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The Association of Canadian Pension Management

L'Association canadienne des administrateurs de régimes de retraite



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ACPM Response to the Draft Capital Markets Stability Act (CMSA) Consultation

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FOREWORD

THE ASSOCIATION OF CANADIAN PENSION MANAGEMENT (ACPM)

ACPM is a national non-profit volunteer-based organization acting as the informed voice of plan sponsors, administrators and their service providers, advocating for improvement to the Canadian retirement income system. Our membership represents over 400 retirement income plans consisting of more than 3 million plan members, with assets under management in excess of \$330 billion.

ACPM believes in the following principles as the basis for its policy development in support of an effective and sustainable Canadian retirement income system:

Diversification through Voluntary / Mandatory and Public / Private Options

Canada's retirement income system should be comprised of an appropriate mix of voluntary Third Pillar and mandatory First and Second Pillar components.

Third Pillar Coverage

Third Pillar retirement income plan coverage should be encouraged and play a meaningful ongoing role in Canada's retirement income system.

Adequacy and Security

The components of Canada's retirement income system should collectively enable Canadians to receive adequate and secure retirement incomes.

Affordability

The components of Canada's retirement income system should be affordable for both employers and employees.

Innovation in Plan Design

Canada's retirement income system should encourage and permit innovation in Third Pillar plan design.

Adaptability

Canada's retirement income system should be able to adapt to changing circumstances without the need for comprehensive legislative change.

Harmonization

Canada's pension legislation should be harmonized.

Thank you for the opportunity to provide comment on the draft CMSA (the Consultation Draft), released on September 8, 2014.

General Comments:

ACPM concurs that the principal objective of the CMSA – stability of Canada’s capital markets – is a reasonable and worthy goal. However, for the reasons outlined below, we are of the view that the application of the CMSA to pension funds may produce unintended consequences at odds with pension regulation and pension plan administrators’ duties to plan members.

Principal Submission:

ACPM is of the view that the reference to pension funds should be removed from the definition of “capital markets intermediary” (see paragraph (c) of that definition in Section 2 of the Consultation Draft).

Concerns:

Parts 1 to 3 of the Consultation Draft, among other things:

- provide that regulations enacted under the CMSA for the purpose of addressing systemic risk related to capital markets may prescribe requirements, prohibitions and restrictions for systemically important capital markets intermediaries, including in relation to policies and procedures for risk management and internal controls, disclosure to the public of information of which disclosure is not otherwise required, aspects of governance and organizational and ownership structure related to risk management, liquidity, and plans for business continuity, recovery and winding-up (s. 28);
- give the Authority the power to make an order imposing on a systemically important capital markets intermediary one or more of a number of obligations, including to dispose of a security, derivative or other asset, to increase its capital or financial resources, to terminate or restrict its activities, and to implement its plans for business continuity, recovery or winding-up (s. 29(1)); and
- give the Tribunal the power, if it considers it necessary to do so to protect the stability or integrity of Canada’s capital markets or financial system, to order that a systemically important capital markets intermediary make changes to its practices and procedures (s. 49(1)).

ACPM submits that the application of Parts 1 to 3 of the CMSA to pension funds is unnecessary to achieve the policy objectives of the CMSA and will create unnecessary compliance costs and potentially interfere with the legitimate investment strategies of pension funds.

Rationale for Submission:

ACPM contends that the application of Parts 1 to 3 of the CMSA to pension funds is unnecessary because:

- pension funds do not pose a systemic risk to Canada’s financial system because they do not invest for short-term profit. Rather, pension funds focus predominantly on long-term investments;
- similarly, since the liabilities of a pension plan are long-term in nature, pension funds are unlikely to increase stress on the financial system during a financial crisis since they will not need to sell assets (unlike other financial institutions and capital markets dealers);
- we are not aware of any evidence that suggests that pension funds pose a systemic risk to Canada’s financial system or to the integrity of its capital markets;
- pension funds are (based on their jurisdiction of registration) subject to direct regulation by the Office of the Superintendent of Financial Institutions Canada (OSFI), the Financial Services Commission of Ontario (FSCO) or other provincial pension fund regulators and must provide detailed financial and other reports in compliance with applicable laws;
- small to medium-sized pension funds are unlikely to have any material impact on capital markets due to their size and manner and type of investment;
- all pension plans are required to take certain steps to manage risks relating to plan investments - for example, every pension plan is required to establish and adhere to a statement of investment policies and procedures (SIPP) which must contain policies for managing risk, diversification, the use of derivatives, asset mix and liquidity. Further, larger pension plans frequently have more comprehensive systems to manage risk, including having an investment committee and chief risk officer that monitor compliance with the SIPP. However, these risk management practices, driven by pension standards legislation, are intended to address plan-specific risks, rather than broader market risks addressed by the CMSA. At a minimum, clarity is necessary with respect to which legislative regime would govern in any particular circumstance. It may be more appropriate for the participants in the Cooperative Capital Markets Regulatory System to further consult with OSFI, FSCO and the other provincial pension regulators of the participating jurisdictions to ensure consistency and compatibility between the CMSA and pension standards legislation in those jurisdictions; and
- requirements imposed under the CMSA in response to short term impacts in the capital markets relating to, for example, governance, risk management, leverage or liquidity, could quite conceivably be at odds with the purposes of a pension plan (delivering stable, long-term incomes for plan members) and be inconsistent with the duties of plans’ governing fiduciaries to plan members under pension legislation and the common law.

Additional Jurisdictional Concerns for Pensions Administration and Regulation

The Consultation Draft also raises several jurisdictional issues which have the potential to impact pension plans operating both within and outside the jurisdictions participating in the Cooperative Capital Markets System, including:

- the CMSA will, due to the Supreme Court of Canada’s ruling, presumably only apply to those jurisdictions that are participating in the Cooperative Capital Markets System; however, the wording of the Consultation Draft is unclear on this point;
- for pension plans that operate in multiple jurisdictions, there are currently inter-jurisdictional agreements in place respecting how regulation of those plans will be conducted. For purposes of plan investments, it is typically the laws of the jurisdiction where the plan is registered which will apply. For plans which are registered in a province not participating in the Cooperative Capital Markets System but which have members located in a participating jurisdiction, the intent of the Consultation Draft is unclear regarding its potential application to such plans. Further, there are potential impacts from operation of the CMSA on the continued application of the well-established inter-jurisdictional agreements for pension regulation;
- assuming that the CMSA will only apply to plans registered in participating jurisdictions, the proposed legislation also has the potential to lead to an “uneven playing field” for plans in different provinces (for example, large plans in Ontario designated as systemically important capital markets intermediaries would be subject to the portions of the CMSA referenced above, while similar plans in other non-participating jurisdictions would not be); and
- finally, clarification is needed that Ontario would not take the position that plans in non-participating jurisdictions would be required to comply with CMSA in order to trade on the TSX or other public markets located in Ontario.

Conclusion

Pension plans in Canada are currently subject to a comprehensive regulatory framework set out in both pensions and tax legislation, including oversight by both pensions and taxation regulatory authorities, as well as being subject to the existing requirements of securities legislation across the country where the plans invest.

Given this regulatory framework and the unique nature of pension plans which differentiates them from other capital markets intermediaries (discussed above), ACPM believes that pension funds should be excluded from potential categorization under the CMSA as systemically important capital markets intermediaries. If, however, pension funds are to be included, certain matters should be clarified in the legislation, including:

- given that only pension funds above a certain size threshold could conceivably impact financial markets, clarity is needed regarding the size of plans which would be subject to potential application of the legislation;

- application of the CMSA requirements should be limited so as to cause no significant increase in compliance costs to pension plans, given the direct impact on funds available to pay benefits to plan members;
- steps should be taken to ensure that the requirements of the CMSA and its regulations will not be in conflict with pension plan administrators' duties under pension legislation or under common law; and
- the scope of the regulator's powers under the CMSA, and the conditions under which those powers would be exercised, should be clarified so that pension plan administrators may properly understand the potential impact on the plans and their members.

ACPM would be pleased to provide further information in support of this submission or to discuss the concerns set out herein at your request.