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*A Branch of the CANADIAN BAR ASSOCIATION*

# **Feedback on the Report of the Ontario Expert Commission on Pensions**

Submitted on *February 27, 2009*

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Submitted to:  
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## Feedback on the Report of the Ontario Expert Commission on Pensions

### **Introduction**

We are pleased to provide our submission on behalf of the Ontario Bar Association (the “OBA”). Established in 1907, the OBA is a branch of the Canadian Bar Association. It is the largest voluntary legal association in Ontario and represents more than 17,000 lawyers, justices, law professors, and law students. The OBA Pensions and Benefits Section has more than 280 members (“Members”) who serve as legal counsel to various stakeholders within the pension and benefits community. These stakeholders include pension and benefit plan administrators, employers, pension and benefit consultants, investment managers, actuarial firms and other advisors.

On November 20, 2008, the Ontario government released the Report of the Ontario Expert Commission on Pensions (the “OECRP”): “A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules” (the “OECRP Report”). At that time the province asked for feedback on the OECRP Report from Ontarians. The OBA’s submission is in response to this request.

The OBA is very pleased that this initiative is underway. As you will see from the comments below, the OBA is of the view that legislative change is imperative in this area of the law. Several recent court decisions illustrate some of the inadequacies in the current pension legislation and the need for better rules in this critical area of public policy. All Members are concerned about the future of defined benefit (“DB”) pension plans and wish to see such plans continue as a key source of retirement income for Ontarians.

The Members represent a diverse spectrum of organizations and employee groups plus those employed by the government, the broader public service and consulting firms. The submission attempts to present a consensus position where possible. However, given that the OBA represents members with differing interests, certain of our responses present differing views (we have noted this where applicable). Where there is more than one position stated, the OBA should not be viewed as specifically supporting any particular position.

We have structured this submission as follows. First, we identify certain key areas of potential change as priorities for the government to consider. Second, we respond to each of the recommendations set out in the OECRP Report.

### **Key Areas and Priorities for Change**

The OBA recognizes that it may not be feasible for the government to implement all recommendations contained in the OECRP Report. Accordingly, this section highlights certain recommendations the OBA believes could be implemented on a priority basis.

As a general comment, the OBA supports harmonization of pension rules. It is currently extremely difficult for plan administrators with members across the country to administer plans. It also makes pension law more difficult for members to understand. The OBA believes that any changes to the Ontario rules should be evaluated and assessed in light of the recommendations of the Report of the Alberta/British Columbia Joint Expert Panel on Pension Standards “Getting our Acts Together” (the “JEPP Report”) and the Report of the Nova Scotia Pension Review Panel “Promises to Keep” (the “NS Report”). The goal should be to reach common solutions where possible and in particular where the recommendations made in the JEPP Report and the NS Reports are consistent with the recommendations made in the OECRP Report. This being said, the OBA recognizes that complete harmonization of pension legislation may not be practical in the short term. Because Ontario has more pension plan members than

any other jurisdiction, it is particularly important to ensure that Ontario gets pension regulation right, even if other jurisdictions may not.

Also as a general comment, we support the Government's consultative approach, which has prioritized balanced groups or packages of reforms along a critical path. We believe that the implementation of recommendations made in the OECP Report and by stakeholders should reflect this consultative and balanced approach, to the extent possible.

1. **Solvency Relief:** For many plan sponsors, the most immediate concern is pension funding relief. We would refer you to our letter dated February 6, 2009 in which the OBA provides comments to the government on the recent solvency funding relief proposals. We would urge the government to act quickly to implement a balanced package of solvency funding measures that offers relief measures for plan sponsors that will not prejudice plan member benefits. We note that alternative solvency funding measures (not contained in the December 16, 2008 proposal) are discussed in this submission that some Members would urge the government to consider. Other Members believe that the measures proposed by the government in December are balanced and appropriate.

2. **Changes to the Pension Investment Rules:** As set out in our letter dated February 6, 2009, the OBA recognizes a need for reform of the investment rules and supports elimination of the quantitative investment restrictions, with appropriate checks and balances. As set out in the OBA's submission to the OECP dated October 12, 2007 (the "OBA Submission"), the OBA supports a model for pension plan investing similar to the one recently implemented in the *Trustee Act*, R.S.O. 1990, c.T.23. The *Trustee Act* imposes a "prudent investor" test on trustees, outlines the criteria that trustees must consider in investing the trust assets, but does not impose quantitative limits. The *Trustee Act* also requires the trustees to implement a written investment strategy. The focus is on ensuring there is a strong governance process rather than on imposing detailed rules for investing trust assets.

Some OBA Members are of the view that Ontario should not wait for the federal government to update the investment rules contained in the Pension Benefit Standards Regulations, 1985<sup>1</sup> that many pension jurisdictions have adopted. These Members believe that Ontario should adopt its own pension investment rules.

Other OBA Members are of the view that, given the desirability of uniformity, at least some effort should be made to persuade the federal government to reform the Federal Investment Rules before Ontario acts alone. These Members are of the view that now that the federal government has released its consultation paper, Ontario should wait to see what the federal government proposes based on its consultation before making changes to investment rules.

Regardless of the approach taken, the OBA believes the following principles should underlie pension investment regulation:

- Reference to a "prudent person" standard should replace "one size fits all" quantitative investment restrictions. The standard should include criteria pension plan administrators must consider in making investment decisions (please refer to our correspondence of February 6, 2009 for further details).
- There should be appropriate prohibitions on related-party transactions, conflicts of interest and limits on borrowing.

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<sup>1</sup> Hereinafter, the "Federal Investment Rules".

**3. Specialized Pension Regulator:** The OBA strongly supports the creation of an independent, specialized pension regulator as set out in recommendation 7-18. The OBA believes that a strong pension regulator is critical to the success of the Ontario pension system. It is particularly important that the new, independent regulator be provided resources and staffing with expertise in pensions drawn from both the private and public sectors sufficient to ensure leadership in the field of pension regulation as well as appropriate service levels. The OBA agrees that the new regulator should be empowered to issue binding advance rulings. While this is a significant undertaking, the OBA believes that structural change in pension regulation is vitally important. The new regulator, again, if staffed appropriately, should have some discretionary authority to respond to specific stakeholders' needs. For example, in the area of solvency funding, the new regulator could be given some discretionary authority to allow for longer funding periods provided the regulator is satisfied that pensions would be protected (this could involve letters of credit or employee/union consent in some form). In the short-term, the government could identify key roles for the new pension regulator and start to establish the structure of the new regulator. Some OBA Members support the provision of a policy-making function to the new regulator.

The OECP Report recommends creation of several new entities: a Pension Champion, a Pension Tribunal of Ontario, an Ontario Pension Agency and a Pension Community Advisory Council. The OBA believes that certain of these are longer term goals and represent the ideal structure. However, given the enormity of the task of implementing each of these changes, the OBA supports prioritizing them. The OBA believes that the priorities should be as follows:

- A new, independent pension regulator (recommendation 7-18).
- A new Ontario Pension Agency (recommendation 5-2) to receive stranded pension-assets (or another mechanism to deal with stranded pensions, such as the use of an existing agency ).
- A new, independent Pension Tribunal of Ontario, that does not include part time adjudicators who are actively working the pension industry, with decisions protected from appeal by a strong privative clause (recommendation 7-26).

The government should also consider establishing a Pension Community Advisory Council to assist with implementation of the OECP Report's recommendations.

These new entities offer significant potential to protect member pension benefits, streamline pension administration, improve certainty and timeliness in the settlement of disputes and reduce costs for pension plan sponsors who cannot locate missing members while providing greater assurance that stranded pensions will be made available to missing members.

