a. General Support for Consultation Paper:

We are generally supportive of the Consultation Paper, both its publication and its approach though we do have several specific concerns. We strongly support the harmonization of regulatory regimes and rules to ensure that similar rules apply to similar products and the Consultation Paper is a significant step in this direction. Our view has long been that CAP members, wherever they may reside and whatever product structure may be made available to them, should be treated fairly and equitably. The overriding goal must be to ensure that adequate and appropriate tools and information are provided to all members of CAPs to assist in the making of investment decisions and this goal appears to be reflected in the Consultation Paper.

b. Appropriate Regulatory Framework:

Many of the specific comments we set out below are directed at identifying what might be seen as "adequate and appropriate tools and information". In particular, we support the Joint Forum's statement that "[i]t may be that securities legislation is not the appropriate regulatory framework for these employer-sponsored plans in which the employers and administrators owe fiduciary duties to members that may be different from the typical retail securities transaction." encapsulates several of our specific comments.

c. *Employer's Responsibilities:*

The Consultation Paper specifically notes that one of its purposes is to address the need of employers and administrators to have their duties and responsibilities with respect to CAPs clearly defined and harmonized across jurisdictions and products. The principles employed to address that issue were derived from various models including the U.S. ERISA model. Although the proposed principles seek to clarify some of the fiduciary duties of employers, no safe-guards or safe harbours are proposed for employers and administrators who have exercised prudence to fulfill those duties. As a result, we are concerned that employers may be dissuaded from providing appropriate pension plans if it becomes too costly or if it exposes the employer or administrator to undue potential liability with little avenue for mitigation. Particularly in situations where employees are not negotiating from a position of strength, employers may find it preferable simply to pay employees a higher salary than take on what may, as an ultimate result of the Consultation Paper, be the more costly and risky burden of offering employee pension plans.

SPECIFIC COMMENTS

Our comments are set forth below in the form of responses to each of the specific questions asked in the Conclusion to the Consultation Paper.

1. ***Are the statements in the paper about the existing regulatory environment accurate, in your experience?***

   Ans. With two important exceptions, Part IV of the Consultation Paper accurately identifies the fundamentals of the existing regulatory environment in each of the pension, securities, insurance and trust industries applicable to CAPS.

   a. In the summary of the fundamentals of pension regulation, the Consultation Paper states that "pension legislation contains a number of specific investment restrictions which are designed to ensure pension funds are adequately diversified and managed so as to avoid conflicts of interest". While accurate in respect of the pension legislation in most Canadian jurisdictions, this statement fails to note the important changes to Quebec pension law which moved away from this regulatory approach. Instead, Quebec pension legislation now reflects a general "prudence" approach to plan governance. Quebec's change reflects the approach now taken to pension regulation in a number of other jurisdictions (including Australia, the U.K. and the U.S.). The adoption of this "prudence" approach by governments in Canada and throughout the world is evidence that the use of specific investment restrictions within the regulation of capital accumulation plans should be seriously questioned.

   b. In the summary of the fundamentals of securities regulation, the Consultation Paper, on page 19, states that "*… to the extent that an ECDCPP or other CAP relies on the minimum "sophisticated investor" exemptions and the assumptions of this discussion apply, that reliance is misplaced*". We agree that certain exemptions only apply if a portfolio manager has full managerial discretion over individual accounts and our relationship with our clients often takes this form. However, with respect to ECDCPP's, we respectfully disagree with this statement. The purchaser in that situation is a single legal entity, the pension plan trust, and nothing in the relevant securities regulation distinguishes this type of investor from any other.

2. ***Are the proposed regulatory principles appropriate and adequate to address the needs of CAP members, plan administrators, employers and regulators?***

Ans. With the exceptions, and subject to the concerns, outlined below, the proposed regulatory principles are appropriate and adequate. Each principle will be addressed in the order set out in the Consultation Paper.

a. Obligations with respect to the establishment and maintenance of a CAP.

We support the four specific duties prescribed in connection with a Plan Administrator's or Employer's Fiduciary Duties Regarding the Establishment and Maintenance of a CAP and believe that prudent administrators and employers currently fulfill these duties. We note however that the listing of these specific responsibilities constitutes a departure from past practice where pension legislation required an administrator or employer to be prudent but did not specify the components of prudence such as the reasonable range of options, etc. that should be offered. In implementing this principle, if it is felt appropriate to specifically enunciate the components of a prudent process, compliance with those components by an administrator or employer should constitute a safe harbour as is the case under ERISA.

b. A minimum level of disclosure for new CAP members and continuous disclosure.

Disclosure, in many circumstances, is an effective tool in ensuring that investors understand the investments that they are making. We caution however that disclosure is only effective where it is used by the investor. Regulation based primarily on disclosure amounts to an absence of regulation where the investor does not or cannot take advantage of the disclosed information. In the non - retirement savings market, it takes a pro-active step on behalf of individuals to initiate the investment process and it is therefore appropriate to assume that such investors will avail themselves of disclosure related to their proposed investment (though many would argue that even in this context few investors take advantage of the available disclosure). In the CAP market, we believe that it is significantly more problematic to make this assumption. The traditional Defined Benefit pension plan operated wholly without participation by employees and there are doubtless many employees within ECDCPP's that have no interest in or are not capable of reviewing disclosure concerning investment alternatives. This is clearly reflected in the existence of the extensive fiduciary obligations placed on administrators and employers and we believe this fact requires significant flexibility in legislating disclosure standards.

We note that the principle enunciated in the Consultation Paper is that there be "a" minimum level of disclosure. We believe that this approach is wrong. Minimum levels of disclosure, depending on the circumstance, may be appropriate but a one "one size fits all" standard is clearly not. When implementing a new CAP or when converting an existing Defined Benefit plan to an ECDCPP, an employer or administrator should have flexibility to provide disclosure appropriate to the members of the relevant plan.

In addition to the efficacy of disclosure, it is important to consider the cost. We note that the Consultation Paper does not consider the cost of disclosure in its discussion of this issue. In particular, we feel it important that the existing securities regulatory prospectus disclosure regime, with its considerable costs, not be adopted as the de facto standard in respect of CAPS.

Finally, we caution against following the path of least resistance in this respect which may be for the relevant regulator(s) to simply adopt the existing securities regulatory prospectus regime. As noted above, in the circumstances of a CAP flexibility is essential to the disclosure regime and, in many circumstances, will add no significant value to the CAP member who will rely on his or her employer or plan administrator. Forcing the CAP to incur the cost of providing this type of disclosure to this type of member will give rise to costs with absolutely no offsetting benefit.

c. *CAP members may either rely on advice provided by a registered sales representative or advisor, or receive and rely upon appropriate investment information from a party that owes fiduciary duties to the members.*

This principle gives rise to several concerns:

First, as with the disclosure principle, this principle appears to be proposed without full consideration of the potential cost that will be incurred if registered sales representatives are chosen to provide advice to employees. Further, the proficiency requirements to become a registered sales representative do not necessarily coincide with the advisory character of the service it is contemplated they should provide in respect of retirement planning. The CAP business is not the retail mutual fund or insurance contract distribution business and careful consideration should be given to the appropriate proficiency requirements of individuals providing advice to plan members. The fiduciary obligations upon an employer or administrator are greater than those of many registered sales representatives and may be a more appropriate guarantor of members' interests than proficiency requirements deemed appropriate in other industries.

The only alternative offered to incurring this cost however is for the employer or administrator (the only parties with direct fiduciary duties to the members) to assume a responsibility for providing investment information that it is clearly not in a position to provide. This second alternative clearly imposes a significant fiduciary burden on employers that arguably does not exist today without any detailed analysis as to the costs and benefits of the principle. Particularly in the absence of a safe harbour provision this approach is problematic. In the absence of an ERISA like model in which investment managers or others are permitted to assume the fiduciary obligations of the employer, this alternative could not be fulfilled without the employer itself being able to provide the advice it seeks from its investment managers.

Finally, we are concerned with the impact this principle could have on the relationship between investment managers, plan administrators or employers and employees. The CAP business is already evolving in a way that is reducing the direct contact between investment managers (registered under securities legislation as advisors – the category with the most stringent proficiency requirements) and plan sponsors or members. The parties that have direct contact with the administrators or employers do not have the same knowledge of the investment alternatives nor the same overall investment knowledge and proficiency as these investment managers. Some industry observers and participants see this as a negative development. The proposal that a sales representative be required to provide advice to members could significantly worsen what some already see as a problem.

d. *The investment products or funds must comply with minimum standards (e.g., investment restrictions and practices, valuation/redemptions, and fundamental changes).*

As noted above, the trend in the pension industry has been away from specific rules dealing with plan administration and towards a "prudence" requirement that offers flexibility to plan administrators and employers. Within Canada, this trend has manifested itself in the recent changes to Quebec's pension regulations but there is growing support within the pension industry for similar changes elsewhere. This trend started many years ago when the "legal list" approach to investing was discarded and it would be inappropriate to introduce a regulatory model at this time that did not address this trend. A similar trend exists within the securities industry. A "fund governance" project is now being undertaken by the Canadian Securities Administrators to develop a "fund governance" model for Canadian mutual funds. It is expected that with the adoption of an acceptable governance mechanism, at least some of the existing quantitative and self-dealing rules currently applicable to the mutual fund industry will be withdrawn. We note that the proposed fiduciary and governance obligations of the CAP administrator or employer should provide sufficient comfort to minimize the number of specific minimum standards.

To the extent minimum standards do need to be enunciated, we encourage flexibility. The ultimate objective of a CAP is to provide the best investment return to members at the lowest possible cost. Artificial restrictions upon this process may be appropriate in certain circumstances but a thorough cost-benefit analysis should be done prior to the imposition of any such restriction and the restriction, when implemented, should not limit the flexibility of the employer, plan administrator and investment manager.

3. ***What would be the most effective and practical method of implementing the regulatory principles that emerge from this process?***

Ans. The fragmented nature of the regulation of our business is a significant impediment to our ability to provide high quality, cost effective services to our clients. By far the most effective method of implementing any regulatory principles that emerge from the process the Joint Forum has initiated would be the adoption of a single regulatory regime, applicable in all jurisdictions, under the authority of a single regulator. Unfortunately, this method may fail the "practicality" test. The next most effective method would be to have a single regulatory regime adopted in each Canadian jurisdiction that delegated responsibility for all aspects of CAP regulation to one local regulator. We appreciate that implementation of these regulatory principles could require significant changes to the existing regulatory structure or, at minimum, a concerted effort amongst regulators to cooperate in this area. We note that with the proposed merger of the Financial Services Commission of Ontario with the Ontario Securities Commission this approach should be easier to implement in Ontario than elsewhere but we would encourage its adoption elsewhere as well.

4. ***What are the anticipated short-term and long-term costs (in $ and in plan coverage) of implementing the proposed regulatory principles?***

Ans. As noted above, we believe that certain aspects of the proposed regulatory principles could potentially impose significant costs, both short and long term. In the absence of any detail however, it is difficult to quantify these costs, in dollars or otherwise. However, we have attempted to demonstrate the impact of these costs in the attached schedule. This schedule shows the impact on an investment earning different rates of return of different increases in the costs incurred in connection with the investment. Our preceding comments have highlighted certain of the additional direct costs that would result from the proposed regulatory principles. In the absence of any detail, one can only guess what these costs might be but the attached schedule demonstrates that even at minimal levels, these costs will have a significant long-term impact on investment return.

In addition, we note that one of the most significant factors that has led to the growth of the CAP market was the regulatory complexity and costs that became associated with administering a defined benefit pension plan. The result of adding too much complexity and cost to the CAP market would similarly be expected to drive administrators and employers to look for alternatives. The complexity and cost of administering a DB plan have not diminished so the only likely alternative would be for employers to simply stop offering employer sponsored plans altogether. Instead they might be persuaded to simply increase the pay of their employees who would be left wholly on their own to invest for their retirement. To the extent therefore that there is still seen to be value in having employers participate in the retirement savings of their employees, we believe it is essential to minimize these costs. Our members manage retail mutual funds, non-prospectused funds and separate accounts and regardless of the form of investment, our members expect to continue managing retirement savings plans for Canadian employees. However, we recognize that CAPS offer employers and employees certain benefits that cannot be obtained through traditional defined benefit pension plans or through individual savings accounts. We therefore urge you to consider the concerns we've outlined above so that employers and employees can continue to take advantage of the benefits offered by CAPS

CONCLUSION

We are generally supportive of the proposed regulatory principles set forth in the Consultation Paper and believe it represents a significant step towards a more consistent and efficient regulatory regime for CAPS. We support the release of the Consultation Paper and urge you to continue consultation with all relevant parties as the process evolves. In particular, we urge you to proactively approach employers or their industry organization to solicit the views of those who may not otherwise focus on this issue. The views of plan administrators, investment managers and their advisors are important and should be carefully considered, but it is just as important to solicit the views of those who may not as easily identify their interest in providing input into this process. We are encouraged by the publication of the Consultation Paper and thank you for the opportunity to comment. If you wish to discuss any of our comments please contact the undersigned at (416) 643-4030 or Warren Collier at (416) 643-4075 at your convenience.

Sincerely,

Gerry Rocchi
Managing Director/President

MEMORANDUM

Regarding

PROPOSED REGULATORY PRINCIPLES FOR CAPITAL ACCUMULATION PLANS

Submitted to

THE JOINT FORUM OF FINANCIAL MARKET REGULATORS

By

CANADIAN ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS

CAIFA

350 Bloor Street East, 2nd Floor
Toronto, Ontario M4W 3W8

Tel: (416) 444-5251 or 1-800-563-5822
Fax: (416) 444-8031
E-mail: info@caifa.com
Website: www.caifa.com

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<u>**CONTENTS**</u>

EXECUTIVE SUMMARY

The core principles and recommendations in this memorandum appear below under sections 1.7 “Limitations of the Discussion Paper” and 1.8 “Additional Principles for Consideration”.

1. CAIFA’s PERSPECTIVE AND OVERALL ASSESSMENT

The **Canadian Association of Insurance and Financial Advisors** (CAIFA) is pleased to respond to the request of the Joint Forum of Financial Market Regulators to comment on its discussion paper, “Proposed Regulatory Principles for Capital Accumulation Plans”. The paper is a report of the Joint Forum’s Working Committee on Investment Disclosure in Capital Accumulation Plans (CAPs), published on April 27, 2001.

1.1 CAIFA

Founded in 1906, CAIFA has been for most of its history the national professional association for sales intermediaries and advisors in the life insurance sector of financial services. CAIFA now welcomes members from the mutual funds and securities sectors as well. CAIFA's members, all of whom are voluntary, participate in the activities of the Association through 51 local chapters.

Among its principal activities, CAIFA provides professional development programs that extend from pre-licensing courses in life insurance to studies that lead to the Certified Financial Planner (CFP), Chartered Life Underwriter (CLU) and more specialized titles and designations. National, regional and local conferences and seminars supplement those programs and sustain mandatory continuing education that is required of all CAIFA’s members. CAIFA also maintains a Code of Professional Conduct and a supervised disciplinary process where members investigate, adjudicate and impose sanctions on their peers.

The Association’s members advise their clients on the short and long-term financial needs of individuals, families and the owners of small and medium-sized businesses. CAIFA’s membership reflects the convergence of life insurance with other financial sectors, notably securities. Approximately 70% of CAIFA’s members are registered to sell mutual funds or other securities. Recent surveys indicate that the majority of CAIFA’s members offer group employer-sponsored group benefit and retirement plans.

1.2 CAIFA's Perspective

The paper describes CAPs as "investment vehicles established by employers for the benefit of their employees that permit those employees to make investment decisions". CAPs specifically include four types of investment vehicles, each of which is provided to employees by an employer and permits employees to make investment choices:

- Defined contribution (DC) pension plans
- Group registered retirement saving plans (RRSPs)
- Deferred profit sharing plans (DPSPs)
- Employee Profit Sharing Plans (EPSPs)

CAIFA approaches the paper from two perspectives. As noted above, a significant number of CAIFA's members advise employers on the establishment and operation of pension plans and group RRSPs. The great majority of these employers are small and medium-sized businesses, with fewer than 500 employees.

In addition, CAIFA is itself a small employer that offers its 75 employees the opportunity to participate in a group RRSP. This CAP is optional and supplements CAIFA's defined benefit pension plan.

This memorandum will address regulatory principles for CAPs that are DC pension plans or group RRSPs.

1.3 Overall Assessment of Discussion Paper

The paper recognizes that CAPs are a conspicuous reality within the total administered money purchase plan market (page 8). That market comprised $60.2 billion as of June 30, 2000. Nevertheless, there is no body of dedicated regulatory principles that address CAPs. The paper therefore considers two issues with respect to CAPs:

1. The need to ensure that members of CAPs uniformly have adequate information and other tools to make informed investment decisions regardless of the legal character of the plan (pension, RRSP or another form of trust) or its underlying investments (mutual funds or insurance products)

2. The need of employers and pension administrators to have their duties and responsibilities with respect to CAPs clearly defined and harmonized across jurisdictions and products.

CAIFA commends the Joint Forum and its Working Committee for undertaking this project. CAIFA fully agrees that those needs exist and supports the objective of developing and then implementing regulatory principles that will respond to them. The paper is a valuable first step towards achieving that objective. With input from participating financial sectors and other stakeholders, CAIFA is confident that the Joint Forum will develop a body of regulatory principles that are appropriate to CAPs.

1.4 CAIFA's Perception of the Discussion Paper

The paper observes at page 4:

> "It may be that securities legislation is not the appropriate regulatory framework for these employer-sponsored plans in which the employers and administrators owe fiduciary duties to members, and in which the nature of the investment decision may be different from the typical retail securities transaction."

CAIFA agrees with the second part of the comment, that investing in a CAP is different from investing in the retail securities market. CAIFA differs with the observation and the perspective of the paper as a whole insofar as they presume a two-dimensional regulatory option for CAPs.

The two dimensions are based on pension and securities models of existing regulation. The paper appears to imply throughout that a regulatory model for CAPs should either impose fiduciary liability on a CAP sponsor for the failed expectations of CAP members or impose a scheme of securities regulation on the CAP member's enrollment and participation in the CAP. CAIFA believes that CAPs have distinctive characteristics as vehicles for employee group benefits that place them outside of the pension or securities models of regulation.

1.5 Limited Role of Employers as Fiduciaries

An employer is a fiduciary for its employees when the employer undertakes to administer assets for their benefit, for example, in a pension plan. More generally, the law will find that a fiduciary relationship exists when one party relies on a second party with superior knowledge or ability in the relationship, there is a potential or actual conflict of interest between the two parties and the first party relies on the second party to its detriment.

When those elements of reliance, unequal knowledge or ability, potential conflict of interest and detriment are present, the courts may find that a fiduciary relationship exists and make the fiduciary liable for losses of the other party. Thus, an executor or trustee may be liable to a beneficiary or a director may be liable to a corporation where the fiduciary fails to protect the other party's interests or even simply places its own interest above the other party's interest. As a practical matter, a court will find a fiduciary duty where it determines to compensate the vulnerable and reliant party in the relationship.

Those elements generally do prevail in the relationship of CAP member and CAP sponsor. In particular, the key element of potential or actual conflict of interest is absent. The CAP sponsor is not selling something to the CAP member. Neither does the CAP sponsor control the investment assets of the CAP member. The CAP sponsor does not receive compensation for enrolling CAP members. There is no pecuniary advantage to the CAP sponsor in any investment choice made by the CAP member. Their interests are aligned.

