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

January 25, 2009

Mr. Daniel Padro
Policy Manager
CAPSA Secretariat
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Dear Mr. Padro:

Re: Proposed Agreement Respecting Multi-Jurisdictional Pension Plans

ACPM Introduction

First, we congratulate Canadian Association of Pension Supervisory Authorities ("CAPSA") on arriving at the draft Multi-Jurisdictional Agreement ("MJA"). Such an agreement is very much needed by the pension industry to give certainty to the administration of multi-jurisdictional plans, and in some cases to give sanctions to existing practices.

We also recognize the extensive negotiations that must have taken place among the jurisdictions. That CAPSA members were able to agree as to the extensive list of matters to be governed by the major jurisdiction set out in Schedule B is very much to their credit. We were especially encouraged by the joint presentation by representatives of Ontario and Quebec, noting the number of multi-jurisdictional plans with a significant number of members in each jurisdiction.

We view the initiative and the draft very positively, and welcome the opportunity to comment on the draft. Our comments are intended to improve or give additional certainty to the draft. In addition some of our comments are directed in giving employers and plan administrators additional flexibility. We recognize the need for certainty and have tried to minimize the suggestions for flexibility to those that we believe are necessary to make the MJA work.

Preliminary Comments: Change in Major Authority

We believe that the most difficult practical problems with the MJA as presently proposed would come about as a result of a change in the major authority. The problems would arise principally from the different funding and investment regimes, as they exist now and may exist in the future.

- In respect of funding regimes, the use of letters of credit and extensions of time for solvency funding currently differ from jurisdiction to jurisdiction, and these differences are expected to increase. Further, legislation permitting Pension Security Funds ("PSF") or requiring that a provision for adverse deviations ("PFAD") be maintained, where such legislation is enacted, will undoubtedly not be uniform. The MJA recognizes the difficulties of changing investment regimes by providing for a five year transition period. We urge that a similar five year transition period be given for funding regimes as well.

- Moreover, there should be flexibility respecting the treatment of forms of funding, to give the employer flexibility in adjusting the new major authority. For example, if PSFs should be permitted as proposed by the Alberta-British Columbia Joint Expert Panel on Pension Standards, and if a new major authority does not allow a PSF, the PSF should become part of the pension fund only to the extent required to have 100% solvency ratio (or the higher ratio required to attain solvency margin required by the new major authority, if applicable), and the excess PSF is refunded to the plan sponsor, unless the employer waives the refund.

- In respect of investment restrictions, we note with concern the potential for departures from the general uniformity as to investment restrictions that presently exists across Canada. In this respect, we urge the federal authorities to correct the existing problems in the federal regulations, which are well known, and for the other jurisdictions to adopt the federal rules.

Our concern is that the problems of changing funding and investment regimes could give rise to artificial means of altering the major authority by way of plan splits, plan mergers and partial wind ups. Generally we believe the response to these concerns is, as noted above, to give a transition period of five years for a change in funding or investment regimes, and in <u>all</u> cases providing for three year notice of a change in major authority. We would also suggest that there be some flexibility in changing the major authority at the request of a plan administrator earlier than the 3 year period; for example if the plan sponsor/administrator is prepared to certify that it reasonably expects the new plurality of active members to remain constant for a specified number of years, probably three.

PART I – GENERAL PROVISIONS

<u>Section 1</u>

1(1): We suggest that for simplicity and clarity the definition of "active member" be based on the definition of active member in the annual information report that is required to be filed by the administrator.

PART II – MAJOR AUTHORITY

<u>Section 4</u>

4(3)(a)(b): Clarify whether these decisions are contemplated on a plan-by-plan or case-by-case or area of jurisdiction basis. We appreciate that the provisions may be necessary but comment

that their use in any but very exceptional circumstances would detract from the usefulness of the MJA, which is based to a considerable extent on certainty as to which rules apply.

Section 5

5(1): We are concerned as to the short time for the change in major authority in (1)(b) and (c). See **Preliminary Comments** above.