**4. Establishment of the Ontario Pension Agency:** The OBA supports the establishment of the Ontario Pension Agency (or some mechanism for dealing with the benefits of un-located members, whether a full-fledged "agency" or not) as set out in recommendation 5-2. Although plan administrators employ best efforts to locate missing members, they often cannot be found. The ability to deposit funds with this new agency would save plan sponsors the time and resources needed to locate missing members. In the case of a full wind up, administrators and sponsors would not be obligated to keep the pension fund open for a prolonged period of time. By maintaining a centralized list, the Agency could consolidate funds for missing members and improve the odds that they would eventually receive their entitlements by carrying out continuing searches.

**5. Target Benefit Plans:** It is widely recognized that insufficient pension coverage is a serious concern for Ontario workers. The OBA supports legislative change to facilitate new pension plan designs that could enhance pension coverage, such as jointly-governed single-employer target benefit plans (see recommendation 9-3). The OBA notes that similar vehicles have been promoted in both the JEPP Report

and the NS Report. In some situations, target benefit plans with responsibility for funding shared between employers and employees may offer the potential for more sustainable pension coverage than traditional DB plans.

The OECF Report also recommends exempting target benefit plans (as well as MEPPs and JSPPs) from solvency funding, which the OBA also supports. The OBA supports the amendment of the legislation in such a way as to be flexible for implementing other types of plan designs in the future.

## **OBA Response to the Individual Recommendations**

### **Chapter 4 – Funding**

#### *4.4 Common Valuation Rules: Transparency and Timing*

##### **1. Recommendation 4-1**

**The Superintendent should work with the Canadian Institute of Actuaries to ensure that actuarial standards and practices continue to evolve in the direction of greater transparency and more structured discretion. For example, actuarial valuations should reveal the reasons behind the assumptions used in valuations to set discount rates and to select the mortality trends used to calculate plan liabilities. They should also reveal whether the sponsor intends to take a contribution holiday.**

The OBA does not take a position on this recommendation other than to comment that the OBA supports greater transparency.

##### **2. Recommendation 4-2**

**The Superintendent should have the power to require that plans cease using assumptions that are unreasonable or that depart materially from accepted actuarial practice, and to order an independent valuation or peer review of a report, at the expense of the plan, if there are grounds to believe that the actuarial valuation misrepresents a material factor in its funding.**

The OBA supports this recommendation provided that there is some guidance regarding what is reasonable recognizing that “one size does not fit all”. The Superintendent of Financial Services (the “Superintendent”) should undertake to publish and update annually the range of what would be considered reasonable assumptions for typical plans. The Superintendent should also provide reasons for challenging the plan’s assumptions. The Superintendent should publish and update annually a guide of assumptions for “typical” plan types it considers reasonable for interest rate, salary scales and mortality tables, and variance that would be acceptable if they could be supported by the plan's actual experience.

##### **3. Recommendation 4-3**

**Going concern valuations should no longer permit the exclusion of promised indexation benefits. Solvency valuations should no longer permit the use of the smoothing practices or the exclusion of benefits. A special exception should be made for those plans that continue to provide plant closure benefits pursuant to a specific, long-standing commitment to continue their non-funded status.**

**Potential increases in sponsor contributions attributable to these enhanced transparency measures should be offset so far as possible by the extension of amortization periods, by selective relief from contribution increases for well-funded plans or by other means.**

The legislation is silent on whether going concern valuations must include promised indexation benefits and therefore leaves room for argument on this point. Some OBA Members are of the view that as the legislation does not expressly permit the exclusion of benefits, that the exclusion of benefits is not permitted. All OBA Members are of the view that the legislation should be clarified in this regard. The OBA does not take a position on this recommendation other than to say that to the extent that this recommendation is adopted, given today's market conditions, it is appropriate to "phase in" the changes.

The OBA agrees that any potential increases in sponsor contributions attributable to these enhanced transparency measures should be offset so far as possible by the extension of amortization periods, by selective relief from contribution increases for well-funded plans or by other reasonable means.

#### 4. **Recommendation 4-4**

**The current requirement for an actuarial valuation every three years should be maintained. The time for filing the valuation after it is due should be reduced from nine to six months. Extensions should be given only in exceptional circumstances.**

The OBA agrees that the current requirement for an actuarial valuation every three years should be maintained.

There is no consensus among OBA Members regarding whether the time for filing should be reduced from nine to six months.

Some OBA Members are of the opinion that it is not practical that the time for filing the valuation after it is due be reduced from nine to six months. Some Members are of the opinion that it is too onerous a requirement for plan sponsors that the filing deadline for a valuation after it is due be reduced from nine to six months. Statements may be produced in the first six months and the subsequent three months may be necessary to finalize the valuation report. The OBA also notes that nine months from the due date of the valuation is currently the standard in the majority of the provinces and therefore, in the interest of promoting harmonization, should not be changed in Ontario.

Other OBA Members are of the opinion that this is an appropriate control during a 3-year funding cycle, and that the 6-month deadline is important to obtain more timely information.

There is also no consensus among OBA Members regarding the circumstances under which extensions should be granted.

Some OBA Members are of the view that extensions should be given only in exceptional circumstances. Other OBA Members suggest that limiting extensions to being given only in exceptional circumstances is an unrealistic change for plan sponsors. As long as the Superintendent continues to enforce that interest be paid on catch up contributions that were late as a result of the timing of the valuation report, these Members submit that there is no adverse impact to the benefit security of the members.

#### 5. **Recommendation 4-5**

**Plans whose triennial valuation shows that their funding has fallen below a threshold to be specified by regulation should continue to be required to perform and file an annual valuation.**

The OBA supports this recommendation.

6. **Recommendation 4-6**

**The Superintendent should develop the capacity to monitor the pension system, and individual plans, more closely, and should have the power to order an interim valuation at any time if there are reasonable grounds to believe that a particular plan is at risk of failure.**

The OBA agrees that the Superintendent should develop the capacity to monitor the pension system, and individual plans, more closely. We also agree that the Superintendent should have the power to order an interim valuation at any time if there are reasonable grounds to believe that a particular plan is at risk of failure.

The OBA notes that under the *Pension Benefits Standards Act, 1985* the Superintendent of Financial Institutions has broad powers to direct filing of actuarial reports, financial statements or certain other information at such intervals and times as the Superintendent of Financial Institutions may determine.

The OBA observes however that at the present time the regulator does not have the expertise and staff to undertake such monitoring and does not support giving the Superintendent any further powers under the present structure.

7. **Recommendation 4-7**

**The Superintendent should more aggressively discourage and more predictably sanction late filings, and develop a capacity to scrutinize filings to the extent necessary to improve the likelihood that inaccuracies will be detected.**

There is no consensus among OBA Members on this recommendation. The OBA is very supportive of the Superintendent developing a capacity to scrutinize filings to the extent necessary to improve the likelihood that inaccuracies will be detected.

Some OBA Members agree that the Superintendent should more aggressively discourage late filings.

Other OBA Members are of the view that in many instances late filings occur as a result of legitimate delays typically in obtaining data that is necessary for the completion of the report. If there is a valid reason why the filing is late and the employer is keeping the Financial Services Commission of Ontario (“FSCO”) in the loop as to its progress, sanctions should not be imposed.

*4.5 One Size Does not Fit All: Ensuring That Funding Rules are Appropriate to Each Plan Design*

8. **Recommendation 4-8**

**MEPPs, JSPPs and SEPPs should have separate funding rules related to their distinctive characteristics. In general, MEPPs and JSPPs should be allowed more flexibility in funding, while SEPPs should be subject to stricter rules than other plans.**

The OBA supports this recommendation.