The CAP sponsor's interest is to attract and retain employees by facilitating their ability to save for retirement. The CAP member's interest is to save for retirement at lower cost and with greater convenience than are generally available to ordinary working people in the retail investment sector.

The employer wants satisfied employees. The measure of the employer's satisfaction with the CAP is its employees' satisfaction with the CAP. Again, their interests are aligned. CAP providers compete for the business of the CAP sponsor by striving to maximize the level of service, information and performance provided to the employees.

In a typical CAP, the employer retains a CAP provider and the employee makes investment decisions over his or her assets in the CAP. Accordingly, because the CAP member relies on the decision of his or her employer, the employer may arguably be under a fiduciary obligation to select a suitable CAP provider before establishing a plan. A reasonable regulatory scheme would establish guidelines for that selection and would absolve the employer of further liability to the employee if the employer selected a suitable CAP provider consistent with guideline requirements and exercised reasonable care to monitor the performance of the CAP provider.

1.6 Investing through CAPs vs. Retail Accounts

The investment decisions made by a CAP member are "very different from the typical retail securities transaction", typically commencing with a carefully screened menu of limited investment options. The group basis of the plan enables significant cost savings to the employee, all of which over the long term will enable a more rapid compounding of retirement savings. Those cost savings include: reduced management expenses, reduced or nil sales charges, free switching among investments and low minimum investment amounts.

Furthermore, the CAP member never deals with an intermediary who has a pecuniary interest in recommending one investment over another. The employee requires investment information but not the services of an advisor who is regulated to minimize a conflict of interest between advisor and investor. There is no need for the employer to become a surrogate for a personal investment advisor to the employee. Rather, the employer should, in accordance with industry guidelines, ensure that the CAP provider selected by the employer is able to provide and does provide the necessary information to enable the CAP member to make informed decisions in a controlled, low-cost, self-directed investment environment.

1.7 Limitations of the Discussion Paper

CAIFA has carefully considered the regulatory principles that underlie the paper, both express and implied, together with the specific proposals that the paper presents for comment. In CAIFA's view, the following deficiencies are evident in the paper in its present form:

- The paper outlines existing regulatory models, principally for the pension, securities and insurance sectors, and finds gaps between those models and the administration of CAPs in practice. There appears to be a bias, which is understandable, to adapt and extend existing regulatory concepts to CAPs.
- Thus, the paper looks to the fiduciary obligations of a pension administrator that manages pension assets and proposes similar fiduciary obligations for the sponsor of a CAP. This outcome would deny the defining characteristic of a CAP: the CAP member is responsible for investment choices.
- Again, the paper looks to established concepts and procedures in the retail securities market and proposes similar levels of product disclosure and the need to give a plan member advice that is founded on matching the suitability of an investment to the individual investor.
- The paper generally fails to give sufficient recognition to the fact that a CAP member participates in the CAP as a benefit of employment and that the employer chooses to offer the CAP but need not do so.
- The paper does not sufficiently identify the unique benefits of CAPs to employer and employee—why the employer chooses to sponsor a CAP (attract and retain employees) and why the employee chooses to participate (the ability to save for retirement with greater convenience and at lower cost than are generally available to younger and more modestly compensated employees in the retail sector).
- The paper does not recognize that there is no need to erect fiduciary obligations of CAP sponsor to CAP participant because their interests are aligned and there are no pecuniary conflicts of interest between them.
- The paper does not sufficiently acknowledge the genuine cost advantages to saving for retirement that CAPs now make possible compared with the retail sector: reduced management expenses, reduced or nil switching costs, reduced minimum purchase amounts.
- The paper appears to imply that a CAP is an alternative investment that should be regulated like other investments—something like a fund of funds—and does not sufficiently perceive that it is an alternative to the retail investment market.
- The paper does not appear to appreciate the vulnerability of CAPs to replacement by readily available alternatives: sponsors can offer other benefits, including cash; employee members can invest in the individual retail market or not at all.
- The paper does not sufficiently recognize that a market characterized by employers who willingly sponsor a CAP, employees who willingly participate in it, financial institutions that willingly provide it and a competitive market have combined to develop best practices. Those practices constitute a sound basis for regulation that may depart from existing regulatory principles.
- The paper acknowledges that the investment universe which 90% of CAP participants confront is, on average, 12 choices. It does not sufficiently recognize that that field of choice is not only quantitatively but also is qualitatively profoundly different from the choices that confront an individual retail investor in the markets for pooled or individual investments that number in the thousands.

- Apart from a passing reference to “members’ … obligations under the CAP” (page 28), the paper entirely fails to recognize that CAP participants have their own obligations to participate responsibly.
- Above all, the paper does not hold up the governing principle that CAPs uniquely provide social value by removing barriers and offering incentives to save for retirement and that a regulatory system for CAPs must foster and not threaten their continuing existence.

1.8 Additional Principles for Consideration

This memorandum will attempt to correct the preceding deficiencies. In CAIFA’s opinion, the following principles are pertinent:

- Sponsors will abandon CAPs and offer other employee benefits or cash if they are exposed to liability for shortfalls in the retirement assets of disappointed retirees.
- Sponsors, especially small and medium-sized enterprises, have adopted CAPs as an alternative to the cost and compliance burdens of maintaining a defined benefit pension plan. Sponsors will abandon CAPs if regulation similarly becomes too complex and costly.
- Sponsors will abandon CAPs if employees no longer perceive participating in a CAP as a benefit of employment. That may occur as the cost of regulatory compliance makes participating in a CAP as expensive as investing in a mutual fund or segregated fund or if the experience of enrolling in a CAP becomes indistinguishable from purchasing an individual investment.
- Employees will resist disclosing financial or personal information to a perceived agent of the employer as a condition of participating in a CAP. Conventional requirements that an investor disclose personal information to enable an intermediary to “know your client” and assess suitability of an investment are inappropriate in the workplace.
- The critical elements that allow a CAP to be a cost-effective vehicle for investment in the workplace are (1) effective investor information that is pertinent to (2) a limited selection of screened investment options. CAP participants require information that is sufficient to enable the participant to choose from a limited but balanced field of screened and complementary investment options.
- The information may be delivered by multiple vehicles—print, seminar, client service telephone number, internet. The information that is provided must impart a working knowledge of the principles of asset allocation and risk vs. reward, all keyed to investment timelines relating to retirement.
- The *quid pro quo* for informed self-selection by investors in the workplace is effective information and a limited menu of rigorously screened choices. The life insurance industry has developed best practices for both education and selection.
- To date, a competitive market among CAP providers has engendered effective best practices. They should be codified more formally.
- A sponsor’s obligations should be confined to due diligence to verify that a proposed or current CAP provider adheres to acknowledged best practices. Contrary to the

position stated in the paper, there must be a "safe harbour" for sponsors who document that they have done so.

- Representatives of CAP providers should be demonstrably proficient before they may advise a CAP sponsor.
- Guidelines for CAP providers should require that information providers, whether call centre employees or speakers at seminars, should be demonstrably proficient.
- When CAP participants receive sufficient information, individual advice should not be mandatory. Plan providers and sponsors may, but need not, provide individual advice or encourage CAP participants to seek it from their personal advisors.
- Regulatory principles should as a minimum promote measures to ensure that CAP participants acknowledge, in writing, their obligations to consider information that the CAP provides, to choose responsibly and to recognize the consequences of failure to do so. Best practices guidelines should include practical measures, such as standards for advance notice for any educational programs and attendance sheets to record participants and follow up absentees.

2. THE PROPOSED REGULATORY PRINCIPLES

2.1 Safe Harbour

The paper sets out proposed regulatory principles for CAPs at pages 26 to 31. The following statement appears at page 27: "It is not proposed that plan administrators and employers would be held harmless for investment losses of members, if the principles were followed".

In effect, the proposals would impose obligations on employer CAP sponsors that are far in excess of existing requirements and in addition expose them to liability for the losses of disappointed CAP members. That proposition is a recipe for driving CAP sponsors out of the market. In the recent environment for employer-sponsored retirement plans, employers, especially small and medium-sized enterprises, have tended to move from defined benefit plans to defined contribution plans and from defined contribution plans to group RRSPs in an effort to control their exposure to costs and liability for guaranteed outcomes. It is difficult to see why those employers would volunteer to assume liability for the disappointed expectations of their employee investors.

If the proposed regulatory principles were implemented, those employers would opt to avoid CAPs altogether and offer their employees other benefits or cash. That outcome would be a disservice to employees who would lose the convenience and cost advantages of saving for retirement in the workplace and divert income to consumer expenditures. It would also be a detriment to the nation, when public expenditures would have to compensate for lost private opportunities to save for retirement.

CAIFA can support regulatory principles only if they restrict the obligation of the CAP sponsor to exercise due diligence in selecting and monitoring the CAP provider, according to agreed guidelines, and then relieve the CAP provider of further obligations to CAP members for the consequences of their investment decisions. Accordingly, CAIFA considers that the regulatory principles described in the paper under "The Fundamentals of the U.S. *Employee Retirement Income Security Act of 1974* ("ERISA")" deserve careful consideration (pages 23 to 26). That is precisely because they provide a "safe harbour" for sponsors that comply with the fiduciary duties and investment disclosure standards summarized in the paper.

ERISA principles are particularly attractive because, as the paper notes at page 24, "several Canadian CAP providers, particularly insurance companies, currently follow ERISA's lead and provide the same type of information to members of CAPs…that is required of U.S. sponsors of defined contribution pension plans under ERISA".

CAIFA understands that, under original ERISA principles, CAP providers are generally precluded from providing investment advice to plan members. CAIFA further understands that, in response to consumer demand, the U.S. Congress has proposed to allow plan providers to offer investment advice to plan members.

*CAIFA **recommends** that CAP providers be permitted to offer individual investment advice as an option.*

In the discussion which follows, text headings that appear in quotation marks are taken from the paper.

2.2 "Plan Administrators' or Employers' Fiduciary Duties Regarding the Establishment and Maintenance of a CAP"

CAIFA can support proposed duties, described on pages 27 and 28 of the paper, that a CAP sponsor must:

1. Select investment options for members which offer a reasonable range of options with different risk and return characteristics, each of which is diversified;

2. Prudently select, using all relevant knowledge and skill, the investment managers for each investment option;

3. Where no prospectus is provided, ensure contracts with a third party provider or investment manager allow the plan administrator or employer to pursue an action on behalf of members for any misrepresentation about the investments; and

4. Allow members to switch between investment options without penalty.

It is unrealistic to expect that many CAP sponsors, such as CAIFA itself, will be able to select "the investment managers for each investment option". Most CAP sponsors will rely on the CAP provider, typically a financial institution. Regulatory principles should provide that a CAP sponsor discharges those duties by exercising due diligence in selecting a CAP provider that will perform those duties on behalf of the CAP sponsor.

CAIFA must reject expressly proposal (i)3 that a CAP sponsor must:

> “prudently monitor the performance of the investment managers for each investment option, including setting and monitoring benchmarks for investment performance according to the type of fund, and taking appropriate action where performance is unsatisfactory”.

As a practical matter, that responsibility is manifestly beyond the capability of most small and medium-sized businesses. It should be the responsibility of the CAP provider. Even if the CAP sponsor were able to monitor the performance of investment managers selected by the CAP provider, the requirement would be a direction to second-guess professional managers and engage in market timing, to the ultimate detriment of plan members.

Again, regulatory principles should provide that a CAP sponsor will discharge the duty to monitor performance by exercising due diligence in selecting a CAP provider that will perform that duty on behalf of the CAP sponsor. Due diligence may include a requirement that the CAP sponsor and CAP provider sign a memorandum that documents their understanding of their respective undertakings.

2.3 Qualifications for CAP Advisors

CAIFA understands that the province of Quebec requires employee benefits consultants to obtain additional certification as evidence of their qualification.

*CAIFA **recommends** that intermediaries between CAP providers and CAP sponsors should similarly be required, by certification or licensing, to demonstrate their competence to advise a prospective CAP sponsor and to provide assurances that the CAP will be compliant with any regulatory requirements.*

Appropriate certification may be included within the qualification standard for another licence. For example, CAIFA anticipates that the proposed new national proficiency standard for life insurance agents, the Life Licensing Qualifying Program, will include a module on group benefits.

2.4 “Plan Administrators’ or Employers’ Fiduciary Duties re: Initial and Continuous Disclosure”

CAIFA is generally able to support the proposals for disclosure to a CAP member of the operation of the CAP and the performance of CAP investments outlined on pages 28 to 30, with the following reservations:

1. The CAP sponsor may delegate the disclosure responsibilities to a selected CAP provider.

2. The CAP sponsor will discharge its fiduciary duty to the CAP members by exercising due diligence in

3. CAP members should have the option to receive required information through electronic media, such a secure internet website or personal e-mail.

2.5 Consumer Guide

The paper proposes that “a standardized consumer guide, including a retirement ‘income profile’ to educate members about investments” be provided to CAP members. The guide will be critical to ensuring the successful operation of a CAP in a self-directed investment environment.

The proposed requirement for “a standardized consumer guide” to educate members about investments should be interpreted liberally. CAP providers in the insurance sector compete vigorously to provide this kind of information, with resulting continuous improvement and customized guides dedicated to target audiences. The requirement should not inhibit beneficial innovation and customization. Since the intended investors will already be enrolled in the CAP, there should be no concern that a CAP provider will corrupt the guide and use it to promote sales and defeat its intended purpose— education and guidance.

CAIFA ***recommends*** *that the requirements for a consumer guide should standardize the outcome for a reader rather than standardize its contents in detail.*

2.6 “Plan Administrators’ or Employers’ Fiduciary Duties to Provide Appropriate Investment Decision-Making Tools to CAP Members”

2.6.1 Advice and Advisors—Optional Only

CAIFA’s members, as life insurance agents and securities salespersons, are professional advisors. Nevertheless, CAIFA firmly believes that regulatory principles for CAPs should not require that a registered securities representative or a licensed life insurance agent must advise a CAP member who makes an investment choice. That requirement would defeat the benefits of CAPs to employees as low-cost, self-directed retirement saving vehicles. An employee who desires individual advice and wishes to incur its associated costs may always turn to an advisor outside the CAP.

Neither should the CAP provider be liable for advice that is given or not given to a CAP member or for the consequences of the investment decisions of a disappointed CAP member. Rather, the paper correctly characterizes the CAP sponsor’s obligation as the “Employers’ Fiduciary Duties to Provide Investment Decision-Making Tools to CAP Members”.

CAP providers compete vigorously to develop effective information and decision-making tools. These may take the form of print materials, website information, seminars, visiting consultants on-site and call centres.

CAIFA ***recommends*** *that individuals who provide information or guidance to CAP members should demonstrate competence to do so.*

For example, a certification program for employees in call centres may promote a consistent level of competent service.

If information and decision-making tools are provided that enable an employee to choose from a limited selection of screened investments, the risk that CAP members will make inappropriate investments will be well controlled. In practice, employers endeavor to minimize the risk of exposing their employees to financial loss. This is not because they desire to avoid liability to their employees but because the entire rationale for choosing to provide a CAP is the desire to provide an employee benefit and employee satisfaction.

The paper appears to recognize those realities when it proposes that the employer's duty to "ensure that members deal with a registered sales representative or advisor" is only the first of two options (page 30).

CAIFA ***recommends*** *that the proposal should also include "a licensed life insurance agent" along with "a registered sales representative or advisor" as qualified personal advisors.*

CAIFA ***recommends*** *that personal advice and the participation of a licensed or registered advisor should always be available as an option.*

2.6.2 Information and Assistance

The proposed second alternative to personal advice by a licenced or registered advisor is:

2. Take *reasonable* steps to ensure members (i) are provided with the recommended initial and continuous investment information discussed above, which should be presented in a manner appropriate for the members; and (ii) receive *appropriate* assistance with making investment decisions. For example, this *may* involve reviews of members' investment choices for suitability based on their "know Your Client" profile, surveys of members' investment knowledge, or creating a process to allow members to communicate their investment information needs to the plan administrator or employer, for the purpose of ensuring the effectiveness of the investment material and other assistance provided to members (pages 28 and 29) [emphasis added].

The words above in italics are important. The regulatory scheme for investment information must be flexible. The critical obligation of the CAP sponsor and CAP provider must be to maintain a process to verify that the information and means of providing it to CAP members are appropriate.

In most circumstances, importing "know your client" and reviews of investments for suitability will be inappropriate for CAPs, especially when they are provided by small and medium-sized employers. Those procedures will defeat the cost saving that is intrinsically a beneficial feature of CAPs to employees saving for retirement. Furthermore, employees will resist mandatory disclosure of personal information in the workplace to personnel who are perceived to be agents of the employer.

"Know your client" and suitability reviews may have a place in the retail investment market. However, they will be a redundant expense and inconvenience when CAPs provide effective information and decision-making tools, linked to limited menu of screened investment options.

2.6.3 Obligations of CAP Members

In addition to the regulatory principles outlined in the paper, CAIFA ***recommends*** *that an effective process "to provide appropriate investment decision-making tools to CAP members" will include measures to make CAP members aware of their responsibility to utilize the tools that are provided and the consequences to them personally if they fail to do so.*

Simple measures could include signed acknowledgments by CAP members, signed attendance sheets for educational events and follow-up notices to absentees.

2.7 "Investment Rules"

The paper outlines proposed investment rules "to ensure, among other things, adequate diversification of funds, the avoidance of conflicts of interest and an acceptable level of risk" (page 31). CAIFA can generally endorse the broad principles that the paper sets out.

The investment rules should apply to the CAP provider. The obligation of the CAP sponsor should be to exercise due diligence to satisfy itself that a current or proposed CAP provider is or will be compliant.

The paper states: "CAP members should not be subject to any greater risks than investors in retail funds or segregated funds". That objective can be achieved if investment choices are limited and screened for suitability before they are selected as investment options under the plan.

3. IMPLEMENTATION OF THE PROPOSED REGULATORY PRINCIPLES

The paper proposes three possible implementation options for consideration and comment:

1. Industries involved in CAPs develop harmonized guidelines together with the Joint Forum for regulatory authorities to adopt through regulation or rules.

2. The Joint Forum issues best practices guidelines through its member regulators, similar to best practices guidelines issued by the federal Office of the Superintendent of Financial Institutions.

3. The Joint Forum develops stand-alone model legislation for CAPs, which provincial and territorial legislatures enact, or model regulation which pension, securities and insurance regimes in each jurisdiction adopt as regulations, rules or national policies.

Throughout this memorandum, CAIFA has referred to and approved the best practices for the operation of CAPs that CAP providers, especially life insurance companies, have developed as they have competed for acceptance of their proposals by CAP sponsors. CAP providers have developed CAPs that work for CAP members and satisfy CAP sponsors' objectives to provide their employees with a tangible benefit of employment.

For that reason, CAIFA ***recommends*** *option number 2 above: The Joint Forum should issue best practices guidelines through its member regulators, with input from the financial services sectors that provide CAPs.*

4. COSTS

The paper asks, "What are the anticipated short-term and long-term costs (in $ and in plan coverage) of implementing the proposed regulatory principles?" (page 34).

In this memorandum, CAIFA has, in effect, recommended that regulatory principles elevate the best practices evident in CAIFA's own CAP and CAP provider as best practices recognized by the Joint Forum. Those best practices principally include the provision of a screened menu of suitable investment choices and appropriate information and other investment decision-making tools to enable CAP members to select and monitor investments from that menu. CAIFA has recommended that best practices include measures to impress on CAP members their obligations and the importance of taking full advantage of the investment decision-making tools that are provided.