5(5)(a) The provision that the major authority maintains jurisdiction in respect of matters pending before it is vague. We suggest that these matters be specified to be matters as to which an application has been made to the major authority or the major authority has commenced an enforcement action. Other matters which could be considered to be pending are matters as to which a member complaint has been received, information has been requested by the major authority or a demand for compliance has been made.

PART III –APPLICABLE LAW

Section 6 - Applicable Legislation

6(2)(a)(b): It should be clarified (if such is the intention) that where the legislation of the major authority requires funding of a benefit but the legislation of the minor authority does not, there is no requirement to fund for the benefit for the employees in the jurisdiction of the minor authority.

6(2)(d)(i): We are concerned with the requirement for an immediate payment of the amount secured by a letter of credit on a transfer to a major authority that does not allow letters of credit or permits them on different conditions. We suggest that a transition period of five years may be needed in some cases. See **Preliminary Comments** above.

Section 7 - Determination of Benefits by Final Location

We strongly support the final location concept, subject to compliance problems with income tax legislation, in particular that past service pension adjustments will not be created, and trust that CAPSA has consulted the tax authorities as to this issue.

We suggest that the MJA be clarified with respect to the application of the final location rule for interest credited on employee contributions. It should be credited each year to all contributions made by the employee, based on the rules applicable to the jurisdiction in which the employee is working as of the end of the plan year.

PART IV - PENSION PLAN ASSET ALLOCATION BETWEEN JURISDICTIONS

Section 10 - Applicable Situations

10(d): Allocation between jurisdictions should not be required for a partial wind up in jurisdiction(s) where surplus distribution is not required.

Section 11 - Allocation of Assets

(2)(b)(ii): We suggest for clarity and simplicity that a certification by the actuary that the allocation will not differ by more than 5% from the standard method should be acceptable.

Section 14 - Determination of Portions for Asset Allocation

14(2)(a): The language should be amended to more clearly include:

- optional ancillary contributions made under flexible pension plan provisions; and
- excess employee contributions resulting from the 50% minimum employer cost rule where such amount was already determined due to termination of employment or active participation and has not yet been converted into additional pension benefits.

14(3)(b)(i): We understand that the earliest age at which all plan members would be entitled to an unreduced pension should be used under this provision, without consideration for earlier unreduced pension entitlement based on service requirements or the fact that some active plan members may already be entitled to an unreduced pension based on the plan's early retirement provisions. For most plans, this age would correspond to the normal retirement age (or pensionable age under federal pension standards). The language of this provision should be clarified as there should not be any ambiguity as to its application; otherwise, there would be a significant potential for disputes on the allocation of plan assets by jurisdiction.

14(3)(c): This provision should accommodate situations where plans decided to use the 50% minimum employer cost rule more generously than the minimum requirement for a jurisdiction; for example, in order to have uniform application for all jurisdictions.

14(5: We understand that the purpose of this section is to ensure that where an additional liability is required to be established and funded by a minor authority's pension legislation, the assets allocated for the benefits and other amounts accrued under the plan that are subject to that minor authority's pension legislation in accordance with the first three levels of priority, do not exceed the value of those benefits and amounts. However, to facilitate understanding of this mechanism and consequently avoid potential disputes as to how it applies, we suggest providing examples using numbers of how asset allocation adjustments would be made under this section. These examples should be part of formal notes to the final MJA.

14(6)(e): We believe that no part of the going concern surplus should be allocated to a defined contribution element of a plan as a quid pro quo in giving defined contribution accounts priority on the windup of an underfunded plan.

14(7)(a): For greater clarity, we suggest the "subsections (3) and (4)" be replaced with "subsections (2), (3) and (4)".

14 (7)(b): Again, we believe that no part of the surplus should be allocated to a defined contribution element of a plan. See our comment on 14(6)(e) above.

Section 15 – Rules of Application

Some clarification is needed. First, it should be clear that asset value is before wind up expenses. Secondly, how letters of credit are factored in the asset allocation should be clarified. It seems logical to include them in wind up asset value and allocate them as if there were a fund investment. We would make a similar comment as to PSFs should they become permitted.