This is in keeping with recommendations set out in the OBA Submission regarding these issues. In particular, the OBA Submission points out that there are significant differences between single employer pension plans (“SEPPs”) and the other types of plans, that at a minimum, there should be different funding rules for multi-employer pension plans (“MEPPs”), and that solvency funding should be eliminated for MEPPs and public sector plans.

#### 4.6 *Multi-employer Pension Plans*

##### 9. **Recommendation 4-9 and 4-10**

**4-9 Following consultation with Ontario’s multi-employer pension plans, special legislation and regulations should be developed relating to all aspects of their funding, regulation and governance. The basis for such legislation and regulations should be the Specified Ontario Multi-Employer Pension Plan regulation of 2007. After five years, the practical effects of these arrangements should be assessed.**

**4-10 Multi-employer pension plans should be required to fund only according to going concern valuations, but should continue to provide solvency valuations for the information of the regulator as well as their active and retired members.**

The OBA supports these recommendations.

This is consistent with the recommendation in the OBA Submission that there should be more regulation for MEPPs under the *Pension Benefits Act* (Ontario) (the “PBA”), preferably in a separate division of the PBA. The OBA has also recommended that MEPPs be exempted from solvency funding rules and that “the moratorium on solvency funding for MEPPs that elect to be designated as Specified Ontario Multi-Employer Pension Plans should be made permanent”. However, the OBA does not object to assessing the practical effects of these arrangements after five years or to requiring MEPPs to continue to provide solvency valuations for informational purposes.

#### 4.7 *Jointly Sponsored Pension Plans*

##### 10. **Recommendations 4-11 and 4-12**

**4-11 Jointly sponsored pension plans should be required to fund only according to going concern valuations on the same basis as Specified Ontario Multi-Employer Pension Plans, but should continue to provide solvency valuations for the information of the regulator as well as their active and retired members. The comprehensive legislation and regulations governing the funding of multi-employer pension plans, to be developed pursuant to Recommendation 4-9, should apply, perhaps with appropriate modifications, to jointly sponsored pension plans.**

**4-12 Jointly governed target benefit pension plans that are based on an agreement between one or more sponsors and one or more unions, that have established explicit arrangements for joint governance, and that permit accrued benefit reduction in an ongoing plan in order to deal with funding deficiencies, should be funded in a manner similar to jointly sponsored pension plans, as provided in Recommendation 4-11.**

The OBA supports these recommendations.

This approach is in keeping with the OBA’s position that MEPPs, negotiated cost defined benefit plans and public sector plans be exempted from solvency funding and that it is appropriate to have different rules for these types of plans, which correspond to and address the unique features of these plans.

#### 4.10 Single Employer Pension Plans

##### 11. Recommendation 4-13

**Single employer pension plans should continue to fund according to both going concern and solvency valuations.**

The OBA is supportive of maintaining the legal requirement to value a SEPP's liabilities using methods and assumptions that estimate the SEPP's liabilities on a going concern basis and on a termination or solvency basis. There is some disagreement among OBA Members about the precise methodology and assumptions that should be utilized in determining a SEPP's liabilities on the going concern and solvency bases; however, the OBA is generally agreed that both such measures of a SEPP's liabilities provide valuable information about a SEPP's financial position and thus the benefit security of its members.

##### 12. Recommendation 4-14

**Single employer pension plan should be required to maintain a security margin (or provision for adverse deviation) of 5% of solvency liabilities. This margin should be amortized over an eight-year period. The security should be deemed to be part of the plan surplus on wind-up, but not for other purposes.**

The OBA could not reach a consensus on this issue.

The requirement for SEPP sponsors to maintain a security margin, given the current economic conditions, is a controversial recommendation among OBA Members for two reasons: it imposes a new cost on sponsors and it is deemed to be part of plan assets upon wind-up. On the other hand, some OBA Members view the security margin as an appropriate protection.

#### *The Security Margin*

Some OBA Members view the establishment of a 5% security margin as a positive step towards enhanced benefit security. Other Members view the requirement for sponsors to fund towards 105% of liabilities as too costly and burdensome, especially in an environment where some sponsors are finding it extremely difficult to reach even the current required 100% funding.

The OBA notes that Quebec is the only Canadian jurisdiction with a requirement for SEPP sponsors to maintain a provision for adverse deviations, or PfAD. We also note that, unlike the recommended security margin, the Quebec PfAD is funded mainly through experience gains, and does not create new deficits requiring amortization payments. In substance, the PfAD is more akin to the "buffer" proposed by the JEPP Report. Some Members suggest that this is a more appropriate method to initially fund the new funding target.

Some OBA Members note that the JEPP Report explicitly rejected the notion of requiring sponsors to maintain a security margin in favour of, *inter alia*, requiring 100% funding of liabilities measured on a "pure wind-up basis" coupled with more frequent valuations where a plan's funded status on such basis falls below 110% of liabilities. These Members are supportive of a proposal consistent with the approach put forward in the JEPP Report.

In recognition of the OECF's finding that a proportion of SEPPs operate in a unionized context, the OBA would be supportive of a framework that supports the establishment of a security margin where the plan sponsor and representative of the members negotiate and agree to such security margin.

### *Security Margin on SEPP Wind-Up*

Some OBA Members who are supportive of the establishment of a security margin in principle, do not support deeming the security margin to be part of a SEPP's surplus on the wind-up of the SEPP. These Members view this aspect of recommendation 4-14, coupled with recommendation 4-16, as adding to the existing problem of "asymmetry" which is discussed in the OECR Report. These Members would support a security margin if, as a trade-off for the enhanced benefit security provided by a security margin, it could be held in a separate fund and refunded to the employer on the wind-up of the SEPP, or where the SEPP is funded through both employer and member contributions, it could be refunded in proportion to the employer's and members' contributions.

Some OBA Members note that the JEPP Report went so far as to not only reject the establishment of a security margin, but to recommend that contributions required to meet solvency funding requirements that are over and above the going concern funding requirements be diverted to a fund over which the employer has clear reversionary entitlement. The apparent intent of this recommendation is to limit the instances where a plan is terminated in a surplus position and thus limit the number of surplus entitlement disputes.

### 13. Recommendation – 4-15

**For plans that have achieved 95% of solvency funding, the normal amortization period for achieving the new required funding level, inclusive of the security margin, should be extended from five to eight years. For plans funded below 95%, the current amortization period of five years should continue to apply until such time as they become eligible for the extended amortization period.**

For the time being and to a limited extent, recommendation 4-15 has been pre-empted by the Ontario government's recent announcement that it will implement certain *temporary* funding relief measures; however, as part of a *permanent* reform, the OBA is generally supportive of recommendation 4-15 which would see SEPPs with larger deficits funded more aggressively than SEPPs with smaller ones. Please note that some OBA Members support recommendation 4-15 in the context of a 100% funding target and where the solvency valuation is a measure of "pure wind-up liabilities".