If CAIFA's recommendations were adopted, CAIFA, CAP sponsors that have adopted similar plans and the providers of those CAPs should expect negligible additional short-term or long-term costs.

However, not all plans follow the same principles. For example, the paper observes that "39% [of CAPs] offer no investment education whatsoever" (page 9). It is difficult to account for such a deficiency or to determine whether the cost of providing investment education would be prohibitive to any of those plans. In CAIFA's experience, alternative CAP providers should be able to supply CAPs that are compliant with CAIFA's recommended proposals, at an acceptable additional cost.

5. FURTHER CONSULTATION

On behalf of its 51 chapters across Canada, CAIFA thanks the Joint Forum for this opportunity to comment on the paper and offers its further assistance in future consultations on these important issues.

July 31, 2001

Ms. Carla Adams
C/o Financial Services Commission of Ontario
5160 Yonge Street
17th Floor, Box 85
North York, Ontario
M2N 6L9

Dear Ms. Adams,

Re: A Report by the Joint Forum of Financial Market Regulators' Working Committee on Investment Disclosure in Capital Accumulation Plans

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Corporate Benefit Analysts Inc. is a Pension & Benefits Consulting Firm located in Kitchener, Ontario. We provide consulting, actuarial and administration services for our clients' defined benefit and defined contribution pension plans. We respectively submit our comments with respect to the above report dated April 27, 2001.

We support the need for harmony among capital accumulation plans, across different jurisdictions, industries and products.

We also support the desire to clearly define employer's and administrators' duties and responsibilities with respect to CAPS and to promote harmonization across jurisdictions and product lines. We fully support the need for clear communications and full disclosure to plan members.

We do have the following comments with respect to several items included (or not included) in the above report:

- We suggest the concerns raised in this report are also applicable to defined contribution pension plans in which the administrator is responsible for making all investment decisions and fail to see the rationale for their exclusion
- Similarly a "trusteed" plan, where the trustees make all investment decisions faces the same if not more issues relating to disclosure, fiduciary responsibility and we recommend this report also include this type of arrangement

- We do not agree with the concept that an Employer should be obligated to provide financial planning or investment advice to a plan member. Most employers do not have the expertise, resources, or the tools to be properly advising plan members with respect to investment decisions. Nor is it appropriate to impose KYC responsibilities on a Plan Sponsor.

- We would like to see a form of a ‘safe harbour’ for the plan sponsor to limit their potential liability by providing a minimum of information that is deemed to be appropriate for employees.

- We have some concerns about imposing additional regulations on Plan Sponsors already burdened with significant compliance requirements, and suggest the prescribed reporting requirements be minimized (as with the approach taken by FSCO with the SIP&P).

- We would like to see a relaxation of the regulation for those financial institutions that must follow the securities' model. Providing a prospectus to a member of each fund they choose within 2 days is onerous and costly. As pension consultants it is difficult to recommend these products, which are more costly for the plan sponsor. Allow best practices within the industry to develop competitively.

In general, however we applaud the Joint Forum for their report and analysis of the deficiencies in the delivery system of our retirement programs.

Yours truly,

Anne Williamson
Pension Consultant

Olga Knight
Manager, Retirement Serivce

Cam MacNeish
Vice President, Group Pensions

Hewitt

Hewitt Associates
25 Sheppard Avenue West
Toronto, Ontario M2N 6T1
Tel (416) 225-5001
Fax (416) 225-5121
www.hewitt.com

August 3, 2001

Via Courier

Private and Confidential

Ms. Carla Adams
c/o Financial Services Commission of Ontario
5160 Yonge Street
17th Floor, P.O. Box 85
North York, ON M2N 6L9

Dear Ms. Adams:

Subject: Proposed Regulatory Principles for Capital Accumulation Plans

We are writing to provide you with the comments of Hewitt Associates to the Report by the Joint Forum of Financial Market Regulators' Working Committee on Investment Disclosure in Capital Accumulation Plans (the "Report").

Generally

Overall, we are very pleased that an attempt has been made by the Joint Forum to harmonize the regulation of capital accumulation plans ("CAPs") across Canadian jurisdictions. We are equally pleased to be given an opportunity to comment on the Report and to participate in the consultation process.

We have seven primary areas of concern with the Report:

1. The Report is too general on its expectations of plan sponsors.

   The Report was developed to address two issues: (i) the need of members of all types of CAPs to have similar regulatory protection and disclosure in order to make informed investment decisions, and (ii) the need of employers to have their duties and responsibilities with respect to CAPs clearly defined. While the attempt to address these issues is laudable, we believe that the second issue has not been addressed with sufficient clarity, as discussed later in this submission. As a result, employers may become more confused of their roles in respect of CAPs.

2. The Report is too narrow in scope.

   We do not understand the rationale of excluding traditional defined contribution pension plans in which the administrator is responsible for all investment decisions. In our view, members of these plans are in equal need of regulatory protection and should be entitled to investment disclosure about the types of investments that are being made with their retirement income. Further, we feel that by excluding traditional defined contribution pension plans, the Joint Task Force is tacitly endorsing the manner in which these plans are being administered, including the failure to offer plan members any investment choice despite taking on all the risk of a fluctuating stock market.

We suggest that, instead of providing one scenario on page 5 in respect of a plan administered by a Board of Trustees and in which the members have investment choice, you could provide a number of fact scenarios. This would help demonstrate to the readers the diversity of CAPs in the marketplace and to illustrate the types of issues that flow from the different designs of plans. The Report could also more effectively distinguish between:

(a) retirement plans where funds are locked-in to retirement age (eg. money purchase pension plans);

(b) savings plans where funds may be locked-in at least to date of termination, but sometimes are not locked-in at all (eg. group RRSPs, DPSPs and EPSPs); and,

(c) profit sharing plans which are dependant on company profits and may be created specifically to invest in company stock (eg. DPSPs and EPSPs).

Further, a fact scenario where a member has a choice of investment options with respect to his or her contributions but no choice with respect to employer contributions (eg. the employer contributions are directed into an investment option selected by the employer) could also be presented.

Finally, there should be some reference to notional or unfunded plans in which employees may have similar investment choices as in the underlying funded CAPs.

3. The Report appears to be shifting all responsibility for the sufficiency of a plan member's retirement income to the plan sponsor.

   Besides the other examples of increased obligations imposed upon plan sponsors set out in this letter, there is an unusual requirement found on page 28 of the Report. Specifically, it requires that, where no prospectus is provided, the plan sponsor must ensure that contracts with a third party provider or investment manager allow the plan sponsor to pursue an action on behalf of members for any misrepresentation about the investments. We find this statement quite startling. Why is it the obligation of the plan sponsor to pursue an action on behalf of the members? The members can pursue a claim without the plan sponsor since the cause of action is one of Tort Law, not Contract Law.

4. The Report appears to require plan sponsors to provide plan members with financial planning advice and even, at times, imposes the "know your client" rule upon the plan sponsor.

   The following are a few examples from the Report evidencing the promotion of the "know your client" rule:

   (a) One of the fundamental principles for the proposed regulatory model is listed on page 26 as "CAP members may either rely on advice provided by a registered sales representative or advisor, or receive and rely upon appropriate investment information from a party that owes fiduciary duties to the members";

   (b) On page 29, there is a requirement to provide a member with a standardized consumer guide, including a "retirement income profile";

   (c) Page 30 states that the plan sponsors' fiduciary duties should include the duty to:

      (i) ensure that members deal with a registered sales representative or advisor; or

      (ii) take reasonable steps to ensure members are provided with the recommended initial and continuous investment information, presented in a manner appropriate for the members; and receive appropriate assistance with making investment decisions.

   The Report even goes so far as to suggest that the plan sponsor "…may involve reviews of members' investment choices for suitability based on their "Know Your Client" profile." This, in our view, is much too onerous of a responsibility to expect a plan sponsor to be saddled with. Further, we suggest that fiduciary law does not impose such an obligation in Canada today and the Report is therefore expanding the fiduciary duties of the plan sponsor of a CAP.

5. The Report starts to address the registration requirements under securities legislation and aptly describes the requirements for anyone who trades in a security or who is in the business of advising in securities. In our view, the Report does not go far enough in elaborating on these basic principles.

A few fact scenarios would assist the reader and would help to ensure that one standard is not applied to CAPs in all situations. For example, in the older model of CAP during the days of paper administration, a member would make an investment election on an election form and submit the form to the human resources department. The human resources department would then forward the form to the financial institution and the financial institution would take the direction and make the appropriate investment. In this case, the employer is simply acting as an intermediary, is not exercising any discretion and is not providing any advice. The same holds true where the employer has chosen to outsource the recordkeeping function, regardless of whether the recordkeeping is performed by the financial institution that has custody of the funds (a bundled service provider) or by another third-party record-keeper (an unbundled service). In either case, the record-keeper takes the place of the employer and, similarly, may not exercise discretion or provide any advice.

In these cases, we suggest that it be made clear that there would be no registration requirements for the employer's human resource employees or for the record-keeper's employees to be registered under securities legislation. We also suggest that securities legislation or regulation be adopted to make it clear under what circumstances registration is required. Clearly, the basic principle should be that record-keepers not be required to register under securities legislation when acting strictly in their role as record-keepers. However, where record-keepers take on the additional role of providing investment advice to members, as is the case with some financial institutions, then registration should be required under securities legislation.

6. Despite imposing several new obligations upon a plan sponsor, the Report is against any "safe harbour" rule.

   There is a very real responsibility that imposing new obligations on a plan sponsor that result in a greater risk of legal liability and, at that same time, failing to provide the plan sponsor with relief from the additional risk of legal liability, will result in employers terminating their CAPs. This, we think we all agree, would be disastrous and certainly not in the best interest of employees in Canada.

7. The imposition of the aforementioned new obligations upon a plan sponsor will necessarily lead to an increased cost of administering a CAP to be absorbed by the plan sponsor or passed onto the plan members.

Hewitt

Once again, we commend you on the release of the Report and thank you for giving us an opportunity to be a part of shaping the regulatory environment within which our clients will be operating in the future.

Sincerely,

Hewitt Associates

Rick C. Headrick   Christopher M. Newton

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THE INVESTMENT FUNDS INSTITUTE OF CANADA
L'INSTITUT DES FONDS D'INVESTISSEMENT DU CANADA
IFIC
151 YONGE ST., 5TH FLOOR, TORONTO, ONTARIO, M5C 2W7 TEL 416 363-2158 FAX 416 861-9937

October 31, 2001

Ms. Carla Adams
c/o Financial Services Commission of Ontario
17th Floor, Box 85
5160 Yonge St.
North York, Ontario
M2N 6L9

Dear Ms. Adams:

Re: Joint Forum of Financial Market Regulators – Proposed Regulatory Principles for Capital Accumulation Plans

Introduction

We are writing to respond to the request for comments on the Proposed Regulatory Principles for Capital Accumulation Plans ("CAPs") (the "consultation paper") published by the Joint Forum of Financial Market Regulators (the "Joint Forum") on April 27, 2001. We appreciate the opportunity to comment on this very important initiative.

The Investment Funds Institute of Canada is the national association of the Canadian investment funds industry. IFIC's Manager Members are responsible for managing approximately 99% of the total mutual fund assets under management in Canada, with over $385 billion in approximately 52 million unitholder accounts. IFIC's Membership is comprised of fund managers, retail distributors and service providers to the industry from the legal, accounting and other professions.

IFIC's Members offer funds held by employees in CAPs, act as distributors in connection with employee investments in CAPs and provide other services to CAPs. Mutual funds are popular investments in these plans because they offer access to diversification and professional management to the average Canadian.

General Comments

We commend the Joint Forum for undertaking the very difficult task of seeking to rationalize and harmonize a very complex area of regulation.

Our general observation is that the proposed regulation of CAPs should balance considerations of investor protection with the promotion of a healthy market that will encourage employers to offer these plans to their employees. An inflexible regulatory environment might discourage employers from sponsoring CAPs, which would not serve the interests of Canadian employees.

Our specific comments on elements of the consultation paper are set out below. Throughout our comments, the term 'employee' has been used instead of CAP member.

Establishing and Maintaining a Capital Accumulation Plan

Scope

The consultation paper observes that CAPs are meant to include plans in which the investor plays a key role in choosing the investments in the plan. There is also considerable discussion in the paper devoted to the plan sponsor's role in establishing and maintaining a CAP, from the initial selection of the investments to the ongoing monitoring of the performance of those investments. Together, these suggest that the primary focus of any proposed CAP regulation should be on plans in which the plan sponsor has narrowed the choices offered to employees from an unlimited number of investment options (such as the range that might be offered through a typical self-directed registered plan) to a narrower set of investment options.

We believe that, for all CAPs, plan sponsors should be required to make available to employees general investment education. However, beyond that, it is only in the selection of a narrower range of investment options that a plan sponsor should be required to observe certain additional minimum standards for establishing and maintaining a CAP. Therefore, as a starting point we suggest that the proposed regulation define a range or 'universe' of investment options. From our perspective, the full range of available mutual funds, or even a broad sub-set of all available mutual funds, would be an appropriate 'universe' for the purposes of the proposed regulation.

The regulation should then clearly establish that if, and only if, the plan sponsor has narrowed the investment options in the CAP from that established universe, then additional minimum standards for establishing and maintaining a CAP should apply.

"Fiduciary Duty"

The use of the term "fiduciary duty" and the implication of a fiduciary obligation on plan sponsors is concerning. In our view, it is not clear in law that every CAP sponsor has a fiduciary duty to its employees. Employers are not obliged to offer CAPs to employees; they are intended to be an additional benefit of employment. Employers rely on the expertise of the managers that have been selected to manage the CAP. Imposing a fiduciary obligation on the employer as plan sponsor would, we think, lead many employers to conclude that they should not offer a CAP to employees because they cannot assume that kind of potential liability. In fact, in our view, the proposed regulation should specifically exclude fiduciary liability for plan sponsors of all types of CAPs in order to negate any implied or express fiduciary duties that currently apply at law.

We suggest that the proposed regulation should focus instead on creating clear, detailed minimum standards that plan sponsors must observe when the plan sponsor creates and maintains a CAP. The standards outlined under the "Proposed Regulatory Principles" provide a starting point. However, in many cases, much more detail is required.

The minimum standards we suggest should take into consideration a number of important factors that will affect the plan sponsor's decision-making in creating and maintaining a CAP, including (a) the fees and expenses associated with particular investment managers and the investment options they offer, (b) the reliability and level of service provided by the record keeper of the CAP who makes available the investment managers and investment options to the CAP, and (c) the size of the CAP, in terms of amount of assets and number of employees. Large CAPs will be more attractive to providers of record keeping services because of their ability to achieve certain economies of scale and will have more options in terms of the range of investments and services they will be able to provide than will smaller CAPs.

Safe Harbour

If a plan sponsor has not narrowed the 'universe' of investment options available in the CAP it sponsors, and has met the requirement to make available general investment education, it should have a safe harbour from liability for the investment return realized by employees. Similarly, a plan sponsor that has narrowed the 'universe' of investment options in the CAP through the adequate discharge of the minimum standards in establishing and maintaining the CAP should also have a safe harbour.

Provision of Initial and Continuous Disclosure

The proposed disclosure requirements are familiar to our Members, as they suggest the type of detailed disclosure that is already provided by mutual funds under National Instrument 81-101. Item 4 indicates that management and investment fee information for each investment option should be provided. We suggest that standardized disclosure of fees and expenses across different investment options would be preferable, to give plan sponsors and employees the ability to make informed comparisons.

Provision of Appropriate Investment Decision-Making Tools

General

We do not believe that employees necessarily need to deal with a registered sales representative or advisor for investments made through a CAP, nor do we agree with the Joint Forum's approach that appears to favour the implementation of a "know your client" ("KYC") and suitability obligation in the context of CAPs.

In the retail market, investors can already choose between advice and simple order-execution. As the consultation paper notes, the trend in the CAP market has moved toward providing choice to investors in CAPs and giving them the responsibility for making their own investment decisions. Investors' growing interest in making their own investment decisions and managing their own assets efficiently has already been recognized through the relief given to discount brokers in Ontario and British Columbia from their suitability obligation in connection with the provision of order execution services. In addition, the Investment Dealers Association of Canada has implemented a policy that relieves full service brokers from suitability obligations in cases where the client is not provided with a recommendation on a transaction.

Implementing a KYC model in the context of CAPs could add an unnecessary layer of complexity and cost to the process, which in turn might discourage the use of defined contribution plans and group plans. We do not believe this would always be in the best interests of investors who might otherwise derive tremendous benefits from access to a well-structured defined contribution or group plan.

We favour an approach that requires the plan sponsor to communicate to employees that suitability testing will not be done, make available general investment education and provide appropriate disclosure to assist the employee in making an informed investment decision. This approach, coupled with a plan that has been established and maintained by the sponsor in keeping with the minimum standards, should ensure employees are able to make appropriate investment decisions.

Provide Safe Harbour to Service Providers

An issue that we would like clarified involves the role of the service provider in the administration of a CAP. Plan sponsors frequently retain third parties to provide record keeping and administration services. It is typically the service provider, not the plan sponsor, which has ongoing contact with employees regarding the CAP and their investments. A sponsor may retain a service provider that happens to be a regulated entity, such as an insurance company, mutual fund company or trust company.

We suggest that the regulation should grant service providers retained by plan sponsors the same safe harbour we suggest be granted to plan sponsors. To the extent a plan sponsor has delegated certain of the minimum standards required of it to the service provider, the service provider should be relieved of liability provided it has discharged those minimum standards. In addition, the service provider should not be required to discharge responsibilities imposed upon it by virtue of its regulatory status to the extent those responsibilities exceed the minimum standards required of plan sponsors. For example, a mutual fund dealer, acting as service provider, would today be required to perform suitability testing on employee trades. If plan sponsors are not required to provide suitability testing under the regulation but the plan sponsor retains a mutual fund dealer as service provider, then the mutual fund dealer should not be required to comply with the usual requirement to perform suitability testing. The fact that the mutual fund dealer will not be doing so should be communicated in advance to employees in the CAP so that they do not have a contrary expectation.

Investment Rules

If a mutual fund observes the investment restrictions of NI 81-102, this should be sufficient for the purposes of meeting the investment rules described in the consultation paper under Part V, item (iv) – Investment Rules.

We ask that our submission to CAPSA dated March 13, 2001, in relation to the pension investment rules and their interaction with the mutual fund investment restriction provisions in NI 81-102 also be considered in connection with any discussion of investment rules in the proposed regulation. A copy of that submission is attached for your information.

Implementation of the Proposed Regulatory Principles

The consultation paper outlined a number of possible ways for the regulation of CAPs to be implemented. Since the motivation for the release of the consultation paper is to simplify and streamline the myriad of regulation relating to CAPs, the aim should be to create one model of regulation and one source of regulation that can be accessed and applied uniformly by all participants in the CAP market. Any applicable pension, insurance or securities legislation that may touch on CAPs should defer to the single model that is adopted.

In Ontario, we realize that this may be simpler to achieve given the proposal to merge the Financial Services Commission of Ontario with the Ontario Securities Commission into a single financial services regulator. We acknowledge that in other jurisdictions where there are separate regulators, this may be more difficult but we think it is important that a method of applying a uniform approach be identified and adopted.

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We appreciate having the opportunity to comment on this consultation paper. Should you wish to discuss our comments in more detail, please do not hesitate to contact Leslie Byberg, Senior Counsel at 416 363 2150 ext. 473 or by e-mail at lbyberg@ific.ca.

Sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA

“ORIGINAL SIGNED BY JOHN MOUNTAIN ON BEHALF OF TOM HOCKIN”

Hon. Thomas A. Hockin
President and Chief Executive Officer

cc: All Member Senior Officers
Regulatory Committee

Commentary on Joint Forum's Proposals for Regulation of CAPs

Prepared by Morneau Sobeco

We wish to congratulate the Joint Forum for preparing a very good summary paper on an important and timely topic. A harmonized regulatory environment, a level playing field for members, sponsors, and providers, and a much greater certainty of what the rules are and how they apply is very much needed.

The Joint Forum asked four questions at the end of the report, which we will address in order.

1. **Are the statements in the paper about the existing regulatory environment accurate, in your experience?**

   While not specifically addressed by the question, we will start by commenting on the summary of the CAP market, (Section III). In general we believe the summary is reasonable for the purpose. We suspect that there are assets not being reported through Benefits Canada, so their asset numbers are probably low, but we do not think they would be materially low. Also, we do not believe that the Mercer survey of 206 plans is a reasonable basis for segregating the CAP provider market between Insurers, Trust companies and others. However, this has become a moot point with the recent sale of both Canada Trust and Royal Trust's CAP administration business. The market will now be predominately with Insurance companies and other providers, and the results of the survey of little ongoing use.

   Regardless, the different rules will still present an issue for members, sponsors and providers.

   The summary of the regulatory environment is reasonable based on our knowledge and experience, subject to one comment below. However, we do not believe that we have sufficient experience with the details of Insurance law or ERISA, nor with all aspects of Securities law to be able to provide a full answer. We assume that there will be sufficient comments from other parties with better knowledge on these points.

   It is stated that the exemptions under securities law do not apply to ECDCPPs where employees make the investment decisions. That may be the interpretation which regulators might prefer, but it differs from the interpretation we understand most industry experts have, including a number of securities regulators. We understand these exemptions do apply to many CAP plans who meet the requirements. We also believe that there are many CAP plans relying on these exemptions, even if they have not secured approval or do not meet the size requirements.

   Our first concern with such an exemption is that if exemptions from current securities law are appropriate for larger CAPs, why not for small CAPs? Since most small CAPs are funded through insurance companies where exemptions do not depend on plan size, this is likely only an issue with respect to plan sponsor choice of provider.

Secondly, giving plans an exemption from securities law on the basis of rules intended for sophisticated investors may, in certain circumstances, violate the intent of the exemptions, but not, we believe, the wording. This may be an example of the ends justifying the means.

Securities law was designed to apply to situations where the investor makes a voluntary decision to invest. In the case of CAPs, many of the members are required to participate and the regulation of the resultant investments should take this difference into account. The best practices which have developed around CAPs focus on member education and simplified fund information. The focus of this information is, quite properly in our opinion, on a much lower level of investment sophistication than prospectuses, whether full or simplified.

Our recommendation to the Joint Forum is to create a regulatory framework for CAPs which recognizes the significantly different needs of the plan members from those people who invest through the retail side of the investment industry.

2. Are the proposed regulatory principles appropriate and adequate to address the needs of CAP members, plan administrators, employers and regulators?

a. Sponsor directed investments

The paper is clear that for Money Purchase Plans where there is only one fund with investments directed by the sponsor, the proposals are not intended to apply. While rare, we believe that there are also some RRSPs, DPSPs and EPSPs where members have no control over investments. We suggest that if the proposals are to cover only situations where plan members have some form of control over investments, the exclusion should apply to all types of CAPs.

We also are not comfortable with a definition of CAPs as being all types of DC plans except those with no member control over investments. The industry does not make such a distinction. As a minimum, we believe that it would be better to leave the definition of CAP as including all types of DC plans, but make it clear that the paper's proposals are not intended to apply to CAPs where members have no investment control.

But why should the regulatory rules exclude plans where the sponsor makes all investment decisions? Surely the members of those plans deserve to know about the investments used for their retirement savings. Some of the proposals would clearly not apply to such plans, but others would help to enhance member understanding and knowledge – which may affect their personal savings strategy.

b. Problems addressed by proposed principles

We agree with the description of the problems addressed by the paper. The CAP industry needs

- rules for member investments which are the same regardless of the product used by the sponsor.

- consistent and appropriate protections for plan members.
- clear and understandable regulations for sponsors and providers to follow.

c. Principle (i) – Obligations with respect to establishment and maintenance of a CAP

We agree that the five listed fiduciary duties should be specifically spelt out.

We agree that in selecting investment options, there should be a reasonable range of options, with different risk and return characteristics. We do not believe that each of these options should have to be diversified, regardless of how the term is defined. The requirement should be that sufficient funds be available so a member can make investment choices that are diversified. If there is not a reasonable range of diversified funds available, there should be an obligation to provide information on how to construct a diversified portfolio.

A practical issue with the Proposal's requirement for diversification is the plan which offers employer stock as an investment fund. There are plans in each of the sub categories of CAPs where this type of fund exists. With some RRSPs and EPSPs, employer stock is the only available investment choice, because the primary purpose of the plan is to provide a tax effective plan for investing in employer stock.

Further, if the term "diversified" is to be used, we believe it should be defined in terms of whether it applies to diversifying across the asset class of the fund, (such as High Tech Equities, or Government Bonds), or whether it means diversifying across a prudent portfolio.

The duty to prudently select investment managers using all relevant knowledge and skill is important. Unfortunately, there are many, (possibly even a majority) of CAP sponsors who do not possess such knowledge and skill. We suggest this requirement be modified to provide such sponsors with the option of hiring a third party to assist in the process by providing the knowledge and skill through advice and guidance. This should also be applied to the ongoing monitoring of managers.

d. Principle (ii) – Fiduciary duties for initial and continuous disclosure.

We agree with the disclosure items 1 to 8. We would like to see these enhanced in three areas.

- ♦ The material provided to CAP members should be written at a level designed to be understood by virtually all plan members. For many sponsors, this would suggest the level of writing be at about a grade 6 to 8 level. It may require sponsors to consider offering two or more versions of the material, aimed at different levels of sophistication and literacy. However, sponsors should not have to ensure that the material can be understood by all members, since that would require a highly intimate knowledge of each member's sophistication and literacy. Similarly, aiming information at an average knowledge level of members is not reasonable, since that would, by definition, exclude about half of the members from being able to understand. This issue is alluded to in section (iii) (2) by referencing the provision of information "in a manner appropriate for the members". We suggest that this needs elaboration as to what the regulators believe is appropriate.

- There is no mention of information regarding retirement savings goals. A survey conducted by Morneau Sobeco of DC Plan Members in late 2000, suggested that very few members had any idea of what their savings goal was. In a retirement plan, which is what the vast majority of CAP plans are, the goals should be understood in terms of retirement income. Merely understanding risk and return, and selecting an appropriate set of funds is not sufficient.

- The call from the industry for a "safe harbour" has so far been rejected by the Joint Forum. If a safe harbour remains unacceptable to the regulators and legislators, we believe it is incumbent for the regulatory principles to include a list of member responsibilities. These would include a responsibility to read the disclosure material, and to seek assistance if it is not understood. It would also include responsibilities covered by other sections of the proposals, such as understanding the investment choices they make, monitoring their portfolio and making appropriate changes.

The commentary suggests that use of an existing prospectus may be appropriate. In general, we believe that prospectuses, (simplified or full) do not meet the needs of the majority of CAP members. Far too many CAP members will *never* be able to understand a prospectus and most of the remainder will *never* read it.

The aim of sponsor disclosure should be to provide information that the member can understand. In the retail world, a prospective investor can decide to not invest if the prospectus or other disclosure material is not understandable. In a CAP plan, members are frequently required to belong as a condition of employment, and thereby may not enjoy the choice of not proceeding with an investment.

e. Principle (iii) – Fiduciary duties to provide appropriate investment decision making tools to CAP members

It is clear to us that CAP members are crying out for more help in making their investment decisions. The issue is essentially one of liability. At present, sponsors are very afraid of engaging in activities that may expose them to increased liability. This is an area where the regulatory rules could address both parties' concerns in a positive manner.

We recommend that the regulatory rules set out both sponsor and member responsibility for providing and getting appropriate advice.

Sponsors could reasonably be required to provide members with information about where to find an advisor, and how to select one. This should stop short of making an advisor available, since that would add significant cost to a plan and provide opportunities for member misuse. It is entirely reasonable for a sponsor to assume that if a member does not have the expertise to make investment decisions, then the member should be expected to get outside help. This is similar to an apartment dweller who does not have the expertise to install a dishwasher. There is no requirement for the apartment owner to provide such expertise. It is the tenant's responsibility to obtain sufficient information to fill any void in knowledge. We see no reason why investments should be any different.

f. ***Principle (iv) –Investment rules***

Again, the requirement for diversification for each investment option is not appropriate, as discussed above. We also do not believe that "acceptable level of risk" should apply to each investment choice. Rather, the level of risk should be disclosed, so that individual members can determine if the level is appropriate for them.

3. What would be the most effective and practical method of implementing the regulatory principles that emerge from this process?

Based on past history, if the regulatory principles are implemented through legislation, we can virtually guarantee that there will be differences by jurisdiction. We have no confidence in politicians putting the need for harmonization ahead of their own personal preferences.

The model developed by securities regulators for a National Instrument which is incorporated into law by reference is our model of choice. We believe this would be the quickest way to implement the policies, and give the greatest chance of a consistent set of rules.

In implementing the principles, we urge the regulators to remain cognisant of the very positive development of best practices over the past decade. The quality and level of information and service available to CAP members is progressing at great pace. Pushing these best practices to new levels is probably not as important to members as broadening the application across all plans. In this regard, there may be some situations of great cost and significant hardship meeting the requirements, so we would caution that implementation be gradual to give an opportunity for affected sponsors to plan appropriately.

We wish to note that, subject to the details to emerge, the industry's best practices already substantially comply with the principles in the paper – and these best practices are being used by a substantial number of the CAPs.

4. What are the anticipated short-term and long-term costs (in $ and in plan coverage) of implementing the proposed regulatory principles?

The proposed principals are expressed in very broad language. On the surface, most of them could almost be described as "motherhood statements", with many of the industry suppliers already in significant compliance. However, it was apparent at the breakfast meeting held by the ACPM in Toronto, that the real issue will be what follows in the details. The industry seems to clearly expect that the details will be onerous and burdensome, going far beyond what is perceived as required for most plan sponsors. This has been the industry experience in the past with other legislative proposals.

It is therefore not possible to answer this question at this time, because there is not sufficient information. If the proposals are implemented in a way that recognizes the current providers are already substantially in compliance, then we believe any costs will be minor and of very little concern for most sponsors and plans. If the proposals are implemented in a manner that the industry seems to fear they will be, then we believe that the costs will be large, and will result in many employers abandoning retirement plans entirely, leaving all retirement savings up to the individual.

Summary

We agree with the two main issues driving the need for the paper, namely:

a. CAP members should have similar regulatory protection and information regardless of the regulatory regime, and

b. Harmonized and clearly defined duties and responsibilities should exist for employers and administrators.

However, we believe that one important element is missing from this – setting out clearly defined duties and responsibilities for the plan members. The regulatory framework should cover all involved parties. Plan members have been excluded from past legislation because it was primarily driven by defined benefit plan issues, and member responsibilities in such a plan are minimal. Members play a much bigger part in the operation and success of a CAP plan, and neither legislation nor the regulators should ignore them.

Member responsibility may not be a current part of the regulators' mandates, but that should not preclude adding it.

Our second major concern is with the unknown element of the proposals which lie in the (not yet developed or disclosed) details. The CAP industry will likely react to these proposals as if the worst set of details imaginable will be promulgated following this round of discussions. Unfortunately, that is not without precedent.

Even if the mandate of a participating regulator does not specifically include promoting pension plans and growth in coverage of plans, we believe that it would be bad public policy and very bad for Canadians individually and as a whole if the proposals are implemented as expected by the industry.

The Joint Forum and CAPSA should act quickly to clarify what details will be included in the proposals so that a more effective and constructive commentary can be prepared by the various stakeholders.

Even with these concerns, we believe that the paper is a valuable addition to CAP plan operations. It has and will make sponsors look at how they operate, and areas of weakness are likely to be improved voluntarily over the coming months. With details that build on all of the existing strengths of the provider industry, the proposals have the potential of simplifying and harmonizing plan administration in a positive way for all stakeholders.

If you wish to discuss this submission with us, please call either Peter Gorham (416) 383-6438 or Fred Vettese (416) 383-6454.

Respectfully submitted,

Morneau Sobeco

RESPONSE TO THE PROPOSED REGULATORY PRINCIPLES FOR CAPITAL ACCUMULATION PLANS

Introduction

The following is a response to the Proposed Regulatory Principles for Capital Accumulation Plans submitted by Warren Laing, Chairman and CEO of ***Open Access*** Limited, a CAP provider registered under the Securities Act of Ontario.

This response makes the following three recommendations:-

- Create an environment that encourages small employers to start CAPs.
- Ensure that plan participants receive the appropriate investment advice.
- Create a level playing field for CAP providers free from conflicts of interest.

Open Access Limited

Open Access Limited ("***OA***L") provides CAPs to plan sponsors. The Company is currently registered with the Ontario Securities Commission as an Investment Counsel and Portfolio Manager and as a Mutual Fund Dealer. ***OA***L has no internally generated investment products to offer and instead offers a wide array of GICs, mutual funds and index funds to plan participants from over 40 different suppliers.

Since most plan participants have limited investment knowledge and do not know which mutual funds to select, the Company has created eighteen Managed Model Portfolios each consisting of five or six mutual funds or index funds. Each plan participant is guided to the Managed Model Portfolio that best meets his or her individual needs through a combined Know Your Client-Risk Assessment questionnaire, which each participant is asked to complete and sign annually. The questionnaire includes a discretionary investment management clause that enables the Company to vary the composition of the Managed Model Portfolios as required.

Alternatively, if the plan participant is knowledgeable they may design their own individual portfolio from a large list of GICs, mutual funds and index funds. In this case their investment selection is checked against the Know Your Client-Risk Assessment questionnaire for appropriateness.

Encouraging Employers to Create CAPs

It is important for Canada to encourage Canadians to save for retirement for three reasons.

1. Higher retirement savings rates improve the quality of life for retired Canadians.

2. Higher retirement savings rates reduce the potential social welfare costs of all levels of government.

3. Retirement savings provide a pool of capital needed for Canadian economic growth and job creation.

Brendan Wood International estimates that there are roughly 400,000 businesses in Canada with between 5 and 99 employees and 18,000 businesses with 100 to 1,000 employees. These small and medium sized companies, which represent a sizeable segment of the Canadian workforce, need a simple, inexpensive method of providing a group retirement plan.

Currently in the United States the percentage of private employers offering 401(k) plans by firm size is as follows;

Percent of Private Employers Offering a 401(k) plan by Firm Size*

	< 100 employees	100 to 499 employees	> 500 employees
1993	2.5%	3.0%	27.0%
1994	2.8	3.3	29.9
1995	3.2	3.7	31.2
1996	3.6	4.2	34.6
1997	4.0	4.6	35.9
1998	4.4	5.0	38.6
1999	4.7	5.4	40.6
2000	5.0	5.7	42.4

*Base includes all employers, whether or not they are eligible to offer a 401(k) plan.
Source: Plan Sponsor Magazine July 2001 and US Census Bureau, Cerulli Associates.

While this is American data it undoubtedly applies to Canada also. Clearly, more needs to be done to encourage employers with less than 500 employees to create retirement plans for their employees.

There are many reasons why an employer does not create a retirement plan for their employees. Too busy; too expensive; employees don't want it; management doesn't have time to manage it; can't afford it; stock option plan serves as a retirement plan; are all reasons given for not creating a CAP. In the final analysis, the decision boils down to simplicity and cost.

Fortunately, CAPs in general and group RRSPs in particular meet most of the needs of these small employers. However, to make it more attractive for employers to create and maintain these plans the regulatory environment must remain both fair and simple, and the employer should be protected from potential liabilities associated with below median investment results.

The current trend away from defined benefit pension plans to defined contribution pension plans and group RRSPs is in part due to the issue of surplus ownership, in part due to the complexity of periodic valuations and the need to have actuarial consultants, and in part due to the possibility of incurring unfunded liabilities. The same trend is apparent in the United States as illustrated in the following table;

Number of Private Pension Plans*
1977 – 1997

	Defined Benefit Plans	Defined Contribution Plans
1977	121,655	280,972
1980	148,096	340,805
1985	170,172	461,963
1990	113,062	599,245
1997	59,499	660,542

Source: Plan Sponsor Magazine, and Dol. Private Pension Plan Bulletin Number 10, Winter 2000-2001

A small employer can assume neither a heavy regulatory burden nor a high cost of creating and managing a retirement plan, therefore, the regulatory map needs to remain simple and straightforward. Secondly, few small employers are equipped or prepared to bear the cost of selecting and monitoring investment managers. Instead, they need to be able to transfer the investment responsibility to the employee without the employer assuming meaningful potential liabilities for below median investment results at some future date.

These potential liabilities could be significant if it represents long-term below median investment results. As an example, an small employer with 20 employees, all aged 65 years old, who set up a CAP plan 45 years ago when each of the employees was 20, and who has paid the employees an average of $50,000 per year, with employer/employee contributions to the CAP plan of 6% of earnings, would have a potential liability of $3.4 million if the investments the employees had selected produced investment results with a compound annual rate of return 1% below the median annual investment rate of return (Future Value of 20 * $250/month for 540 months @ 0.08% interest/month). This would be sufficient to frighten most small employers from creating a CAP plan.

Secondly, the employee should assume the responsibility for their investment results, provided they have been given;

1. A wide array of different investment options.
2. Complete control in selecting which options best meet their needs.
3. Freedom to make changes whenever they wish.
4. Access to professional investment management advice from a registered investment counsel and portfolio manager free from any conflicts of interest. (This point is covered in detail in the next section)

To encourage small companies to create CAPs Canada needs legislation similar to the ERISA 404(c) “Safe Harbour” provisions in the United States.

Appropriate Investment Advice for Plan Participants

It is important that the assets of plan participants be properly invested to ensure that the capital accumulated at retirement is sufficient to provide adequate retirement payments. Too often employees invest retirement plan assets, which have a long range time frame, in short-term, low yielding securities based on the assumption that the equity markets are overly risky for this type of asset. Conversely, speculative activities are also inappropriate for retirement assets.

The annual rates of return for the different security classes and the Consumer Price Index vary significantly, as illustrated in the following table;

Annual Rates of Return for Different Security Classes

1926-2000

	TSE 300	S&P500	LT Gov Bonds	3-Month T-Bills	CPI
Average	11.92%	13.59%	6.49%	4.81%	3.25%
Median	11.02%	14.50%	4.32%	3.79%	2.70%
Standard Deviation	19.08%	19.93%	8.90%	4.09%	4.14%
Highest	53.44%	51.80%	43.88%	19.09%	14.01%
Lowest	-33.57%	-35.28%	-7.39%	0.36%	-9.52%
Spread	87.01%	87.08%	51.27%	18.72%	23.53%
Compound Ann R of R	10.23%	11.73%	6.15%	4.73%	3.17%

Source: Canadian Society of Actuaries and private data maintained by ***Open Access*** Limited

Most plan participants are ill-equipped to determine the appropriate investment strategy, the asset mix, or to select the individual investments for their retirement portfolio. They have had neither the training nor the experience to make these important investment decisions. In most cases, the employee will turn to anyone who holds themselves out as an investment expert for assistance, irrespective of whether the “expert” is registered or not, and irrespective of whether there is a conflict of interest or not.