Section 18 – Use of Assets Following Allocation

18(1): For assets allocated to a jurisdiction that does not allow letters of credit, or a PSF, the same rules should apply to the amount secured by a letter of credit or the PSF as the case may be as if there were a transfer to new major authority, with the appropriate transition.
(See **Preliminary Comments** above)

18(2): It should be clear that an excess PSF must not be treated as surplus assets upon partial or full wind up in any minor authority. We appreciate that PSFs are not currently permitted under the legislation of any jurisdiction, but believe it would be prudent to address them, perhaps in general terms, in the MJA, to preclude future misunderstandings.

PART VI - EXECUTION AND COMING INTO FORCE OF AGREEMENT

Generally, we are concerned with there being adequate time to transition from current to a new funding regime, as set out in our **Preliminary Comments** above.

SCHEDULE B - MATTERS COVERED BY INCORPORATED LEGISLATIVE PROVISIONS

1. We suggest that the following matters be added to Schedule B, or if they are intended to be included, that it be clarified:

- Restrictions on plan amendments based on a plan's solvency position. Add restrictions on plan amendments based on equitable use of surplus.

- Provisions respecting payment of expenses by a pension fund, adding explicitly provisions respecting restrictions on payment of benefits based on plan's solvency position (including transfer deficiency payment rules).

- Termination/retirement/death benefit statements.

- Provisions respecting plan wind up process (except provisions dealing with plan members' entitlements, surplus sharing, priorities if deficit).

2. We would also like to see the treatment of multi-jurisdictional plan mergers and other asset transfers more clearly addressed in the MJA. These are two areas as to which certainty would be of considerable assistance to employers and administrators.

In this respect we understand that the intention of the MJA is that the merger or asset transfer requirements of the major authority of the sending plan govern the merger or other asset transfer, and that the effect of the merger or asset transfer upon the receiving plan be addressed by the major authority for that plan, and that common law relating to that plan text of that plan.

CONCLUDING COMMENTS

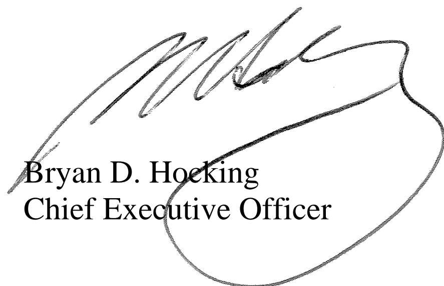
We have not herein dealt with the possible legal impediments to the implementation of the MJA as it is proposed, but we assume they will be addressed by CAPSA or other commentators. We understand that CAPSA is reviewing the existing legislation in all jurisdictions to ensure that it is adequate to give force and effect to the MJA, and note that that Alberta has already moved to amend its legislation. Further, we are not sure how a multi-jurisdictional agreement could either impose or remove the fiduciary or trust obligations that are in the legislation of the various jurisdiction.

We trust that efforts towards greater uniformity of pension legislation will not stop with the MJA. We observe the reports of the Expert Commissions in Ontario, Alberta/British Columbia and the preliminary report of the Expert Commission in Nova Scotia. If their respective recommendations are adopted in the jurisdictions to which they relate, there will be further departures from uniform pension legislation across Canada. We recognize the efforts of CAPSA to address the existing variances in pension legislation and hope that these efforts will not be derailed by those reports. We remain of the view that many of the minor uniformity irritants could be removed if the legislatures conferred rule-making power upon the various regulatory authorities and CAPSA worked together with the industry as it did so effectively with the CAP Guidelines.

We hope that the foregoing comments will be of assistance. If the suggestions we have made were considered and objected to, we would ask that they be reconsidered.

We would be pleased to discuss any of the foregoing comments with CAPSA representatives. It is very much our desire that the MJA be instituted as soon as possible for the improved efficiency and better health of the pension industry.

Yours very truly,



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