### 14. Recommendation 4-16

**If a single employer pension plan is in surplus on being wound up, the surplus should be distributed in accordance with the plan documents unless the parties agree, or the proposed Pension Tribunal of Ontario rules, that the documents are not clear. In the event of such an acknowledgement or ruling, the sponsor may propose a scheme for the distribution of surplus, which would take effect if approved in one of two ways:**

- (a) **if plan members are not represented by a union, the proposal should be submitted to a vote by secret ballot of the plan members and retirees, and would take effect if approved by two-thirds of those voting; or**
- (b) **if plan members are represented by a union or other organization, the sponsor should submit its proposal to representatives of the active members and retirees with a view to concluding a surplus distribution agreement.**

**If the sponsor and the representative negotiators cannot reach agreement, they should submit the matter for determination to a dispute resolution procedure of their own choosing. If they cannot agree on such a procedure, or if it does not resolve the matter within a reasonable time, any party**

**may apply to the Superintendent to refer the matter to the Pension Tribunal of Ontario, which would then establish the terms of the surplus distribution agreement.**

**Any scheme approved by secret ballot, any surplus distribution agreement reached by representative negotiators, and any determination by the Tribunal or an agreed dispute resolution procedure would be final and binding on the Superintendent and on all persons claiming to be entitled.**

Surplus entitlement is a contentious issue among OBA Members, over which we were unable to reach consensus in the OBA Submission in 2007. The OBA generally supports the OECP's attempt to establish a clear and certain process whereby sponsors and members will be able to determine entitlement to and negotiate a surplus sharing agreement in respect of any surplus remaining in a SEPP on wind-up. Some OBA Members are of the view that if surplus ownership continues to be decided based on trust principles, the current surplus disputes will continue in a different format. These OBA Members believe that the legislation must clarify whether or not trust principles will continue to apply in the context of surplus withdrawals. Some OBA Members recommend that the government enact legislation which enables plans to limit their exposure to surplus disputes, similar to the "ring fencing" proposal in the JEPP Report.

Other OBA Members support the principle in recommendation 4-14 that facilitates the sharing of pension surpluses and believe that such a recommendation reduces the potential for protracted surplus disputes. These OBA Members also believe that the definition of "clear" for the purpose of determining surplus ownership under the plan documents should therefore refer only to new plans established after the PBA was amended in 1987 to require plan documents to clearly denote surplus ownership. For all other plans, including historical and predecessor plans, these Members are of the view that surplus withdrawal should be based on the negotiated solution as set out in the recommendation.

The OBA notes that if the Ontario government implements recommendation 4-14 (establishment of a security margin) without establishing clear and fair rules of entitlement over such security margin, it is possible that it will more often be the case that SEPPs will terminate in a surplus position and that sponsors and members will then be faced with the prospect of determining entitlement. As such, if recommendation 4-14 is implemented, the OBA submits that a simplified surplus sharing regime similar to that proposed under recommendation 4-16 be implemented in connection therewith.

Some OBA Members support that aspect of recommendation 4-16 that would render any surplus distribution agreement approved by secret ballot or entered into between representative negotiators final and binding on the Superintendent. Other OBA Members raise a concern about the practicalities of administering such a ballot vote.

#### **15. Recommendation 4-17**

**Plan sponsors should be entitled to reduce or omit their contributions to a plan in any year in which it is funded at 105% or more of its solvency liabilities. However if – based on benchmarks to be developed by the regulator – a plan administrator knows, or ought reasonably to know, that funding has fallen below 95%, the administrator should immediately notify the sponsor to resume contributions until the plan is again funded at 105% of solvency liabilities. The pension regulator should develop benchmarks based on the plan's annual financial statements that will enable plan administrators to determine when contributions should be resumed.**

**If the regulator finds that a contribution holiday was improperly taken or continued, any contributions withheld from the plan should become immediately due and payable, together with interest, regardless of the plan's present funded status, and the sponsor should be subject to an**

**administrative fine of up to \$1 million, or double the amount withheld during the improper contribution holiday, whichever is less. The improper use of plan surplus to pay the expenses of the plan, including PBGF premiums, should be treated in similar fashion.**

**The parties to a collective agreement should be free to negotiate other arrangements for the use of surplus in an ongoing plan. These arrangements should prevail notwithstanding those proposed in this recommendation or established in the plan documents.**

The OBA is generally supportive of the recommendation that contribution holidays be taken only when a SEPP has sufficient assets to support such contribution holiday. While some Members do not support the requirement to maintain a 5% “buffer”, the OBA notes that the JEPP Report also recommended that contribution holidays be permitted only to the extent that a 5% buffer is maintained.

Some OBA Members are concerned that recommendation 4-17 places too heavy a burden on administrators and sponsors (who are often one and the same in SEPPs) and on the regulator. These Members are concerned that SEPP sponsors and administrators may not have all the information they require on a monthly basis to determine if a contribution holiday has been or will be properly taken. Some Members suggest that the regulator provide guidance or “reasonable” parameters such as those established by OSFI for OSFI-regulated plans. Some Members are concerned about assigning to the regulator the task of establishing benchmarks which may not be appropriate for some SEPPs given their asset mix and demographic profile.

Some OBA Members would rather see either a requirement that sponsors taking a contribution holiday be required to procure and/or file updated actuarial estimates on an annual basis which confirm the sponsor’s ability to take a contribution holiday for a specified period, or the implementation of restrictions on the use of surplus, such as a five-year amortization period for contribution holidays.

Some OBA Members are of the view that implementing restrictions on a sponsor’s ability to take, or enhancing the filing requirements where a sponsor takes, contribution holidays is preferable to the penalty system proposed in Recommendation 4-17.

#### **16. Recommendation 4-18**

**Sponsors may apply to withdraw surplus from an ongoing plan pursuant to the procedures set out in Recommendation 4-16, provided that the plan remains funded subsequent to withdrawal at 125% of full solvency funding, or 105% of full solvency funding plus two years of current service costs, whichever is greater.**

The OBA supports recommendation 4-18 as it attempts to strike a fair balance between access to surplus and benefit security in an ongoing plan. However, this recommendation does not address the basis upon which the surplus will be withdrawn. Is it to be based on legal ownership of surplus? In that case, as a practical matter, the employer will not be able to take advantage of this right because legal ownership is rarely clear. As indicated above, the OBA believes that the legislation must clarify whether or not trust principles will continue to apply in the context of surplus withdrawals. The OBA notes that this re-establishes the current 125% limit on surplus withdrawal.

#### *4.11 Annuity Rates*

#### **17. Recommendation 4-19**

**Ontario should investigate strategies for reducing the cost of annuities and the influence of the annuities market.**

The OBA supports any initiatives that may have the effect of reducing the costs of annuities. An investigation in respect of the supply side of the annuities market may require the government to consider expanding the types of entities that can sell annuities in Canada, which may have broader implications to the capital markets and therefore this may not be simply a pensions-specific issue. To reduce the demand for annuities, the OBA submits that the purchase of annuities on a partial wind up (assuming the concept of a partial wind up is not eliminated) where the remainder of the plan is ongoing should not be required, and recommends that the PBA be amended accordingly.

#### 4.12 Indexation

##### 18. Recommendation 4-20

**Every plan should contain a clause stating explicitly what provision, if any, has been made for the indexation of benefits and for the funding of indexation. Each triennial valuation and each annual statement provided to the regulator, active plan members and retirees should provide the same information.**

The OBA supports measures to improve the transparency of plan provisions to the plan members through the disclosure of whether the plan's benefits are indexed to inflation.

##### 19. Recommendation 4-21

**The government should proclaim in force the provisions of the *Pension Benefits Act* that allow it to require that pensions be inflation-adjusted in accordance with a formula to be prescribed. That formula should be restricted to “inflation emergencies”.**

Section 53 of the PBA refers to the mandatory indexation of pension benefits to provide for inflation-related increases. However, the Ontario government has not proposed any such formula and could only establish such formula by amendment to the PBA. The formula recommended by the Friedland Task Force was never implemented.

Mandatory indexation would increase the costs for sponsors and as a result, could potentially drive more sponsors away from defined benefit plans.

However, some Members acknowledge the impact of inflation on pensions, especially in “emergencies”. The most difficult time to address this impact is during emergencies. These Members suggest that any emergency measure made available to the regulator or Minister be used only in serious emergencies – however defined – and include a mechanism to offset or spread costs over time so as not to burden sponsors during difficult periods.