This need for professional investment advice by plan participants is confirmed by the fact that 93% of plan participants in the ***Open Access*** Limited database select one of the Managed Model Portfolios rather than designing their own retirement fund portfolio from a wide array of GICs, mutual funds, and index funds.

The importance of obtaining professional investment advice can be illustrated by the following simple calculation. The pool of capital available at retirement for two employees each of whom contribute $250 per month to their retirement plan for a total of 45 years (age 20 to 65). One of whom invests solely in 3 month Treasury Bills and earns a compound annual rate of return of 4.73%, while the other invests 50% in the TSE 300 and 50% in Long-Term Government Bonds and earns a compound annual rate of return of 8.19% would be as follows;

Retirement Capital Accumulated

	Conservative Investor	Balanced Investor
Monthly Contributions	$250	$250
Period (45 Years)	540 months	540 months
Asset Mix	100% T-Bills	50% LT Bonds/50% TSE 300
Compound Annual R of R	4.73%	8.19%
Assets at Retirement	$467,000	$1,405,000

Clearly a difference of this magnitude will get the attention of employees. However, if they are at or close to retirement it will be too late.

In the past, the investments of most retirement plans were managed by plan administrators who retained licensed professional investment managers, often an investment counselor, trust company or insurance company to manage the assets on behalf of the plan participants. This was a case of knowledgeable administrators retaining professional investment managers. Under the Proposed Regulatory Principles much of the investment advice given to the individual plan participants could come from investment advisors registered only as mutual fund or security sales people. This could be a case of unsophisticated investors retaining biased investment sales people for investment advice.

Retirement assets deserve the highest standard of investment care; the livelihood of many depends on how their retirement assets are invested. We recommend that plan sponsors be required to provide independent professional investment advice from a licensed Investment Counsel and Portfolio Manager to their employees.

A Level Playing Field for CAP Providers

A level playing field between CAP providers will;

- Facilitate the selection of a CAP provider by reducing confusion for small employers.
- Ensure that the regulatory protection afforded to both plan sponsors and plan participants is consistent.
- Foster healthy competition among CAP providers.

CAP providers operating under the Securities Act currently are at a disadvantage compared to CAP providers operating under the Insurance Act. Some examples would be;

a) Licensing requirements for sales and implementation staff. Currently, all sales and implementation staff need to be registered under the Securities Act as they provide investment advice. We do not believe that implementation staffs from insurance companies have the same licensing requirements.

b) Review of sales representatives advertising. The performance claims of all sales representatives registered under the Securities Act are subject to review by the organization through which they hold their license. We do not believe this to be the case for independent insurance brokers.

c) Disclosure of referral arrangements. All referral arrangements must be disclosed under the Securities Act. We do not believe this to be the case under the Insurance Act.

d) KYC information. Annual KYC forms are required under the Securities Act. We do not believe this to be the case under the Insurance Act.

e) Suitability of trades. All trades must be reviewed for suitability under the Securities Act. We do not believe this to be the case under the Insurance Act.

These compliance requirements create a more onerous regulatory environment for a CAP provider operating under the Securities Act. If we are to have a level playing field all CAP providers irrespective of whether they currently are regulated under the Securities Act or Insurance Act need to be subject to identical regulations and audit processes. This would include ensuring that all investment products provided to plan participants would require an annual document identical to a prospectus with full and continuous disclosure of all fees, charges, and commissions payable.

Consultation Process

1. To our knowledge, and bearing in mind that ***Open* Access** Limited operates under the Securities Act, we believe that the statements made regarding the existing regulatory environment in the Report of the Joint Forum are accurate.

2. We believe that;

    a) Employers should be given the protection afforded by the ERISA "Safe Harbour" provisions under the same conditions as outlined in the ERISA Legislation, provided that independent professional investment advice from licensed Investment Counselors and Portfolio Managers is available for all plan participants.

    b) The regulatory environment must remain simple and straightforward.

    c) A higher standard of investment advice than that of commission remunerated sales representatives must be available to plan participants who need investment advice.

    d) The Joint Forum should ensure that no competitive advantages exist for CAP providers operating under either the Securities Act or Insurance Act.

3. We believe the most effective and practical method of implementing the regulatory principles is having insurance company CAP providers subject to the Securities Act for their CAP product. This would ensure that all CAP providers and their employees would be subject to the same regulations and licensing requirements.

4. For ***Open Access*** Limited there would be no short-term or long-term costs of implementing the proposed regulatory principles as the Company currently conforms to all of the proposed principles.

This response to the Proposed Regulatory Principles for Capital Accumulation Plans is respectively submitted by;

Warren Laing,
Chairman and CEO
Open Access Limited
Suite 300
154 University Avenue
Toronto, Ontario M5H 3Y9
Telephone: (416) 364-1800
FAX: (416) 364-3354
e-mail: wlaing@openaccessltd.com

July 24, 2001

Carla Adams
c/o Financial Services Commission of Ontario
5160 Yonge Street
17th Floor, Box 85
North York, Ontario M2N 6L9

Dear Ms. Adams,

Re: Proposed Regulatory Principles for Capital Accumulation Plans

Thank you for the opportunity to comment on the Report on Proposed Regulatory Principles for Capital Accumulation Plans.

While Petro-Canada agrees with the objective of the paper, i.e. to provide a harmonized regulatory approach to capital accumulation plans that meets the needs of plan members and employers, we have concerns with the general premise of the Report and some of the proposals. The focus of our comments relate to defined contribution pension plans where employees make their own investment choices.

Our most significant concern is the perspective that "these plans are primarily intended to ensure the financial security of employees in their retirement". The fact is these plans are simply one element of employees' total compensation package and are intended to provide a convenient, cost-effective vehicle for saving toward retirement. They are not promoted as providing a specific level of income replacement, as one would find under defined benefit arrangements, but rather are intended to assist employees to save. Ultimately employees are responsible for their own financial security, a key point missing in the Report's assumptions.

We are also concerned that the proposals increase significantly the regulatory burden on employers without providing reasonable protection (i.e., a "safe harbour") against liability arising from the plan. They imply that plan members have no liability for investment results while employers carry full liability. It is difficult to understand how the proposed regulatory structure would achieve anything but a decline in the number of voluntary retirement arrangements sponsored by employers, not a positive result from a public policy perspective. If the cost and liability burdens imposed are sufficiently onerous, employers may conclude that employees would do just as well in the retail investment markets with higher fees but no employer responsibility.

We believe that a better balance between employer and employee responsibility and liability is essential for the good of the retirement system in Canada.

Thank you again for the chance to provide our views on the Report.

Yours truly,

EFHR:kk

August 3, 2001

Carla Adams
c/o Financial Services Commission of Ontario
5160 Yonge Street
17th Floor, Box 85
North York, ON
M2N 6L9

Re: Proposed Regulatory Principles for Capital Accumulation Plans

Dear Ms. Adams:

Shell Canada supports the concept of defining duties and responsibilities for CAPs and the notion of harmonization. We are concerned however with a number of specific proposals in the report as they relate to Defined Contribution Pension Plans, which are the only CAP style program that Shell Canada provides to their employees. Specifically our issues are:

- The report states " these plans are primarily intended to ensure the financial security of employees in their retirement". We would assert that Defined Contribution plans are not intended to ensure any form of financial security, unlike Defined Benefit plans which do provide a specific value if certain age and or service criteria are met. Defined Contribution plans are provided to assist employees with their saving for retirement. The underlying premise of DC plans is plan members themselves are responsible for their financial security in their retirement, not the employer.

- We are very concerned that the proposals place virtually all liability and responsibility on the employer. However, there is no liability protection defense for the employer, such as is provided by ERISA's "safe harbour" provision, nor does it appear that any responsibility is placed on the plan member. This would lead many plan providers to seriously question the benefit of implementing, or continuing, with such plans given the higher risks, which is counter to what we would think such regulations would be striving for. Employers may consider alternatives that are less regulated, but less beneficial to plan members.

- With regard the duty to provide appropriate decision making tools, for Defined Contribution plans, administrators should be responsible for providing information regarding investment options (i.e. continuous disclosure). However for these types of plans it is not appropriate to provide specific investment choice advice, which is the securities regulatory model. Defined Contribution plans are part of plan members compensation, not securities.

- There must be a sharing of responsibility and liability between employers and plan members. Individuals need to take more responsibility for their personal future financial savings and becoming more educated about this subject, recognizing employers can help in facilitating access to some educational tools. Individuals must plan and make decisions about virtually all aspects of their lives, whether it involves mortgages or major capital outlays or ongoing household financial planning. Future savings planning should be no different.

- Uniform regulations allow standardized practices across the country for national employers, however "similar" regulatory protection is inefficient, costly to administer, and another deterrent for providing such plans. We would prefer harmonized best practice guidelines, not a cumbersome regulatory regime.

We appreciate the opportunity to provide input on this report, and thank you for the response date extension that was granted to Shell.

T.J. Bancroft
General Manager Human Resources and Public Affairs

BY COURIER

October 26, 2001

Ms. Sherallyn Millar
Superintendent of Pensions
Ministry of Skills, Training & Labour
British Columbia Government
360 West Georgia Street, Suite 870
Vancouver, British Columbia
V6B 6B2

Dear Ms. Millar,

Subject: Cost Impact of Proposed Principles for Regulating CAPs

As a result of our meeting of September 7, 2001 we are pleased to provide you with the following information.

At present, sponsors and members of group Capital Accumulation Plans (CAPs) managed by life insurance companies enjoy the benefits of customized services, low costs, wide diversification and competitive returns. It is no secret that group CAPs provide for streamlined administration, economies of scale and the benefits of "group buying power".

The industry contends that recent proposals for harmonizing the regulatory treatment of CAPs with a model inspired by securities regulation will add to the costs of establishing and maintaining a CAP without a corresponding improvement in the outcome for plan members. Indeed, it is foreseeable that some of the key benefits will be eroded if the industry moves towards a retail-style model of regulation.

Diversification

Diversification is the first rule of prudent investing and Group CAPs strongly support and encourage this cornerstone of successful investing… and at reasonable cost. The Group CAP business is founded on economies of scale achieved through bulk processing and the streamlined administration of many individual transactions and accounts. An illustration of this is seen in the low minimum requirements for plan deposits and fund allocations by CAP members. At Standard Life, there is a low minimum *deposit* requirement and effectively *no minimum* on amounts that can be allocated to an investment option.

These low or non-existent minimum requirements are a practical reality. CAP members take full advantage of diversification opportunities by combining asset allocation models with dollar-cost averaging. In fact, in the last twelve months, Standard Life processed over 4 million payroll-deducted CAP deposits which were then split into separate accounts (e.g., employer, member, voluntary, spousal) and allocated to the individual investment choices, according to the members' instructions. The result of this process was over 30 million fund-level transactions, averaging *over 100 fund transactions per member,* each averaging *less than $25.*

By contrast, the equivalent retail products impose minimum requirements on both the initial and ongoing contributions to each individual's accounts. Usually, the initial requirement is $500 or $1,000 to open the account and $50 to $100 per fund for subsequent investments. In other words, a retail investor with $50 can access only one fund whereas a group CAP member (with even less money) can access many more investment choices. It is clear that for many of the Canadians who have a group CAP, prudent diversification using the retail alternative is beyond their limited financial means. The #1 rule of investing *is* achievable for all CAP members.

	Standard Life	Retail Mutual Fund
Minimum Initial Deposit	$25	$500 - $1,000
Minimum Allocation to a Fund	NONE	$50 - $100

Cost

MERs associated with retail mutual funds fall in the range of 2% to 3% for balanced Canadian mandates. This excludes front-end or deferred sales charges. By comparison, Standard Life is able to deliver similar investment options to members of typical group plans with investment management fees in the range of ½% to 2%.

It is worth noting that the Group CAP caters to the needs of a broad cross-section of working Canadians. The average account balance is between $15,000 and $20,000. This means that the fees collected are even lower than they seem at first glance. An annual management fee of 1.00% on $20,000 of assets produces $200 of revenue.

On the other hand, the securities business has traditionally dealt with a wealthier segment of Canadian society, with assets averaging much higher levels – over $40,000 according to one recent study[1]. With a MER of 2.00%, the average account would generate annual revenue of $800 – 4 times higher than the group CAP.

<u>Advice</u>

If there is one cost element which drives the added costs, it is ***advice***.

Advice is individualized information that serves directly as the primary basis for a plan member's investment decisions while communication is general financial and investment information about markets and risks.

In the retail environment, advice is provided on a one-on-one basis by a licensed representative operating within the constraints of the KYC rules. All transactions must go through the advisor. The time spent by the advisor requires compensation in the form of a percentage of deposits and/or assets, leading to higher MERs charged to the funds.

<u>Prospectus</u>

The information on investment funds is available in prospectuses. Significant legal costs and filing fees with regulatory bodies are incurred and are charged to individual investors through the funds' MERs. Because of these fixed costs, prospectuses are drafted with an eye to reducing the need for amendments on account of changes to investment style, practices or policy. In this regard, the disclosure documentation evolves towards vague wording designed to limit the manufacturer's legal liability rather than disclose detailed information.

For large, mass-market mutual funds, these fixed costs can be spread over many unitholders' accounts. In the Group CAP environment, the sponsor of a plan expects to be able to customize the investment options to the needs of his particular group. In effect, the sponsor is performing a function at the group level which advisors perform one-on-one. In our experience, the result of this customization process is usually a short list of a dozen or so hand-picked options that suit the sophistication, circumstances and preferences of the membership of the specific CAP. Inappropriate investment funds are screened out; suitable options are presented without clutter.

As with other suppliers, at Standard Life, we provide clients with generic asset allocation models to communicate prudent diversification habits to members in the most direct and convenient way. Furthermore, plans sponsors and their advisors choose the actual funds within their customized model mixes, again, reflecting the needs and preferences of their group. If retail-style prospectuses were mandated for this situation, every employer who tailors the fund selection to the needs of his or her employees would face the obstacles of a new mutual fund manufacturer starting out: high fixed costs spread over a small initial asset base. The alternatives to custom-tailored disclosure documentation for the custom-tailored CAP would be

(a) choose an off-the-shelf generic product (regardless of whether or not the investment options are suitable for the membership)
(b) deliver off-the-shelf, generic documentation (regardless of the fact that not all investment funds are available to the membership).

Neither of these alternatives improves the situation for the membership.

[1] LIMRA Canadian Ownership Study (2000 Report)

Group Model: Cost-Effective, Customized Communication and Guidance

In the case of Group CAPs, the sponsor's choice has been to play an active role and create value for the membership by removing inappropriate or duplicate options, so members can concentrate on learning the basic principles of successful investing and making wise asset allocation decisions.

With the assistance of experts, sponsors of Standard Life plans select the investment funds to be offered under their plan and the funds that will be included in suggested investment mix models applicable for each investor risk profile.

In this way, plan sponsors provide communication and guidance to their employees without offering personal advice. Sponsors are wary of directly or indirectly providing personal advice to their plan members for two compelling reasons: the added cost and the inherent liability.

At Standard Life, members of group CAPs receive communication and education through:

- Enrolment seminars
- Specialized seminars
- Financial Security Hotline
- Enrolment information package
- Interactive Voice Response Info-line
- Internet VIP Room
- Statements

<u>Communication</u>

Enrolment Seminars

Standard Life has developed a national team of salaried Financial Consultants whose primary responsibility is to focus on the communication and education needs of employees under group CAPs. Whether employees are concentrated in one location or spread out across the country, our team delivers a consistent message.

Based on our experience, dealing with employees face-to-face has proved to be highly effective. Our on-site seminars form the centerpiece of our communication and education program. The enrolment seminars cover:

- the details of the retirement program
- the advantages of payroll deduction and dollar cost averaging
- the importance of saving for retirement
- the various types of investments offered
- the steps to establishing a sound retirement strategy by determining the risk tolerance, the amount of money needed and the appropriate investment mix.

We have the flexibility and the capability to meet the most demanding schedule – day or night. On average 25 employees attend each session. Since it may not always be convenient to hold face-to-face seminars, we offer clients the same information provided during the seminars in a generic video or CD-ROM. Customized videos are also produced to meet the special needs of the sponsors of particular plans who have a specific message they want to communicate to their plan members.

Specialized Seminars

We also develop specialized seminars designed to address other areas of interest or concern, such as pre-retirement strategies, or what to do when a plan undergoes major changes or when new investment funds are being added.

Financial Security Hot-Line

At all times, employees are encouraged to call our Financial Security Hotline to obtain information on their plan, on the investment funds or on their accounts. Each salaried Financial Representative is fully licensed, can address the employees' questions and carry out transactions. The role of these Financial Representatives is to provide information and guidance about choosing the asset allocation mix that is in line with the member's risk profile, diversification among asset classes, and following a long term investment approach (i.e., avoiding unnecessary switching from one fund to another).

On the other hand, no advice is given with respect to transactions involving specific funds.

<u>Information</u>

Enrolment Information Package

New members of the plan receive an information package. The key component is a brochure which contains graphics and text that expand on the seminar content giving employees further insight into the various topics that have been covered.

The brochure also contains an Investor Profile Questionnaire and a Retirement Income Calculator. These tools help employees to determine their investor profile and the amount they need to save to reach their desired income at retirement, and to establish a strategic asset allocation according to their risk tolerance.

In addition, employees receive information on the most recent interest rates and a description of each investment fund offered under the plan. The description covers the objective and style of each investment fund, the top ten equity holdings, the sector holdings, and the performance compared to its corresponding benchmark.

All information is presented in a consistent format with emphasis on user-friendliness – brevity, simplicity, clarity and straightforward graphic presentation (e.g. pie charts depict portfolio composition).

This package can also be customized to meet the particular needs of a plan

Interactive Voice Response Info-Line

Using a touch-tone phone, a member calling the Info-line obtains quick access to account balances, investment mixes, interest rates, unit values and maturing term deposits. This interactive technology is supported by the Financial Representatives at the Financial Security Hotline.

Internet VIP Room

The VIP Room is a password-protected Web site for members of CAPs only. Using the latest encryption technology, only authorized individuals can access plan account data. Employees can make inter-fund transfers and changes to their current investment mixes, get up-to-date information on their plan holdings as well as information and descriptions of the investment funds offered under the plan. As indicated above, the fund descriptions are simple and concise. Making this fund information available on an ongoing basis through the Internet cuts publication delays as well as costs.

Member Statements

Statements are sent on a periodic basis (at least semi-annually) to each employee home address. These statements show how much has been accumulated under the plan, the financial activity since the last statement, pie charts with investments broken down by fund type. They also indicate the personalized rate of return of the investments over the last 12 months and annualized fund returns for all funds available under the plan. We have a good indication that members pay attention to their statements, because they often call the Financial Security Hotline after reviewing their account details to discuss their investment strategy.