The Income Tax Regulations contain provisions that impose limits on benefits provided under a defined benefit provision of an registered pension plan that depend on increases in the Consumer Price Index. If a formula is imposed to provide for indexation, such measures should be consistent with the provisions under the *Income Tax Act* (Canada) (the “ITA”).

#### 4.13 Letters of Credit and Asset Pledges

##### 20. Recommendation 4-22

**Irrevocable letters of credit should be permitted as security for a fixed proportion of contributions owing to a plan, and for a maximum period of time, provided they are enforceable by the plan and**

**immune from inclusion in the sponsor's estate in the event of insolvency. The Superintendent should have no power to relieve against these requirements either before or after the fact.**

**After five years, experience with letters of credit should be reviewed by regulator. if no difficulties are found, they should be made available as permanent feature of pension funding in Ontario.**

Other jurisdictions, including the federal jurisdiction, Quebec, Alberta and British Columbia have already passed legislative or regulatory amendments to permit pension plans to be funded in part through letters of credit. The OBA submits that Ontario should adopt this mechanism as well and that plan sponsors should be permitted to use irrevocable letters of credit as a supplement to, or in place of, the requirement to make some portion of annual solvency funding payments. We submit that reliance on irrevocable letters of credit would provide flexibility to plan sponsors in directing cash flow to business needs without any significant negative impact on the security of the promised pension benefits. From a plan member's perspective, the use of letters of credit provides security in the event of the termination of the pension plan as a result of the failure of the business.

However, some OBA Members suggest that limits be applied to the use of letters of credit, up to a certain level or percentage of a solvency deficit, and for a fixed term.

The OBA submits that irrevocable letters of credit should not be linked to funding of the plan (e.g., available only where the plan is fully funded on a going concern basis), as the letter of credit itself should provide sufficient security for solvency funding purposes. The OBA notes that the use of letters of credit provides an effective mechanism to "manage" surplus to avoid accumulating surplus in a plan.

The OBA notes that in our letter dated February 6, 2009 regarding the government's proposed solvency funding measures, we noted that there are several alternatives that were not addressed in the measures, including the use of letters of credit. We stated:

There are a number of additional potential measures to address solvency funding issues that were not referenced in the December 16 press release, but which are being discussed in the industry. For example, as an alternative to obtaining some form of "consent" from plan members, consideration could be given to permitting the employer to provide a letter of credit in the amount of the difference between the amount actually paid under a 10 year amortization period and the amount that would otherwise have been paid under a 5 year amortization period. A letter of credit would obviate the need for additional protections to plan members in the context of temporary solvency funding relief because the bank issuing the letter of credit would be required to make payments to the pension plan when the relevant triggering event occurred (e.g., employer fails to make required payments to plan or insolvency of employer). As you know, there are precedents for using letters of credit in other Canadian jurisdictions. Some OBA members believe that the Ontario Government should consider other methods of addressing funding issues. These will be discussed in more detail in the OBA's response to the OECF Report.

Some OBA Members believe the government should consider other measures for solvency relief that were not identified in the December 16, 2008 press release. Such measures are (a) the possibility of extending temporary, plan specific relief on a one-off basis to employers who can establish evidence of ongoing financial strength; and (b) the temporary establishment of a target solvency ratio of less than 100% (while funding continues over a 5 year period). Both of these measures have been adopted in

jurisdictions outside of Canada (and the second measure has been adopted in Canada) and would both address the very pressing need to ensure ongoing benefit security within the context of well funded defined benefit pension plans and the unprecedented economic circumstances which have rendered the current solvency funding regime unsustainable.

Other OBA Members note that while current capital market conditions are difficult, they should not be determinative of long-term pension policy. To the extent that the temporary measures are considered, they should be balanced with protection of benefits and member interests, and should be subject to clear and well-defined limits. For example, “evidence of ongoing financial strength” should be carefully delineated, the regulator should be empowered to assess such evidence, and this information should be subject to challenge or review by members.

21. **Recommendation 4-23**

**Ontario ought to investigate the possibility of permitting the use of asset pledges to provide security for unpaid contributions to pension funds, and to define the purposes for which, and the conditions under which, such pledges might be used. If asset pledges seem useful for sponsors, safe for pension plans and capable of being overseen by the regulator, their use ought to be allowed for an initial period of five years, subject to renewal on a permanent basis if experience warrants.**

The OBA supports initiatives to enhance funding flexibility. However, the use of asset pledges to provide security for unpaid contributions to pension funds may raise a wide range of issues, including the type of assets that are permissible to be pledged, the valuation of such assets and the liquidity of such assets. In addition, one of the objectives of pre-funding pension benefits is to separate the provision of the benefits from the viability of the employer’s business. As the value of the pledged assets might themselves be subject to the health and viability of the business, they might not have the same value as that considered by the members. Furthermore, as pledged assets are encumbered and cannot be used for other business purposes, asset pledges may limit the options available to the employer to carry on its business. Accordingly, if asset pledges are permitted to provide security for unpaid contributions, the negative impact from the amount of risk introduced to the funding of the pension benefits and the business operations may exceed the benefits of the enhanced funding flexibility.

*4.14 The Influence of Federal Law on the Funding of Pensions*

22. **Recommendation 4-24**

**The Ontario government should endeavour to persuade the federal government to increase benefit and contribution levels for registered pension plans under the *Income Tax Act*, and to consider policies that encourage participation by workers and employers in DB plans or their functional equivalents.**

The OBA supports this recommendation.

23. **Recommendation 4-25**

**The Ontario government should endeavour to persuade the federal government to reform the federal investment rules and, in particular, to remove or amend particular quantitative restrictions that no longer make sense, such as those involving prohibitions on Canadian, but not foreign, investments.**

**However, if the federal government does not do so within a reasonable time frame, the Ontario government should cease to rely on the federal regulations and establish its own investment rules, tracking the federal rules only to the extent that doing so is deemed good public policy in Ontario.**

The OBA addressed this recommendation in its letter dated February 6, 2009. Our response was as follows:

After noting the inadequacies in the current pension fund investment rules (which, since 2000, have been incorporated by reference into the PBA from the rules in the federal *Pension Benefits Standards Act, 1985*), the Expert Commission recommended that the Ontario government “. . . endeavour to persuade the federal government to reform the federal investment rules”. If the federal government does not do so “within a reasonable time frame”, the Expert Commission recommended the Ontario government should establish its own investment rules.

If the Ontario government decides to effect more immediate reform, it would likely need to disregard the first part of the Expert Commission’s recommendation and proceed directly to implement changes to the Regulations under the *Pension Benefits Act* (“PBA”), which would have the effect of either modifying the federal investment rules as they apply to Ontario registered pension plans or replacing the federal investment rules with a new set of Ontario investment rules. If this course of action is followed, Ontario will have its own set of pension fund investment rules as it did between 1965 and 2000. In the year 2000 the former Ontario pension fund investment rules, which were contained in sections 67-75 of Regulation 909 to the PBA (since revoked), were replaced with the adoption of the federal investment rules in a bid by Ontario to achieve greater uniformity of pension regulation across Canadian provincial jurisdictions.