Retail vs. Group CAP Model

Activity	Retail Model	Standard Life Group CAP Model
Advice	• From a licensed representative • One-on-One basis • Within the constraints of KYC rules	Not Applicable
Communication/ Education	• From a licensed representative • One-on-One basis	• From a service provider selected by the plan sponsor • Delivered by salaried Financial Consultants initially to groups of employees (average 25 employees) in the workplace, usually during paid business hours • Information package adapted to the specifics of the plan • Supported by toll-free Hotline staffed by salaried specialists
Risk controls	• KYC, updated regularly, enforced by the advisor and his/her brokerage firm; • Licensing of advisors	• Initial fund selection by sponsor (screening out options which are considered inappropriate for the group); • Low minimum investment requirements and use of pooled funds ensures diversification to reduce portfolio risk; • "Self-serve" Investor Profile + Asset Allocation Models encourage wise decisions by members
Disclosure	• Prospectuses at the fund level drawn up to cover legal compliance and manufacturer's liability • Significant costs for legal work and filing fees with regulatory bodies, which are charged to the funds	• Individual fund summaries are simple and available at enrolment and at anytime through the Internet to cut delays and costs. • Generic workbooks, planning tools and seminars are used to teach the necessary financial planning skills; • User-friendliness is emphasized – brevity, simplicity and straightforward graphic presentation (E.g., pie charts depict portfolio composition versus multi-page listings of every security held in each fund)
Customization	• Not feasible in light of compliance costs	• Commonplace and cost-effective at the plan level • Investment fund options and descriptive and educational material are regularly tailored to specific client needs; • Members are not bombarded with irrelevant information – facts focus on only the funds used under the plan
Transactions	• Always through the advisor	• Self-serve through Internet or through a toll-free Hotline staffed by salaried specialists; • Self-service cuts costs and delays (akin to discount brokerage model)

Cost Impact of Proposed Principles

Recognizing that retail MERs are necessary to cover the costs of advice and of compliance with stringent regulatory requirements, we can project that the costs of group CAPs would tend to rise towards the level of retail mutual funds if the same rules were to be imposed. The effect is quite dramatic. To generate the revenue needed to cover increased costs (e.g., $800), the fees on the smaller account balances of the group plan members (e.g., $20,000) would almost have to quadruple! Simple arithmetic produces an annual asset fee of … (800/20000) = 4.00%.

Of course, the industry has always found ways to cut costs and it may be possible to achieve a more attractive MER, however, the impact is not negligible. Even cutting the costs experienced in the retail industry by half would still result in an increase 100% to group plan members ($400 versus $200). One way to manage the gap between costs and revenues is to discourage plan members with small account balances from participating or, at least, concentrate their holdings in just one or two funds. Unfortunately, this would be a disservice to the very segment who is most in need of the benefits of retirement savings through a group CAP.

Summary

In summary, we can see that – even with their higher asset balances - typical retail mutual funds charge higher fees than typical group CAPs, mostly, it seems, to pay for personal advice and regulatory compliance.

We do not see tangible benefits to applying this treatment to group CAPs since in the group environment, with the role assumed by the plan sponsors (selecting options that will be available under the plan, negotiating the fees and services with the supplier, continuous monitoring….), the emphasis is on communication and guidance. Management fees are kept low with the use of the Seminars, Telephone, Internet, and Info-Line with user-friendly presentation of the relevant information.

We thank you for the opportunity for this dialogue and we look forward to working together in whatever way we can to improve the retirement security of working Canadians.

Yours sincerely,

CG/dh

PS: Please find enclosed two kits for your perusal.

Legal Department, 12th Floor
P.O. Box 1, Toronto-Dominion Centre
Toronto, Canada M5K 1A2

Facsimile no: (416) 982-6166
Telephone no: (416) 982-2455

July 31, 2001

By fax (416) 226-7880/
Original by mail

Carla Adams
c/o Financial Services Commission of Ontario
5160 Yonge Street
17th Floor, Box 85
North York, Ontario
M2N 6L9

Re: Proposed Regulatory Principles for Capital Accumulation Plans

This submission by the TD Bank Financial Group (TDBFG) is in response to the Request for Comments dated April 27, 2001, issued by the Joint Forum of Financial Market Regulators (Joint Forum) with respect to the Joint Forum's discussion paper titled "Proposed Regulatory Principles for Capital Accumulation Plans" (Proposal). TDBFG's interest in the Proposal stems from our active involvement in the market for group retirement savings plans – one of the types of "capital accumulation plans" (CAPs) which is considered in the Proposal. This GRSP, known as the TD Future Builder GRSP, is offered to small and other businesses by TD Asset Management Inc. (TDAM) and is trusteed by The Canada Trust Company(CT). As a leading provider of GRSP's to small businesses, we have significant insight into the needs and concerns of small businesses regarding providing retirement savings options to their employees.

In our view, the Proposal raises important issues regarding adequate disclosure to employees and regulatory harmonization. However, we have significant concerns in several major areas of the Proposal.

1. **GRSP Regulation**

   The text of the Proposal, including the scenario used to identify problems to be addressed by the principles, is orientated towards defined contribution pension plans where employees make their own investment choices (ECDCPP's). The Proposal does not consider the differences between

ECDCPP's and GRSP's or the implications of these differences for the proposed regulatory principles. A non-insurance ECDCPP, under which a single trust is

established, is governed by pension and securities legislation. A GRSP, on the other hand, is a collection of individual RSP trusts, and is governed by the Income Tax Act (Canada) (ITA) and securities legislation, and is also subject to the policies of the Canada Customs and Revenue Agency (CCRA). We note that the Proposal does not consider the ITA or CCRA policies and we suggest that they require examination in order to give a fuller picture of the current regulation of GRSP's.

2. **Impact on Employers**

In our view, the proposed regulatory principles set out in the Proposal, if implemented, will act as a disincentive to employers to (i) establish GRSP's and other CAP's and to (ii) assist their employees in meeting their retirement planning needs. The principles impose on employers a broad range of fiduciary duties regarding the establishment and maintenance of a CAP, initial and continual disclosure, and the provision of appropriate investment decision-making tools to CAP members. In the GRSP context, these duties will impose significant new administrative burdens and potential legal liability on employers. This cannot but discourage employers from offering GRSP's to their employees. Such discouragement will have negative impact on the ability and ease of employees to save for their retirement, which is surely a major Canadian public policy objective.

In the GRSP context, it would seem inappropriate to impose such fiduciary duties on the employer. Unlike a defined contribution pension plan (DCPP), where the employer or the employee's agent is typically the plan administrator, the responsibility for administration of a GRSP lies, in accordance with the ITA, with the issuer/trustee. In administering the GRSP, the trustee is already subject to fiduciary duties imposed by the common law. In addition, the sale of securities such as mutual funds to GRSP plan holders is already well regulated under securities legislation. Therefore, it is our view that trusteed GRSP's are already adequately regulated to provide plan holders the investor protection to which the Proposal is directed. In addition, we strongly believe that to shift certain duties from the plan trustee to the employer or to impose new duties on the employer will adversely impact the willingness of employers to offer GRSP's to their employees.

If the proposed principles are, in fact, applied to employers, we note that the Proposal states: "It is not proposed that plan administrators and employers would be held harmless for investment losses of members, if the principle were followed". In our view, if the plan administrator or employer or, for that matter, anyone else who may be subject to the principles, complies with such regulation, then such person should be fully protected from liability. The Proposal itself refers to the relief from liability provided in the United States if a plan administrator follows ERISA rules. In our view, if employers are not given assurances that compliance will act as a bar to liability, it is unlikely the employers will wish to assume the risk of offering CAP's to their employees.

3. **Harmonization of Regulation**

The Proposal identifies a number of what it considers to be gaps in the regulation of CAP's. We note that these gaps relate significantly to plans and products governed by insurance regulation. It seems to us that harmonization and adequate investor protection may best be achieved by strengthening the regulatory regime applicable to insurance plans and products so that it is equivalent to the current securities regulation regime.

We trust that the above comments will be helpful to the Forum in considering how best to proceed with the Proposal. We look forward to future information from the Forum on this issue.

Yours truly,

Alvin S. Lampert
Senior Counsel

June 17, 2002

Ms. Carla Adams
Financial Services Commission of Ontario
5160 Yonge Street
17th Floor, Box 85
North York, Ontario
M2N 6L9

Re: Consultation Paper on Proposed Regulatory Principles for Capital Accumulation Plans

Dear Ms. Adams:

The United Steelworkers of America represents over 170,000 workers across Canada in virtually every industry sector. Our membership includes not only steelworkers and mine and smelter workers but also workers in light manufacturing, retail, and banking, health care and private security industries.

We have reviewed the Canadian Association of Pension Supervisory Authorities (CAPSA) Consultation Paper on Proposed Regulatory Principles for Capital Accumulation Plans. We are pleased to have the opportunity to make this submission on behalf of the members of the United Steelworkers of America. We have witnessed that an increasing number of our members are enrolled in capital accumulation plans and support the creation of meaningful legislation that protects the rights of members who belong to such plans.

In this submission, we intend to respond to CAPSA'S proposed regulations, as well as make a series of recommendations which we believe will further improve the rights of individuals who are enrolled in capital accumulation plans.

The need for regulation of CAPs is evident from the data provided in the paper. It shows that 90% of CAPs offering investment choices have 5 or more investment options with an average of 12 investment options available to members. It appears that while these plans offer members investment choice, they offer little investment education. Just over 50% of CAPs offer some form of investment education to all members and 39% offer no investment education whatsoever.

As noted in the consultation paper, the regulation of capital accumulation plans (CAPs) lacks harmonization in legislation relating to the insurance, securities and pension sectors across Canadian jurisdictions. The consultation paper has two stated objectives. Firstly, to create regulations that provide similar protection for members of CAPs in each jurisdiction and to ensure that members receive the information and tools they need to make informed investment decisions. Secondly, to clearly define the duties and responsibilities of employers and administrators across jurisdictions.

The consultation paper has gone to great lengths to develop principles that would clarify the fiduciary duties of employers and administrators. These principles are: provide a reasonable range of investment options with different risk and return options; prudently select investment managers and monitor their performance; and, allow members reasonable opportunities to switch between investment options without penalty. We recognize the importance of ensuring that CAP members are provided with prudent investment advice and education so that they have the ability to make informed investment decisions. While desirable, they offer only limited protection to CAP members. We feel that an employer's fiduciary obligation goes beyond those stated in the paper.

The administrator or employer must also inform CAP members of the investment risks that they are assuming when enrolled in a CAP plan. All to often we find that unscrupulous employers misrepresent the benefits of CAP plans when contemplating a plan conversion from a defined benefit plan. Employers should disclose the difference in accrual patterns between CAP plans and defined benefit plans to members. In addition, employers should show middle age members the effects on their pension if their defined benefit plan is converted, such as reduced benefits and the loss of existing early retirement benefits if applicable. Further more, the employer should provide a transitional benefit to members to ensure that their retirement income is not less than what it would have been under the prior defined benefit plan.

Part of an employers or plan administrator's fiduciary obligation is to provide an initial and continuous disclosure of information. The consultation paper outlines that the initial disclosure should include;

- An explanation of the CAP, and the liability of the plan administrator or members and members for investments.
- Information on investment options, transfer options and penalties or fees, management and investment fees, details of fund performance.
- A default option if a member fails to make any investment choice.
- A standardized consumers guide to educate members about investment with directions on how the member can obtain additional investment information.

The principles for the disclosure of information are reasonable. However, they place an undue burden on CAP members to fully understand and act on the information that they have received. For the novice investor, who we believe the majority of CAP members are, general financial information, asset allocation models and interactive investment materials can be quite intimidating and difficult to understand. This may cause members to make inappropriate investment decisions.

We believe that simply providing plan members with information to read, in conjunction with a brief presentation, is not a sufficient amount of investor education. In addition to the above, a plan administrator, through a registered sales representative or advisor, should be required to perform an individual assessment for each plan member to discuss their retirement objectives and risk tolerance. A follow up assessment should then be done at least every two years thereafter to ensure that the member's objectives are being met. This process would allow the member to develop an investment plan with realistic expectations; investment risks appropriate to the member's circumstances and ensure an appropriate asset mix.

The United Steelworkers support the implementation of legislation relating to capital accumulation plans. However, the purpose of the legislation should be broader than simply providing regulations to protect employers and plan administrators from potential litigation. The legislation needs to provide reasonable protection for plan members. We feel that the addition of our proposals would accomplish this goal.

Sincerely,

Lawrence McBrearty
National Director for Canada
United Steelworkers of America

LMcB/ss
opeiu 343

cc: Harry Hynd, Director, District 6, United Steelworkers of America
Michel Arsenault, Director, District 5, United Steelworkers of America
Ken Neumann, Director, District 3, United Steelworkers of America

July 27, 2001

Carla Adams
c/o Financial Services Commission of Ontario
5160 Yonge Street
17th Floor, Box 85
North York, Ontario
M2N 6L9

Subject: Proposed Regulatory Principles For Capital Accumulation Plans: Discussion Paper

Dear Ms. Adams:

On behalf of Watson Wyatt & Company, I wish to thank the Joint Forum for providing us with the opportunity to make a submission with respect to the Joint Forum of Financial Market Regulators' Discussion Paper, *Proposed Regulatory Principles For Capital Accumulation Plans* (the Discussion Paper). Watson Wyatt & Company is a global consulting firm, providing clients with consulting services in the areas of employee benefits, human resources technologies, and human capital management.

Watson Wyatt recognizes the need to ensure adequate disclosure principles and other protective mechanisms, as well as access to investment information and better investment education for members of defined contribution pension plans and other similar types of capital accumulation plans (CAPs). Further, the need of employers and administrators to have their duties and responsibilities with respect to CAPs clearly defined, is essential. To that extent, the Discussion Paper raises significant issues which merit further consideration by the pension industry. We support the initiative and objectives of the Joint Forum in drafting the Discussion Paper.

However, we have concerns regarding the Discussion Paper's approach, content and direction. For example:

- There is a failure to include so-called "traditional defined contribution pension plans" in the Discussion Paper, i.e., plans in which the administrator is solely responsible for all investment decisions.
- The Discussion Paper over-emphasizes the "securities model" approach to the regulation of CAPs.

- The adoption of new rules/regulations could significantly increase the costs associated with CAPs, and make them less attractive as an employee benefit.
- Increased costs may also reduce or entirely eliminate the inherent advantages that CAPs enjoy over retail mutual funds.
- The Discussion Paper does not clearly recognize that plan members must be primarily responsible for their own investment choices.

Furthermore, Watson Wyatt believes that the issues raised should be addressed in "guidelines" or "best practices" to be adopted by stakeholder groups, but not in further regulations.

Should you have any questions regarding this submission, please feel free to contact me at: 416-943-6082 or by e-mail at: sheryl.smolkin@watsonwyatt.com.

Yours truly,

Sheryl Smolkin, LL.B., LL.M.
Director
Canadian Research & Information Centre

Encl.

Watson Wyatt & Company Submission

Re: Joint Forum of Financial Market Regulators' Report

Proposed Regulatory Principles for Capital Accumulation Plans

July 31, 2001

Table of Contents

Submission on the Joint Forum of Financial Market Regulators' Report on *Proposed Regulatory Principles for Capital Accumulation Plans*

The stated purpose for the development of this Discussion Paper by the Joint Forum is to address two issues:

- The need to ensure that members of capital accumulation plans (CAPs) have
  - similar regulatory protection when making similar types of investment decisions, regardless of the applicable legislative regime, and
  - the information and other tools they need to make informed decisions, where they are responsible for making those decisions.

- The need of employers and administrators to have their duties and responsibilities with respect to CAPs clearly defined, and harmonized across jurisdictions and products.[1]

The Discussion Paper raises significant issues which merit further consideration by the pension industry. Watson Wyatt & Company (Watson Wyatt) supports the objectives of the Joint Forum in drafting the Discussion Paper. However, we have concerns regarding its approach, content and direction.

The Watson Wyatt submission uses the four questions posed on pages 33 and 34 of the Discussion Paper as a framework for our consideration of the document, and the issues it raises.

1. Are the statements in the paper about the existing regulatory environment accurate, in your experience?

The description of the existing regulatory environment contained in the Discussion Paper is reasonably accurate. The Discussion Paper is meant to provide a broad overview of the existing regulatory environment and understandably, lacks specific details. However, as part of our submission, we wish to comment on issues raised or deliberately excluded from the Discussion Paper that we believe should be addressed in the regulation of CAPs.

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1 For the purpose of our submission, we wish to clarify what we understand to be the responsibilities of the "employer" and the "administrator" with respect to the design of a pension plan. The employer's responsibility (as plan sponsor) is to decide on plan design (for example, a defined contribution plan with member investment choice). Pension legislation, such as Ontario's *Pension Benefits Act* requires the administrator to invest the assets of the plan. Therefore, it is the administrator's responsibility as a fiduciary to select and monitor suitable investment options and the performance of the investment fund managers.

1.1 Limited Scope of Discussion Paper

The Discussion Paper states that it does not consider traditional defined contribution pension plans in which the administrator is responsible for all investment decisions.

In light of the purposes for the development of the Discussion Paper noted in the introduction to this submission, we believe that this is a mistake. While regulatory protection and disclosure in making investment decisions are not issues regarding traditional defined contribution pension plans (first purpose above), there is clearly a need to better define the duties and responsibilities of employers and administrators (second purpose above).

It is clear that under pension standards, the administrators of all registered defined contribution (DC) plans have fiduciary responsibilities in these circumstances. There is an implicit obligation to select appropriate investment vehicles based on established criteria, monitor investment returns against benchmarks and take action if these benchmarks are not satisfied. If these requirements are not met, the administrator could be held liable for mismanagement of pension funds.

Even if employees do not select investments for employer and/or their own contributions, they still require adequate information as to the amount of money they can expect to accumulate in their DC account under a variety of assumptions and the amount of retirement income this lump sum will purchase.

If this exception is maintained, it may become the default position for employers who do not want to go to the time and expense – or face the added risks – of ensuring their employees/plan members are in the position to make appropriate investment decisions based on access to investment information and education.

Therefore, to ensure consistent practice in the pension industry, Watson Wyatt believes that industry guidelines or best practices established for CAPs should apply both to DC plans that permit employees to make their own investment choices and DC plans that do not.

1.2 The Securities Model Bias

The following description of the current regulatory environment can be found on p. 4 of the Discussion Paper:

> "Currently, there is a confusing array of regulations that apply to these products, depending on which jurisdiction's laws apply to the CAP and the type of investment products offered by the CAP. There are both regulatory gaps and regulatory overlaps in the current environment. Sometimes securities rules apply to CAPs and sometimes CAPs are exempted from these rules, depending both on the applicable jurisdiction and on the nature of the investment product through which the plan is funded. It may be that securities legislation is not the appropriate regulatory framework for these employer-sponsored plans in which the employers and administrators owe fiduciary duties to members, and in which the nature of the investment decision may be different from the typical retail securities transaction."

Although there is an acknowledgement that the securities model may not be appropriate with respect to employer-sponsored plans, it appears there is an inherent bias towards this approach which presupposes the need for protection comparable to:

- registered salespeople,
- application of the "know your client" (KYC) rule, and
- a prospectus for each investment option.

It is important to recognize that there is no underlying profit motive in employer-sponsored defined contribution pension plans. Unlike the retail securities industry, the employer/plan sponsor derives no financial benefit from a CAP, other than the attraction and retention of a competent, loyal workforce.

The securities model also ignores the existing fiduciary duties, obligations and responsibilities that are already imposed upon plan administrators with respect to the investment of DC plan funds. In that regard, the administrator of the DC plan is required to act with prudence and care in the investment of plan members' funds and in the selection of an investment manager. There is no need for members to deal with a registered sales representative. Further, the costs involved in providing each member with a registered sales representative or advisor would far outweigh any potential benefits. Yet, the proposed regulatory principles state that plan administrators' or employers' fiduciary duties should include the duty to "ensure that members deal with a registered sales representative or advisor" (p. 30).

In addition, it is our experience that employees want simple, concise investment information. They have neither the time nor the financial education to understand the complexities of a prospectus. The potential costs of providing a full prospectus for each investment available to a DC plan member would also be prohibitive. Nevertheless, the proposed regulatory principles suggest that a member should receive a prospectus (pp. 28-29).

It should be noted that many of the crucial components of a prospectus, such as a description of the sales charges and investment management fees (IMFs) do not apply to investment funds offered under most DC plans. Under many DC plans, members are offered a choice of pooled funds managed by institutional managers, and investment funds that invest only in the units of specific mutual funds. These DC plans offer these investment funds to members on a no-load basis and at lower IMFs than are charged on the sale of a comparable retail investment fund.

It is important that the costs of designing and maintaining a CAP remain manageable, so employers continue to offer these programs and employees can receive the benefits of lower IMFs, the flexibility of “no-load” fee arrangements and accumulate retirement savings on a tax-assisted basis.

1.3 “Safe Harbour” Provision

The Discussion Paper (at p. 27) explicitly states that it does not recommend a “safe harbour”:

> “The proposed principles seek to clarify some of the fiduciary duties of employers and administrators, creating more certainty for those responsible for CAPs. It is not proposed that plan administrators and employers would be held harmless for investment losses of members, if the principles were followed. The principles are designed to meet the legitimate concerns of employers and administrators that their responsibilities are currently unclear, while ensuring members are reasonably protected. Under the proposals, plan fiduciaries will have clearer obligations, while still having the general duty to act reasonably and prudently with respect to their members.”

It should be noted that recent amendments to the *Supplemental Pension Plans Act* (SPPA), were part of the major reform of the SPPA contained in Quebec’s Bill 102, effective December 5, 2000.

Section 168 of the SPPA permits members of defined contribution pension plans to decide how the plan assets are to be invested "if the plan so provides." It states: "Where the plan authorizes members to distribute all or part of the amounts credited to them among various investments, it must offer a minimum of three investment options which not only are diversified and involve varying degrees of risk and expected return but also allow the creation of portfolios that are generally well-adapted to the needs of the members." Nevertheless, these provisions do not provide a "safe harbour" or absolve plan administrators from responsibility, if this standard is met.

In order to provide a safe harbour for plan administrators in specified circumstances, principles would have to be codified in the form of statutory amendment or regulations. Watson Wyatt supports a minimalist approach based on industry guidelines or best practices and believes that the concept of a safe harbour is not consistent with this philosophy. However, these guidelines should provide a detailed "roadmap" as to plan administrators' fiduciary duties with respect to:

- the establishment and maintenance of a CAP, and
- initial and continuous disclosure.

Unlike the Quebec or the United States' ERISA model, we do not believe that these guidelines should include a minimum or maximum number of investment options. Prescribing a quantitative number of options cannot ensure proper investment diversity or minimize risks.

2. Are the proposed regulatory principles appropriate and adequate to address the needs of CAP members, plan administrators, employers and regulators?

To answer this question, we first replicate the statements under the proposed regulatory principles in the Discussion Paper in *italics*, and then respond to them point by point as required.

2.1 Plan Administrators' Or Employers' Fiduciary Duties Regarding The Establishment And Maintenance Of A CAP

Plan administrators' or employers' fiduciary duties should specifically include the duty to:

- *Select investment options for members which offer a reasonable range of options with different risk and return characteristics, each of which is diversified;*

Only the plan administrator has fiduciary duties.[2] Watson Wyatt agrees that members should be offered a "reasonable range of options…" As noted above, any proposed regulatory principles should not state the minimum or maximum acceptable number of investment options. However, it should be recognized that as more options become available, the obligation to educate employees and monitor investments against benchmarks will grow.

The phrase, *"each of which is diversified"* implies that each option, on its own, should be diversified. That would mean that only balanced funds could be offered. The language should be clarified to indicate that each investment option should be diversified from the other options.

- *Prudently select, using all relevant knowledge and skill, the investment managers for each option;*

We agree.

- *Prudently monitor the performance of the investment managers for each investment option, including setting and monitoring benchmarks for investment performance according to the type of fund, and taking appropriate action where performance is unsatisfactory;*

Watson Wyatt agrees that appropriate benchmarks need to be established. The adoption of a benchmark can be accomplished through investment research, comparison studies and other recognized analytical methods. Benchmarking is an essential part of the administrator's role as fiduciary. However, it may be worth noting that the cost of benchmarking will be directly proportionate to the complexity of the funds offered.

Watson Wyatt believes employees must be responsible for their own investment decisions. Members should be informed that the plan administrator monitors the fund managers and the investment funds and provides the results of the benchmarking to all plan beneficiaries. It should be up to the members themselves to draw their own conclusions.

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[2] Please refer to footnote 1 above.

- *Where no prospectus is provided, ensure contracts with a third party provider or investment manager allow the plan administrator or employer to pursue an action on behalf of members for any misrepresentation about the investments;*

Prospectuses are generally not required for registered DC pension plans.

Since it is the plan administrator who selects the fund manager(s), it must be up to the plan administrator alone to pursue litigation, regardless of whether or not a prospectus was issued. It only seems logical and prudent that the party selecting the fund/fund manager should have the sole responsibility to initiate any legal action.

- *Allow members reasonable opportunities to switch between investment options without penalty.*

We believe that reasonable opportunities to switch between options without penalties or other costs are essential. Under the current daily valuation environment, DC plan members are typically allowed to make investment changes at any time without fees, or other transaction charges. Many mutual funds are often sold under a deferred sales charge (DSC) arrangement. If changing investments triggers a deferred sales charge, a member could face significant financial losses over time, when the time value of money is taken into consideration. A DC plan member may be forced to sell his/her investment funds when he/she terminates employment and needs to transfer the cash value of the DC account to a new registered plan. It would be very unfair to expose the DC plan member to DSCs under such circumstances.

2.2 Plan Administrators' Or Employers' Fiduciary Duties Re: Initial and Continuous Disclosure

Initial Disclosure

In general, we agree with the eight points on initial disclosure that are reproduced below, subject to our comments that immediately follow. Their purpose is, and should be to serve as a framework to provide all plan members with good investment information in order to choose the investment options most suitable to their individual needs and requirements, without the need of a prospectus.

If an employee/plan member wants more detailed information – or asks for a prospectus – the employer should only be required to inform the plan member how to contact the fund manager directly. Information provided electronically may also be helpful. Through the use of electronic "links" to a Web site, a member may be able to access the amount of investment information appropriate to meet his/her needs.

Plan administrators' or employers' fiduciary duties include an obligation to provide members and potential members with a summary of the CAP outlining its terms and provisions, and explaining members' rights and obligations under the CAP. The initial disclosure should include:

- *An explanation of the nature of the CAP, and the liability of the plan administrator or employer and members for investments;*

We agree. However, it must be clearly explained that the liability of the plan administrator or employer must be limited to the selection of options only. Employees/plan members must be held responsible for the choices they make.

- *A description of the investment options available and instructions on how to make investment choices;*

We agree.

- *Information on transfer options, and any applicable transfer penalties or fees;*

We agree.

- *Management and investment fee information for each investment option;*

We agree.

- *Details of fund performance including a discussion of performance against the established benchmarks;*

We agree.

- *The default option if a member fails to make any investment choices;*

There should be a default option. However, we wish to stress that the default option should be a "money-market fund." Equity funds have short-term risks and therefore, should be avoided unless they are expressly selected by the member. In these circumstances, an employer should have the obligation to inform the member at regular intervals that his/her funds have been invested in the default option, and make him/her aware of the availability and the right to make investment choices.

- *A standardized consumer guide including a "retirement income profile" to educate members about investments;*

This is a good idea. Such a guide can assist a member to better understand how his/her basic investment decisions will determine the total amount of funds available at retirement. This can be accomplished by examining the underlying asset classes and making realistic projections from information about these classes. However, members may still be unaware of the amount of funds that are required to be invested over a period of years in order to produce a pension that will ensure a satisfactory income at retirement.

- *Directions as to how the member can obtain additional investment information.*

Watson Wyatt submits that only investment information/education should be provided by the plan sponsor and/or the recordkeeper, not financial advice. If the plan member wants additional information, the plan sponsor can provide contact information only, so the member can contact the mutual fund provider directly to obtain further or more detailed information.

Continuous Disclosure

Continuous disclosure should include:

- *Annual statements containing information such as the total contributions in each member's account, share/unit value information for each member's account, interest and investment income earned, a listing of transactions in each member's account during the year and any associated fees, annual operating fees for each investment option, share/unit value information for each investment option, and details on how to access other information on the CAP or the investment options;*

We believe that the requirements suggested are excessive. Fees are not usually shown on the annual statement, but are disclosed in the plan documents that the employee receives. Watson Wyatt submits that a member's annual statement should be limited to financial transactions and prescribed data. We believe that the costs will be prohibitive if a plan administrator is required to inform each plan member about the exact fees for each investment or option made during the year. As noted previously, a Web site with links to more detailed information would let employees retrieve information of various levels of complexity that meets their personal requirements.

- *Access to specific information on each investment option, and material change reports on changes in investment options including members' rights or options in respect of the change;*

Since members are responsible for selecting the options in their own accounts, they do require information for each investment option. However, do most members have the financial expertise or the necessary time to evaluate such detailed financial information? What "specific information" are we referring to? Plan members should only be provided with essential information sufficient to meet their needs to make an informed choice. It is the plan administrator's responsibility to review the material changes to the funds offered.

- *Financial statements for each investment option and asset lists of the portfolio of each investment option;*

We disagree. It is the responsibility of the administrator to review the financial statements. This information should only be provided when an individual plan member makes such a request. Financial statements should not be mandatory.

- *Details of fund performance including a discussion of performance against the established benchmarks.*

As discussed above, benchmarks should be established, and the information provided in clear and concise language.

2.3 Plan Administrators' Or Employers' Fiduciary Duties To Provide Appropriate Investment Decision-Making Tools To CAP Members

Plan administrators' or employers' fiduciary duties should include the duty to:

- *Ensure that members deal with a registered sales representative or advisor;*

We disagree. We do not believe that this is compatible with the nature of employer-sponsored registered pension plans. It is impractical for the following reasons:

- The costs of a representative or advisor on a per member basis – whether employer-paid or employee-paid – will be prohibitive, and we question whether such a requirement will provide any short or long term financial benefits.
- For a proper financial plan to be prepared, a member would have to disclose personal financial matters. This raises privacy concerns, and may not be appropriate in the context of an employer-employee relationship.
- Liability issues may be created.

- *Take reasonable steps to ensure members (i) are provided with the recommended initial and continuous investment information discussed above, which should be presented in a manner appropriate for the members; and (ii) receive appropriate assistance with making investment decisions. For example, this may involve reviews of members' investment choices for suitability based on their "Know Your Client" profile, surveys of members' investment knowledge, or creating a process to allow members' to communicate their investment information needs to the plan administrator or employer, for the purpose of ensuring the effectiveness of the investment material and other assistance provided to members.*

We agree that an employer/plan administrator must take all reasonable steps to provide investment information on an initial and ongoing basis. Further, the information should be presented in a manner appropriate for the members, in order for them to make an informed decision. However, we feel that the KYC approach is inappropriate in the context of employer-sponsored DC plans for the reasons stated above. Members must understand that they are ultimately responsible for their own investment decisions and the necessity to properly save and invest for their retirement.

However, we do support the use of members' surveys/demographic studies, in order for employers/plan administrators to prudently select proper investment choices that reflect their members' general investment requirements – a "know your audience" approach.

2.4 Investment Rules

The Discussion Paper indicates that each investment option should comply with minimum investment rules to ensure adequate diversification, the avoidance of conflicts of interest and an acceptable level of risk. It suggests that minimum investment rules will ensure that CAP members "will be able to withdraw their retirement funds at any time…" The Discussion Paper also states that there should be minimum standards to ensure the available options avoid excessive risks. However, despite minimum rules and minimum standards, members must still have access to a "reasonable range of investment options with different investment objectives."

We see no need to set minimum investment rules or minimum standards. Determining "an acceptable level of risk" or avoiding excessive risks are terms that are not in keeping with the very nature of employer-sponsored defined contribution plans. Plan administrators currently have existing fiduciary obligations to ensure that pension funds are properly handled and invested with minimal risks.

Therefore, it is not necessary to impose investment rules, minimal or otherwise. Again, the Discussion Paper places too much emphasis on the securities model and the need to protect consumers from the inherent risks of investment in the retail environment. Funds held in DC plans are different than funds used in individual/retail investing. Although the Discussion Paper only proposes "minimum" investment rules, the imposition of rules may prove onerous to employers/plan administrators that are already burdened with substantial fiduciary duties and responsibilities.

We also have concerns regarding the recommendation that a member be permitted to withdraw retirement funds "at any time." Funds in defined contribution pension plans are subject to locking-in provisions associated with legislation governing pension funds. The suggested model makes the assumption that funds invested in CAPs should be treated as investments in retail securities instruments rather than pension funds. We do agree that members should be able to change their investment allocations at any time.

3. What Would Be The Most Effective And Practical Method Of Implementing The Regulatory Principles That Emerge From This Process?

The principles articulated in the Discussion Paper must be implemented in a manner that is consistent with the nature of CAPs. Furthermore, their implementation must not prove so onerous that employers will abandon the use of CAPs as part of their employees' total compensation package. It cannot be overstated that the end result of this Discussion Paper must be to serve the dual purpose of protecting plan members while at the same time, facilitating the growth of employer-sponsored CAPs. Furthermore, we are concerned about the necessity of adopting formalized regulations or rules.

Therefore, as stated above in our submission, Watson Wyatt supports a minimalist approach based on industry guidelines or best practices.

4. What Are The Anticipated Short-Term and Long-Term Costs (In $ And In Plan Coverage) Of Implementing The Proposed Regulatory Principles?

Clearly, the more onerous the provisions, the more likely it is that employers will no longer be willing to include CAPs as part of their employees' compensation package.

In terms of the dollar costs associated with implementing the proposed regulatory principles, increased transactional costs, disclosure and benchmarking could have an impact on the fees charged under a CAP. These fees may be paid by the plan sponsor, although typically we would expect to see them passed on to the plan members, which will reduce the amount of retirement income that the plan member will ultimately receive. The adoption of new guidelines could also result in increased administrative, educational and training costs. However, as long as the increased costs are reasonable, they will be justified by the results they achieve in terms of greater investment education leading to better investment decisions and hopefully, better investment returns.

The method of information delivery/distribution selected may also have associated costs. This could result from the application of new information technologies such as the increasing use of the Internet, as well as the development and implementation of sophisticated investment software. We would like to stress that any access to personal financial information using advanced information technologies must be designed to accommodate issues of privacy.

It must also be remembered that one advantage of CAPs (and all group plans) from an investment perspective, is the lower fees associated with these plans in comparison to a similar retail mutual fund investment. The lower administrative fee charged for a CAP compared with that of a retail investment is magnified by the compounding effect of the time value of money. The impact of increased administrative fees is even greater on a tax-deferred investment like a CAP. If the implementation of the proposed regulatory principles results in higher potential liabilities and associated higher costs, then these costs will be passed on to the CAP member in the form of higher administrative fees. These increased costs will then have to be weighed against the advantages of offering a CAP to employees as part of their total compensation package.

Since the key reason for CAPs from a plan sponsor's standpoint is to ensure that an employee and his/her family have sufficient financial resources to maintain an adequate standard of living upon retirement, any subsequent development that may significantly lessen the amount of available funds is certainly problematic.

5. Conclusion

Watson Wyatt & Company recognizes the importance of regulating CAPs, and welcomes the efforts of the Joint Forum of Financial Regulators. However, in this submission we raised concerns as to the approach, content and direction contained in the Discussion Paper.

As discussed above, we recommend that the follow-up to the Discussion Paper address some of the following issues:

- Recognize that the employer/plan administrator derives no financial benefit from providing a CAP. Clarify the responsibilities of the plan fiduciaries in terms of disclosure of information and educational requirements for their members. Any subsequent dialogue must acknowledge that the securities model is not appropriate in the context of registered DC plans.
- Any proposed regulatory guidelines should set out that plan fiduciaries are not obligated to provide financial advice, or assist plan members in financial planning. Sponsors must only provide investment education and information.
- Plan members must be ultimately responsible for the investment choices that they make.

- The application of any proposed guidelines to group registered retirement savings plans and deferred profit sharing plans must be fully explored, and the "traditional defined contribution pension plan," in which the plan administrator is solely responsible for all investment decisions, should be covered by the same guidelines.
- Any costs and liabilities that result from the guidelines adopted should not discourage the implementation and growth of CAPs.

COMMENTS ON

PROPOSED REGULATORY PRINCIPLES FOR CAPITAL

ACCUMULATION PLANS

A Report by the Joint Forum of Financial Market Regulators' Working Committee on Investment Disclosure in Capital Accumulation Plans

William M. Mercer Limited
BCE Place, 161 Bay Street
P.O. Box 501
Toronto, Ontario
M5J 2S5

July 2001

INTRODUCTION

The purpose of this submission is to provide comments about the Consultation Paper on Capital Accumulation Plans (the "Paper") released by the Joint Forum of Financial Market Regulators (the "Joint Forum") on April 27, 2001. The Paper raises a number of issues and concerns on matters relating to the proposed regulatory principles for Capital Accumulation Plans ("CAP") and we welcome the opportunity to submit our comments.

We recognise and are appreciative of the research and effort that obviously needed to be done prior to the release of the Paper. We are also fully supportive of the Joint Forum's policy to release draft papers with the corresponding invitation to the industry and other interested parties to provide comments and suggestions prior to going forward with regulatory proposals. The first part of our submission contains some general concerns, comments and suggestions and the second part deals with the four proposals discussed in the Paper.

As the Paper presented proposed regulatory principles at a high level, our comments also take this form. We also provide our suggestions for items in the Paper that we believe require clarification. However, it is the detail of the requirements, and the administrative application of the requirements, that will determine the viability and success of the initiative. We would be pleased to provide further comments once the detail surrounding the principles has been developed.

Our comments are based on our experiences as CAP consultants dealing with plan sponsors of all sizes in all provinces. William M. Mercer Limited is the largest retirement and benefits consulting firm in Canada. We offer the following services to our CAP clients:

- Plan design
- Compliance support (with the exception of support for compliance with securities laws and regulations)
- Governance
- Communications
- Investment manager selection and monitoring
- Recordkeeper selection and monitoring

PART ONE – GENERAL COMMENTS

The stated purpose of the Paper is, firstly, the need to ensure that employees in CAPs have a similar level of protection and access to similar investment information regardless of the type of CAP and jurisdiction that applies. Secondly, it addresses the need to have the duties and responsibilities of plan sponsors clearly defined.

Harmonization

We support the concept of striving for harmonization and standardization of financial service regulations across all jurisdictions. The introduction to the Paper confirms that the regulation of CAPs is not harmonized across jurisdictions and that this results in individual investors receiving varying degrees of regulatory protection depending upon the nature of the investment product and the regulations applicable to that product.

While we appreciate the pro-active nature of this initiative, it would assist readers in further understanding and evaluating the Paper to have further disclosure from the Joint Forum on the impetus for this initiative. While Mercer only deals with a limited segment of the market in the course of our consulting practice, we are not aware of any situations where members have claimed they have suffered under the current multi-regulatory environment. The existing legislated fiduciary standards for Registered Pension Plans "RPP") are high. In our experience, we have found that sponsors of CAPs have a sincere desire to promote their employees' retirement savings and that they are, aside from legislated regulatory requirements, aware of their fiduciary responsibilities to members both with providing information and in educating employees. This applies whether the CAP is an RPP, Deferred Profit Sharing Plan ("DPSP"), Group Registered Retirement Savings Plan ("GRRSP") or other form of CAP.