Some members of the OBA are of the view that Ontario should act unilaterally and establish its own investment rules, not delaying the reform process by consulting with and encouraging the federal government to change the federal investment rules. These members are of the view that many of the countries’ largest pension fund investors are in Ontario and are most affected by these rules. These members note that there have been high profile instances in the recent past that have highlighted the ineffectiveness of the current rules. In addition, these members believe that the existing quantitative limits are outdated and unduly restrictive and are in urgent need of reform. They also note that in the past several years, many have called for the abolition of the quantitative limits and advocated instead for sole reliance on the prudent person investment standard – see, for example, the Pension Investment Association of Canada’s submission to CAPSA in August 2001, *Recommendations for Modifications to Pension Plan Investment Rules*. In the event that the quantitative restrictions are eliminated, these members support the introduction of additional rules (or policy) regarding the expectations/process under the prudent person standard. Others are of the view that the Expert Commission’s recommendations ought to be followed: uniformity is a desirable goal, reform of the investment rules is important but less urgent and at least some effort

should be made to persuade the federal government to reform federal investment rules before Ontario acts alone. Now that the federal government has released its consultation paper, some OBA members are of the view that it makes sense to wait to see what the federal government proposes based on its consultation before making any wholesome changes to the investment rules.

The Expert Commission suggests two specific reforms to the quantitative restrictions currently contained in the federal investment rules. In the commentary preceding Recommendation 4-25, the Expert Commission suggests that those portions of the federal investment rules which favour foreign over domestic investments should be reformed. Specific mention is made of restrictions on holding more than 5% of the book value of Canadian, but not foreign real estate companies, 15% of Canadian, but not foreign real estate properties and 25% of the book value of Canadian, but not foreign resources companies. The recommendation is that these rules should be changed to level the playing field as between Canadian and foreign investments. The OBA notes that the previous rule contained in the ITA, which prohibited pension funds from investing more than 30% of their assets outside Canada, was recently repealed. In our view, if the investment rules are to continue to contain any quantitative restrictions, such restrictions ought not to distinguish between Canadian and foreign investments. However, some members of the OBA do not view this as a matter of urgency and would prefer that some effort be made by the Ontario government to persuade the federal government to change the federal investment rules before Ontario acts unilaterally.

As an additional comment, we note that if the 5/10/25% rule is retained (and we urge the government to eliminate the quantitative restrictions altogether), the elimination of the distinction between foreign and Canadian owned real property and resource property must be made in a way that imposes sensible requirements and respects the current practices of pension plans that have substantial existing real estate and resource property holdings.

## **Chapter 5 – Pension Plans in a Changing Economy**

### *5.2 Enhanced Institutional Capacity to Cope with Change*

#### **24. Recommendation 5-1**

**The pension regulator should immediately investigate the causes of extreme delays in approving transactions, including splits, mergers, asset transfers and conversions, and provide a report that can be used to facilitate the processing of such transactions in accordance with the recommendations of this Commission.**

The OBA supports this recommendation.

The median times for completion of restructuring related transactions by FSCO set out in the OECF Report are surprisingly high (231 days for wind-ups, 481 days for partial wind-ups, 928 days for mergers and 1165 days for asset transfers) and need to be addressed on a high-priority basis. The OBA notes that the pattern in the delays suggests that the hold ups are largely due to FSCO's view that it is required by sections 80 and 81 of the PBA to take into account trust law issues on mergers and asset transfers as a

result of the Transamerica case. It is the OBA's view that if there is a genuine dispute over a trust issue, there is now a sufficiently large and well-developed bar that it can be handled outside of the regulatory process and that FSCO should not be devoting such a disproportionate amount of time in an area where the courts, and not the Superintendent, have expertise. Rather, FSCO should be focussing on areas where it truly does have expertise and where the risks to basic benefits (as opposed to surplus which is not part of the specific defined benefit regardless of where ownership lies) are the greatest, e.g., financial status of pension plans.

**25. Recommendation 5-2**

**The Lieutenant Governor in Council should establish an Ontario Pension Agency to receive, pool, administer, invest and disburse stranded pensions in an efficient manner.**

The OBA supports the establishment of a mechanism (whether it is a separate agency or an existing entity) to deal with stranded pensions. This should be a medium-term objective.

*5.3 The Effect of Restructuring on Active Members and Retirees*

**26. Recommendation 5-3**

**Sponsors should be required to develop a standard policy for dealing with newly hired employees who seek pension credit for service during employment with a previous employer. The policy should state whether such credit will be given and, if so, on what terms, and should be made available to all such employees.**

The OBA could not reach a consensus on this issue.

Some OBA Members do not agree with this recommendation because they believe that the PBA already adequately addresses the portability rights of employees. Additionally, these Members suggest that, if sponsors were required to create such a broad policy, it would likely mean that sponsors would typically not allow for the transfer of assets.

Other Members suggest that this recommendation is providing a valuable option to members who are transferring between employers. They note that it improves clarity and assists employers in selecting appropriate retirement choices. There is necessarily a cost to sponsors, specifically the obligation to make clear the terms of any transfer.

**27. Recommendation 5-4**

**When individual or group transfers from one plan to another are contemplated, the importing plan should provide a detailed statement of the benefits to be provided. Each transferee should be given four options:**

- 1. as a default option, to accept the asset transfer and begin future accruals in the importing plan, provided it offers benefits of comparable aggregate value to those provided under the exporting plan;**
- 2. to remain as a deferred member of the exporting plan;**
- 3. to transfer the value of the first pension to the Ontario Pension Agency; or**
- 4. to transfer the value to a locked-in account.**

**If active plan members are represented by a union or similar organization, it may accept one option on behalf of all members, or allow each member to exercise one or more of the options provided.**

**The value of benefits provided by an “importing” plan should be deemed to be “comparable” to those provided by an “exporting” plan for purposes of the default option, if (a) approved by the Superintendent as approximating the aggregate collective value of such benefits, notwithstanding differences in the nature, value or terms of individual benefits, or (b) agreed to by a union representing active plan members affected by the transfer.**

The OBA could not reach a consensus on this recommendation.

Some Members do not agree with this recommendation for the same reasons stated above. Other Members support this recommendation as providing appropriate options and disclosure. If adopted, this recommendation should be integrated with other recommendations on group transfers. Some Members would like to comment that, to the extent that this recommendation attempts to address group asset transfers, such transfers are already subject to approval by the regulator. This approval is required primarily to ensure that the rights of the employees subject to the asset transfer are protected.

**28. Recommendation 5-5**

**The government should promptly address the pension arrangements for groups of public service employees affected by past divestments and transfers, whether by allowing these groups to use the group asset transfer process proposed in Recommendation 5-4, or by other means, including negotiations with their representatives.**

The OBA does not take a position on this recommendation.

**29. Recommendation 5-6**

**When a pension plan is being wholly or partially wound up, when a transaction provides the opportunity for a pension asset transfer, or when an active plan member leaves a job in which she or he has earned pension credits, active plan members and retirees should be given the choice of depositing the value of any pension accruals standing to their credit with the Ontario Pension Agency. Sponsors and unions negotiating the consequences of corporate or government restructuring should, by mutual consent, also be able to transfer plan assets to the Ontario Pension Agency in respect of some or all of the members affected.**

The OBA agrees that if a full-fledged Ontario Pension Agency is implemented this could be a use for it. Some OBA Members feel that the establishment of a separate, full-fledged agency (as opposed to establishing a mechanism to hold benefits of un-located members) is an unnecessary expense.

**30. Recommendation 5-7**

**The Ontario Pension Agency should receive and administer funds payable to pension beneficiaries who cannot be located. Plan sponsors should be obliged to file with the Ontario Pension Agency a list of all beneficiaries who cannot be located, and of all deferred members whose assets remain under the control of their plan. Plan members seeking to trace their stranded or deferred pensions should have access to this list.**

The OBA supports this recommendation. Although plan administrators employ best efforts to locate missing individuals, often they cannot be found. The ability to deposit funds with this new agency would save plan sponsors the time and resources needed to locate missing members. In the case of a full wind

up, administrators and sponsors would not be obligated to keep the pension fund open for a prolonged period of time. By maintaining a centralized list, the Agency could consolidate funds for missing members and improve the odds that they would eventually receive their entitlements by carrying out continuing searches.