While harmonization of rules by type of CAP (i.e., RPP, GRRSP, DPSP) and by regulator (pension, securities, insurance, trust) may be beneficial, we suggest that cross-provincial harmonization of regulatory principles, both in concept and in administrative application, is also highly important. Lack of harmonization forces employers to treat different groups of employees within the same CAP unequally. We are all aware of how complex the legislation and regulations are surrounding pensions, securities, insurance and trusts because so many differences exist in the various jurisdictions. This is becoming an ever-increasing problem as more employers expand their operations across provincial borders.

For this reason, it is particularly important to achieve cross-provincial harmonization of the proposed regulatory principles both in concept and application. Another layer of regulation, on top of the existing patchwork of regulatory requirements, is not beneficial. This is especially true for registered pension plans currently covered under pension legislation. It may be helpful, as a first step, to harmonize the existing regulatory requirements before attempting harmonization of new principles. If this is not feasible, we suggest the need for exemptions from the existing regulations for CAPs that become subject to the proposed regulatory requirements. Alternatively, issuing best practices guidelines that could be applied by plan sponsors in a harmonized manner would be appropriate. We anticipate that any lack of harmonization would discourage employer sponsorship of CAPs.

Governance

While no plan sponsor wishes to be subject to extensive regulatory requirements, we strongly support the concept of good governance practices. There is a strong argument to support the view that all employer-sponsored plans need to adhere to a well-structured and active governance structure. In doing so, the special needs for individual plans would be properly and adequately provided for. We also believe that harmonized, cross-provincial regulatory principles that contain the following elements would be embraced by both plan sponsors and the financial services industry and would encourage and promote a healthy CAP environment:

- Simplicity of application
- Clarification and certainty of roles and responsibilities, particularly fiduciary responsibilities, including reasonable protection for fiduciaries in fulfilling their responsibilities
- Value-added support for members
- Ability to customize to meet plan sponsor needs
- Cost effective application

We encourage the Joint Forum to consider these elements as it further develops the regulatory principles.

Need for Common Regulatory Environment

Provided plan sponsors adhere to the concepts of good governance, there may not be a need for a common regulatory environment as suggested in the Paper. Different regulatory models for different types of CAPs may serve a useful purpose. We see this as one of the factors to be considered in the good governance process. Variances in requirements for different types of issuers, despite the gaps and overlaps suggested in the Paper, may result in a healthy, competitive business environment in which the competitive nature of the industry acts to increase the overall standards of best practices. We see value in allowing the plan sponsor enough flexibility to determine the nature of the pension contract with its employees (and other non-employee participants such as beneficiaries and GRRSP spousal accounts). We believe the nature of the contract and the obligations of all parties to the contract should be disclosed.

We suggest that the securities model put forth in the paper may not fit as well with the nature of the plan sponsor's pension contract with its employees as it does in the retail investment market. We understand that the securities model was established to address the relationship between issuers of financial products and generally unsophisticated individual purchasers of that product. As the issuer of the financial product directly

benefits financially from the relationship with the investor, the securities model is useful in helping to managing these potential conflicts of interest.
In contrast, the pension contract is one whereby the plan sponsor and member agree to contribute, on a pre-defined basis, to the member's savings or retirement account and uses its bulk purchasing power to prudently engage service providers that can provide safe-keeping, recordkeeping and investment services on a cost-effective basis. The employer is not an issuer of financial products, and gains no direct financial benefit from sponsoring a CAP. Instead, we suggest a more effective model is one based on good governance. That is, an appropriate standard of care is a reasonable basis for determining the plan sponsor's fiduciary duties. This could be accomplished by requiring plan sponsors to develop plan operating policies. Such a policy would include an investment policy statement (similar to the existing RPP requirements) and a communication/education/advice policy (that sets out the plan sponsor's position on providing advice vs. education, the tools to be provided to employees to support this position, etc.). It should also give a clear definition of the roles and responsibilities of the plan sponsor, members and other third-party providers in the education/communication process.

We note that the Paper specifically excludes CAPs which do not offer member investment choice. It would assist readers in better understanding the concepts presented in the Paper if the Joint Forum could explain the rationale for this approach. If the purpose is to ensure appropriate and equivalent regulatory protection and investment disclosure, it is arguable that such plans should be included. Disclosure for the purpose of making investment choices within the plan would not apply. However, sufficient disclosure should also be required to ensure the member can determine how the CAP investment fits in with his/her total portfolio of investments (i.e., personal and employer sponsored).

Further clarification as to the scope of the proposed principles would be helpful. For example, are the proposals intended to encompass all employer-sponsored plans offering investment choice, e.g., hybrid plans, flexible pension plans account, supplementary executive retirement programs, self-directed plans, small plans etc.? Failure to include all types of plans will result in further inequity and may risk creating even more differences in the governance of employer-sponsored plans. However, we note that, for small plan sponsors, compliance with the proposed regulatory principles may be onerous. Issuing best practices guidelines for such plans would be an alternative.

Limitations on Liability

We see value in clarifying the standards that should be met by plan sponsors in fulfilling their regulatory requirements. Different plans may require different standards and a boilerplate approach will clearly not meet these needs.

We see value in providing reasonable limitations of liability to those plan sponsors who meet the regulatory standards. This is consistent with our understanding of the U.S. ERISA safe harbour provisions. We accept that such protection may not exist under the common/civil law, i.e., would not bind a judge in his/her deliberations. However, where there has been compliance with the regulated standards, plan sponsors should be given the benefit of knowing their fiduciary duties to members will be treated by the regulators as having been met and that this compliance will be considered favorably by a court.

We also suggest there are parties more appropriate than the plan sponsor that should be subject to some of the proposed regulatory requirements. In particular, we see merit in assigning regulatory responsibility for prudent investment disclosure to the issuer of the financial product, i.e. the investment manager or funding agent, provided the plan sponsor was prudent in its selection of the third party. As a minimum, we recommend that there be some guidance concerning the delegation of duties by plan sponsors.

The paper omits any discussion on the members' obligations and duties, although it is equally important for a member's duties and roles to be clarified. We have to be careful that we do not fall into the trap of treating members with too much of a paternalism. Members should be required to assume responsibility for those factors that are under their control, i.e., their investment education and financial planning. A motivating factor for many plan sponsors and employees in opting for a CAP over a traditional defined benefit plan is that the member has more control over his/her retirement saving. In developing its regulatory principles member rights, duties and obligations should be clarified as much as those of the plan sponsor.

PART TWO

This section will comment on the proposed principles for the proposed regulatory model dealt with under Section V of the Paper. The principles were broad in nature and raise a number of questions. It would be helpful to the readers if further clarification of the principles could be disclosed in the next stage of the Joint Forum's initiatives.

(i) Plan Administrators' or Employers' Fiduciary Duties Regarding the Establishment and Maintenance of a CAP.

1. *Item 1 – Selection of investment options*. It would be helpful to give further guidance on what is considered a "reasonable range of investment options". Pension legislation in Québec, as well as ERISA legislation, provide specific minimum standards to be met by plan sponsors. We believe that clarity, accompanied by a reasonable measure of safe harbour protection, would be well received by the market.

2. *Item 2 – Prudent selection*. A reasonable test of prudency would be the selection of managers who are compliant with the requirements of the Association for Investment Management Research ("AIMR"). AIMR is an international, non-profit organization whose mission is to serve its members and investors in educating and examining investment managers and analysts and sustaining high standards of professional conduct on an objective standard basis.

   Further clarification of the scope of this requirement would be helpful. For example, would this preclude self-directed arrangements whereby the employer selects the provider of the self-directed arrangement but does not select the investment managers? Guidelines on such issues as the minimum frequency of monitoring, reviewing fees for competitiveness, etc. would also be helpful.

3. *Item 4 – Pursuit of action where no prospectus is provided*. The right to pursue an action against a third-party provider or investment manager by the plan sponsor, on behalf of members for misrepresentation, is an inherent right that will apply whether or not this is set out explicitly in contracts or whether a prospectus has been issued. However, we see value in creating a direct contractual obligation. (Note that, under the AIMR standards, investment managers found to be making misrepresentations as determined by the AIMR Code of Ethics would also be subject to sanctions by AIMR.) . It would be helpful to clarify what constitutes a "misrepresentation". Of greater importance is the assurance that such contracts disclose all potential or perceived conflicts of interest

4. *Item 5 – Reasonable opportunity to switch investments.* Further clarification is needed as to the scope and intention of allowing members reasonable opportunity to switch between investments options without penalty. Would this preclude GIC market value adjustments or self-directed plans where back-end fees apply?

(ii) Plan Administrators' or Employers' Fiduciary Duties re: Initial and Continuous Disclosure.

Initial Disclosure:

We concur that information on applicable penalties, investment fees and annual operating fees, whether explicit or implicit, should be disclosed and would be beneficial to members.

1. *Item 1 – Explanation of CAP nature and plan administrator liability.* It is not clear how a plan sponsor would explain its liability for investments as suggested in the Paper, unless the plan sponsor has some control over the amount of liability it is willing to assume or the liability is specifically defined by legislation. Exposing plan sponsors to an undefined liability will discourage sponsorships of CAPs. We also believe that some reasonable measure of safe harbour protection is necessary to encourage sponsorship of CAPs. Plan sponsors should be afforded protection from liability where they have prudently provided the services suggested in the Paper. As discussed above, we see value in allowing the plan sponsor enough flexibility to determine the nature of the pension contract with its employees (provided the nature of the contract and the obligations of all parties to the contract are disclosed).

2. *Item 2 – Description of investment options and investment choice instructions*. It is not clear how to interpret the requirement to provide a "description of the investment options and instructions on how to make investment choices"? We expect that this item is describing an administrative requirement and not meant to be construed as a requirement that the administrator or employer provide investment advice. Further clarification is required.

3. *Item 5 – Discussion of performance against benchmarks.* We agree there may be value added to members in learning how to benchmark the performance of their investment portfolio. However, most employees do not measure returns against established market benchmarks and the member's entire portfolio of assets (with the CAP and those held personally) should be taken into consideration. Many employee statements issued by recordkeepers already show market index returns and personalized rates of returns. If the regulatory principles anticipate going beyond a reporting of performance against market benchmarks further clarification of the process should be provided. A more relevant requirement would be to require disclosure of fund and personalized returns on a "standardized" basis for comparability purposes.

4. *Item 6 – Default investment option.* Guidance is required on what default options are acceptable. How should the default be selected? What are the protections for plan sponsors who apply the default option? It may be reasonable to exclude plans that are completely voluntary where the plans require selection of an investment option before contributions can be accepted.

5. *Item 7 – Standardized consumer guides.* Who will develop and define the acceptable standard for this "standardised" consumer guide? There are significant quality and content differences between such guides. A lack of an acceptable standard places the plan sponsor in the position of having to assess the suitability and accuracy of this guide, as the member may hold the plan sponsor responsible for the quality of the output. The plan sponsor may not have the necessary skills to make this assessment but will bear the fiduciary liability unless safe harbour protection is available. There is also the risk that such a guide would be too generic to be of any use to employees. Should the Joint Forum find it necessary to adopt this principle, we suggest that this responsibility be allocated to the provider of the financial product (i.e., the investment manager, recordkeeper or funding agent/trustee).

In general, information to members should focus on quality rather than quantity. It should be of the nature that the average investor could understand and apply the information in making investment decisions. Supplementary information, such as voting rights, and other miscellaneous information provided in prospectuses should be avoided as it can distract members from the more relevant information and can discourage members from reading the information.

Continuous Disclosure:

1. *Item 2 – Material change reports.* It would be helpful to define what is considered a material change.

2. *Item 3 – Financial statements.* The continuous disclosure requirements must balance the amount of time required by employees to read, absorb and understand, then act upon the information provided. We feel that this item does not necessarily provide added value to the majority of members, as only a small portion will have the skills to interpret and make use of the information. It is also costly to distribute. We suggest that the best approach may be to focus on the quality of the information disclosed rather than on the quantity of material provided. Thus we would suggest that perhaps the information should be made available, as opposed to being required to actively distribute this material. For example, continuous disclosure could read "Access to" financial statements and asset lists.

3. *Item 4 – Discussion of performance against benchmarks.* Refer to paragraph 3 under the sub-heading "Initial Disclosure" (Item 5) above.

(iii) Plan Administrators' or Employers' Fiduciary Duties to provide Appropriate Investment Decision-Making Tools to CAP Members.

1. *Items 1 and 2 – Deal with registered sales representative/advisor or take reasonable steps to provide recommended investment information*. We agree that individuals providing investment information to members should be qualified to

perform this function. The regulatory principles should not preclude advice from impartial salaried or fee-for-service planners or employee educators who may not be registered but who maintain other designations (e.g., CFA) qualifying them to provide such services. Various types of registration, designations and provincial standards apply, so it would be helpful to define what registration/designations are acceptable (e.g., CFP, IFIC mutual fund licence, Canadian securities course, etc.). Again, please keep in mind that cross-provincial harmonization of standards is critical.

Plan sponsors, in collaboration with the recordkeeper, funding agent/trustee or investment manager, typically make extensive use of custom member meetings and other tools to educate members. This enables the plan sponsor to structure the meeting/tools to meet the unique needs of the workforce (i.e., language requirements, age differences, and investment knowledge differences). In many cases, the information provided to members is more relevant and of a higher quality than what is offered in the retail market. While not a replacement for unbiased individual investment and financial advice, we suggest the Joint Forum recognize these alternative methods of education as an acceptable alternative to a registered sales representative or advisor.

The principles, as stated in the Paper, suggest a requirement to provide investment advice in some manner. If so, we question the appropriateness of requiring plan sponsors to provide advice. This would increase the fiduciary liability of the plan sponsor who may ultimately be held accountable for the advice given. Many plan sponsors, as part of their good governance practices, have consciously decided not to offer advice. The need to diligently select and monitor the advice provider also increases the amount of time and effort expended by the plan sponsor in operating the plan and increases the cost of operating the plan. In most cases, these costs will be passed on to the plan membership, regardless of whether they choose to make use of the service. The end result is diminished investment returns.

This requirement will likely discourage employers from sponsoring such plans. If the Joint Forum finds it necessary to include this requirement, we suggest safe harbour protection for the plan sponsor. It would be reasonable to expect plan sponsors to be relieved of liability if they prudently selected and monitored the advice provider. Alternatively, we suggest the responsibility for adhering to this requirement be allocated to the provider of the financial service (i.e., recordkeeper, funding agent/trustee, recordkeeper, or investment manager, as applicable).

A more important issue is managing conflicts of interests by the sales representative/advisor. Many sales representatives/advisors receive direct financial compensation, in the form of commissions, trailer fees, etc. as a result of their services. We suggest guidelines to ensure unbiased advice.

Item 2 –Take reasonable steps to provide recommended investment information. The alternative of a suitability review by the plan sponsor as suggested in this item is likely to prove unfeasible and would provide a significant disincentive to employers in sponsoring CAPs. We understand there seems to be a move away from suitability requirements in the securities industry (i.e., we understand that discount brokers are exempt from suitability requirements on the basis that they simply take instruction rather than giving advice). If so, we question the appropriateness of plan sponsors fulfilling the suitability requirements, when they too are in the position of taking instructions and not providing investment advice? We suggest this a responsibility best allocated to the provider of the financial service (i.e., the investment manager, recordkeeper, funding agent/trustee, as applicable).

Should the Joint Forum find it necessary to pursue this approach, member privacy becomes an issue. Obtaining assistance from third parties is possible but would unnecessarily increase costs. In any event, the only way to properly determine suitability is to examine the member's (and his/her family's) overall financial circumstances and objectives. It would be inappropriate to make this a plan sponsor responsibility as it this goes beyond the scope of a good governance process. The most important concern is the fiduciary liability plan sponsors would face. It is inappropriate to hold the plan sponsor to the same requirements as a financial institution that specializes in this function.

Subject to good governance standards, plan sponsors should have the flexibility to structure the nature of their support to members, provided there is full disclosure of the division of roles and responsibilities. We see no reason why plan sponsors should not be able to require members to obtain personal investment/financial planning from a provider of the member's choice, if the member wishes this service. Plan sponsors are not investment or financial planning experts and are not in the best position to perform this function. In our experience, many plan sponsors, as part of their good governance process, will review the investment profile of the membership overall, or in age bands, as this can assist them in developing their general communication requirements. However, it would be inappropriate to require the plan sponsor to become involved in a member's personal financial plan.

(iv) Investment Rules

We would expect that, as a minimum, the investment rules designed for CAP investment options would be the same in all provinces. It would be helpful to provide clarity around the basis for the minimum standards. Is it intended that National Instrument 81-102, regulating mutual funds, be the standard? If so, we would argue that there are many pooled funds that are not subject to the National Instrument but which have an equal or lower risk profile. Pooled funds have a significant advantage in their lower fee structure. Most pooled fund managers have adopted the AIMR standards. We suggest that plan sponsors not be precluded from investing in pooled funds. The selection of mutual or pooled funds should be one of the elements to be determined in a good governance structure.

In order to measure risk, it will be important to define it (i.e., market risk, volatility risk, benchmark risk, credit risk, etc.) and to clarify how the standards for determining acceptable levels of risk will be determined. The principle that "members should not be subject to any greater risks than investors in retail mutual funds or segregated funds" will require clarification. For example, would this preclude direct investments in individual securities under self-directed plans?

We agree that plan sponsors should apply their good governance practices in the selection of investment vehicles and, in our experience, most plan sponsors are sensitive to avoiding high-risk vehicles. However, in developing your regulatory principles, plan sponsors and members should be permitted to evaluate risk in the broader context of an overall portfolio. That is, in keeping with the principles of modern portfolio theory and modern concepts of prudence, i.e., the performance of any individual investment should be judged in the context of its contribution to the overall portfolio performance*. Consequently, we are of the view that risk management should be addressed through an investment policy statement. For those plans that are established on a self-directed basis, where the employer does not have any influence on the investments selected, the plan sponsor should not be held accountable for the riskiness of the investments.

**Fiduciary Responsibilities of Investment Managers and Trustees*, William G. Droms, Financial Analysts Journal/July-August 1992, as reprinted in the 1999 AIMR CFA Level III Candidate Readings

Implementation of the Proposed Regulatory Principles

As noted above, it is particularly important to achieve cross-provincial harmonization of the proposed regulatory principles, including the application and administration of the principles. Any principles should concentrate on good governance practices. The plan sponsor should be given enough flexibility to determine the nature of the contract with its employees (and other non-employee participants such as beneficiaries and GRRSP spousal accounts). The nature of the contract and the obligations of all parties to the contract should be clearly stated and disclosed (i.e., perhaps through policy operating statements as discussed above). The plan sponsor should have the ability to select the regulatory model that best fits the agreement. A combination of minimum standards and best practice guidelines, including reasonable safe harbour provisions, may be an effective way of achieving these objectives.

Costs

The plan sponsor will need to engage third-party expertise to meet the requirements of the proposed regulatory principles. We defer to funding agents and investment managers to address the anticipated costs of the providing the additional services. However, we emphasise the advantages of minimizing costs to the plan members. As we reported in our *Focus on Fees* article in the September 2000 issue of Benefits Canada, the median difference in fees between a retail investment fund and the combined investment/recordkeeping fee of an employer sponsored plans was 1.41%. Over a 35-year investment period, we estimated the savings in fees for a typical plan would increase a member's accumulated assets by approximately 23%. The difference in fees may have just as much, or more, impact on the member's accumulated assets than the difference in investment performance between managers. The hidden cost of increased fiduciary responsibility without clear identification of responsibilities or safe harbour protection is also a consideration, but one which cannot be easily measured.