**31. Recommendation 5-8**

**Existing “grow-in” rights that provide access to early retirement benefits for all qualifying single-employer pension plan members in the event of a full or partial plan wind-up should be extended to all such members who are involuntarily terminated. “Qualifying members” should continue to be those whose age and years of service add up to 55.**

The OBA is unable to reach a consensus on this issue.

Some OBA Members believe that grow-in benefits should be eliminated entirely or only be provided if the plan is able to fund them (as is the case in Nova Scotia, which is currently the only other province that requires grow-in rights). These Members do not believe that grow-in benefits should be extended to those individuals who are involuntarily terminated for various reasons, including that grow-in benefits can be extremely costly to fund and that in order to promote harmonization of pension legislation among the provinces, Ontario should consider eliminating grow-in benefits instead of expanding them. These OBA Members also note that the NS Report recommends eliminating the sections in the Nova Scotia Pension Benefits Act that prescribe mandatory grow-in benefits. The NS Report recommends that “if a plan chooses to provide these benefits, they should be funded and are equal to all other benefits”.

Other OBA Members support this recommendation and are in favour of the extension of grow-in benefits to those employees who are terminated involuntarily. These members cite the introduction of grow-in protection as necessary to ensure the pension promise is kept for long-service employees. These Members suggest that one method of addressing the costs of grow-in is to balance this with other measures, such as extending solvency relief and the elimination of partial wind-ups, and the elimination of the distribution of surplus on a partial wind-up.

There are differing opinions regarding the extension of grow-in benefits to individuals who have been terminated involuntarily. The OBA encourages the government to consider both points of view prior to adopting this recommendation.

**32. Recommendation 5-9**

**Multi-employer plans, jointly sponsored plans, and the proposed jointly governed target benefit plans should not be required to provide grow-in benefits.**

There is no consensus among OBA Members on this recommendation.

The OBA Submission sets out the different points of view of OBA Members on the various issues relating to grow-in benefits and the OBA encourages the government to carefully consider all points of view before deciding whether to implement this recommendation.

**33. Recommendation 5-10**

**The Pension Benefits Act should be amended to provide for phased retirement as contemplated by the Income Tax Act.**

The OBA supports this recommendation. The OBA is of the view that the legislation should be amended to permit (but not require) registered pension plans to provide for phased retirement.

**34. Recommendation 5-11**

**All active plan members should be immediately vested for all accrued pension benefits. However, as at present, the plan administrator should retain the discretion to authorize the payment out of small amounts in specified circumstances.**

Some OBA Members support this recommendation without qualification. Other OBA Members would support this recommendation if partial wind ups were eliminated, but provided that grow-ins are expanded for all individual plan member terminations (see recommendation 5-8).

Other OBA Members would support this recommendation if partial wind ups and grow-ins were eliminated. These Members support the view that if immediate vesting of regular benefits and progressive vesting of early retirement benefits become mandatory, partial wind ups would no longer serve any useful purpose, and termination benefits could be settled for all employees much more expeditiously. Immediate vesting, with the plan administrator's discretion to authorize payment out of small amounts in specified circumstances (i.e. a de minimus test) would also benefit those employees who, under the current regime, would not be vested as they do not have two years' service. From the employer's perspective, immediate vesting would increase the costs of providing pension benefits as the number of entitled employees would be increased. However, if partial wind ups are eliminated, the increase in pension costs as a result of immediate vesting may not be substantial because the employer would not have to incur partial wind up administrative costs.

**35. Recommendation 5-12**

**Active plan members who are involuntarily terminated, whether in groups or individually, while a plan is ongoing, should not be entitled to an immediate distribution of surplus. However, those who leave their pension assets in the plan should retain the right to participate in any subsequent surplus distribution.**

There are differences of opinion among OBA Members with respect to distribution of surplus upon a partial wind up or involuntary termination. Some OBA Members believe that partial wind ups should be eliminated but acknowledge that grow-in benefits only compensate the employees who terminate in mid- or late-career partially for the loss of early retirement subsidiaries. Nevertheless, these Members also submit that the current regime to distribute surplus on a partial wind up fails to achieve equity among plan members, former members and employers as there is no nexus between who gets surplus on partial wind up and who was a plan member when surplus developed.

Other OBA Members believe that partial wind ups should be eliminated entirely as the current rules inject significant uncertainty in the administration of pension plans, the structuring of corporate transactions and in the conduct of business by plan sponsors. These Members would support the recommendation to exclude involuntarily terminated members from benefiting from an immediate distribution of surplus.

Some OBA Members believe that partial wind up and grow-in rights should remain. However, these Members can support the elimination of distribution of surplus in a partial wind-up when balanced with a package of reforms that provides adequate protection to terminated workers.

**Recommendation 5-13**

**Involuntarily terminated members may have their benefits annuitized at the option of the sponsor.**

The OBA supports this recommendation. If this option is adopted, it should be made clear in the legislation that the employer is discharged from future responsibility for the payment of the benefit once a terminated member's benefits have been annuitized.

#### **Recommendation 5-14**

**Partial wind-ups of single employer plans should be declared by the Superintendent only when 40% of the active members of the employer are terminated within a two-year period. In such circumstances, administrators should file a plan reduction report, which would enable the Superintendent to ensure that plan funding is secure.**

If partial wind ups are retained, the OBA supports this recommendation to the extent that it provides clear parameters under which the Superintendent may exercise his discretion to declare a partial wind-up of a single employer pension plan. The purpose of the rule should be to ensure the benefit security of all members during the partial wind up process.

#### **36. Recommendation 5-15**

**When 90% of the active members of a single employer plan are terminated within a two-year period, the Superintendent should have the power to require that the plan be wound up or reconfigured. This power should be used only if the Superintendent concludes that either (a) the sponsor is not acting bona fide, or (b) the plan in its reduced state is unable to meet its obligations.**

Some OBA Members support this recommendation. If adopted, the OBA believes that specified criteria should be set out under which the Superintendent may exercise discretion to order a wind up of a pension plan. Other OBA Members believe that as long as a pension plan has active members, there is no basis to wind it up and therefore do not support this recommendation.

#### **37. Recommendation 5-16**

**If a multi-employer or jointly sponsored pension plan experiences a reduction of 40% of its active members, or of sponsors providing 40% of its contributions, or if the sponsoring union splits, the administrator should prepare a plan reduction report and file it with the regulator. The regulator may require the administrator to prepare such a report if there are reasonable grounds to believe that the plan may no longer be viable.**

The OBA supports this recommendation.

Assuming the recommendation to eliminate solvency funding for MEPPs is adopted, it is prudent to have some additional regulatory oversight for MEPPs in which active membership or the number of sponsors reduces significantly.

#### *5.4 The Effect of Corporate Restructuring on Plan Funding and Design*

#### **38. Recommendation 5-17**

**Any surplus in a plan that is to be split (the "original plan") can be allocated to any of the new plans derived from it, provided that the liabilities associated with the original plan and all of the derivative plans remain fully funded (including the 5% security margin) as of the date of completion of the transaction.**

Subject to the OBA's comments in relation to recommendation 4-14, the OBA supports this recommendation.

**39. Recommendation 5-18**

**Any surplus in a plan that is to be merged with another plan can be assigned to the merged plan, provided that the members of the original plan remain in the new merged plan, and that the merged plan itself is fully funded (including the 5% security margin) as of the date of completion of the transaction.**

There is no consensus among OBA Members on this recommendation.

Some Members do not support this recommendation. These Members submit that by effectively precluding surplus transfers when one merging plan is under-funded, this recommendation risks frustrating legitimate transactions. These Members submit that upon plan merger, a sponsor should be able to transfer surplus from one plan to another without the immediate requirement that the resulting plan be fully funded provided that the process in recommendation 5-19 is followed.

Other Members support this recommendation. These Members interpret this recommendation as permitting the merger of funded and underfunded plans, provided the new plan is, after the merger, fully funded. Some OBA Members support such a provision.

Other OBA Members oppose the transfer of surplus in a merger altogether. However, these Members suggest that, if implemented as a balanced package of reforms, this recommendation is appropriate.

**40. Recommendation 5-19**

**A sponsor considering a plan split or merger must give notice of the proposed transaction to active plan members and retirees, and any union or other organization representing them. The notice should be accompanied by an accurate, readily understood explanation of its implications, as well as technical data relating to the new plan in a form approved by the regulator.**

**If the union or representative organization approves of the proposed transaction or, in the absence of such an organization, if the transaction is approved by two-thirds of the active members and retirees voting in a secret ballot, the approval shall be filed with the regulator. Upon receiving the approval and ensuring that the transaction is otherwise in accordance with Recommendations 5-17 and 5-18, the regulator may, without further delay, issue an advance ruling approving the transaction.**

**In the absence of approval from the union, organization or plan beneficiaries, the sponsor must give 90 days' notice to all interested parties and to the regulator. After expiry of the 90-day notice, the regulator should process the proposed transaction in the normal manner.**

**Where a split or merger is proposed by any plan on whose governing body at least 50% of the members are nominated by active plan members and/or retirees, approval by that governing body should serve in lieu of the approval process set out in this recommendation.**

The OBA supports timely disclosure to plan members and retirees of information respecting pension plan restructuring as well the provision for an advance ruling in cases of approval by a union or representative organization, subject to the caveat that no such disclosure can be made until the deal or change in structure is publicly known.

The OBA supports this as a voluntary measure to expedite transactions. Some OBA Members take the position that any vote by plan members and retirees by secret ballot could be impractical and unnecessary. First, while active members are usually tied to fixed places of business, retirees are often widely dispersed and could be difficult to locate. The mechanics of a vote among such a potentially disparate group would be complicated and costly. The OBA notes that a rationale behind the secret ballot in labour law, namely the perceived danger of reprisal after a contentious union certification drive, is not present when sponsors seek to restructure a pension plan. In this regard, the consent of individual members has been directly sought and obtained with respect to surplus withdrawals since the early 1990s, and so far there have been no fears that an employer may be exercising undue influence or using intimidating tactics in relation to the members whom it solicits.

Some Members also question the purpose of a 90-day window before the regulatory process may begin. In some cases, the expedited procedure would not be appropriate (*i.e.* in corporate transactions in which prior consent is an unrealistic option). These Members take the position that a requirement for reasonable notification of the proposed changes to active members and retirees should be sufficient to begin the regulatory approval process without any additional window. These Members submit that when no membership approval is sought or obtained, the regulator should follow clearly delineated statutory criteria in considering whether to allow the transaction. Statutory clarity would avoid much of the complexity and uncertainty that has arisen from courts' application of general legal principles in cases such as *Transamerica Life Canada Inc. v. ING Canada Inc.* and *Burke v. Hudson's Bay Company*.

#### 41. Recommendation 5-20

**Notwithstanding Recommendations 5-18 and 5-19, a sponsor may, with the consent of the Superintendent, use surplus from the original plan to fund a new plan into which it has been merged, or from which it is derived, provided that (a) if the original plan continues in force, its security margin is maintained; (b) the new plan is funded at not less than 100% from its inception by sponsor contributions, if necessary; and (c) the security margin in the new plan is funded within five years.**

Subject to the comments in relation to recommendation 4-14, the OBA supports parts (a) and (c) of this recommendation. However, some Members take the position that the requirement in (b) that the new plan be fully funded by sponsor contributions is unnecessary and unduly burdensome. In this case, the requirement that the new plan be fully funded within five years is sufficient.

Other Members interpret this recommendation as permitting the use of surplus to help fund the new plan, but as requiring contributions by sponsors to ensure the plan is funded at 100% as of the date of the transaction, if necessary.

The OBA is also of the view that, if no membership approval is sought or obtained, the Superintendent should have the power to consent to or reject the surplus transfer according to statutory criteria.

#### 42. Recommendation 5-21

**Following conversion from a defined benefit to a defined contribution plan, or to a hybrid plan with elements of both, surplus carried over from the original plan should first be used to provide the required security margin for defined benefits earned under either plan. If additional surplus remains, it should be available to fund contribution holidays or other expenses of the converted plan.**

Subject to the OBA's comments in relation to recommendation 4-14, the OBA supports this recommendation.

43. **Recommendation 5-22**

**A sponsor considering the conversion of a defined benefit plan to a defined contribution or other type of plan must give notice of the proposed conversion to active and retired plan members and to any union or other organization representing them. The notice should be accompanied by an accurate, readily understood explanation of its implications, as well as technical data relating to the new plan in a form approved by the regulator.**

**If the union or representative organization approves of the proposed conversion or, in the absence of such an organization, if the conversion is approved by two-thirds of the active members and retirees voting in a secret ballot, the approval shall be filed with the regulator. Upon receiving the approval and ensuring that the transaction is otherwise in accordance with Recommendation 5-21, the regulator may, without further delay, issue an advance ruling approving the conversion.**

**In the absence of approval from the union, organization or plan beneficiaries, the sponsor must give 90 days' notice to all interested parties and to the regulator. After expiry of the 90-day notice, the regulator should process the proposed transaction in the normal manner**

**Where a split or merger is proposed by any plan on whose governing body at least 50% of the members are nominated by active plan members and/or retirees, approval by that governing body should serve in lieu of the approval process set out in this recommendation.**

The OBA supports timely disclosure to plan members of information respecting the conversion. However, a plan sponsor should be able to make changes to a pension plan's benefit design on a going-forward basis provided adequate notice is given to the affected members. The OBA notes that retirees would not generally be impacted by this change in plan design. Some Members support this recommendation as a method to facilitate consent to conversions or provide adequate notice of same. Some Members take the position that the 90-day window is unnecessary and that some other reasonable notification of the proposed conversion to affected plan members should be sufficient to begin the regulatory approval process. In addition, Members submit that there should be statutory clarity in terms of what criteria the regulator will consider in deciding whether to approve a conversion (e.g. as an adverse amendment to a pension plan).

44. **Recommendation 5-23**

**The regulator should have the power to review the effects of a plan split, merger, asset transfer or other pension transaction involving related corporate entities in order to ensure that the plan's financial prospects have not been compromised by being assigned to a less solvent corporate entity. The regulator's powers should be exercised in accordance with specified criteria, and should include the power to (a) require a plan to be brought up to its previous funding level, or 105% of full funding, whichever is the lesser, (b) require the previous sponsor to provide guarantees that the new sponsor will meet its obligations to the plan, and (c) rescind the transaction.**

The OBA could not reach consensus on this recommendation.

Some Members take the position that this recommendation is overly broad. First, the triggering provision that the related corporate entity be "less solvent" gives rise to practical difficulties. As outlined in the OBA's submissions, it is not clear how a company's credit-worthiness could be determined for purposes of establishing the funding requirements of its pension plan. These problems are exacerbated when the company is private and there is no public corporate data.

Second, the regulator should properly examine the solvency of any transferee during the initial approval process. If solvency concerns arise, they should be appropriately dealt with at that time and not after the fact through the possible rescission of the transaction. Furthermore, if a union, other representative organization or other plan beneficiaries approve of the transfer, as described in recommendation 5-19, the regulator should not then have the power effectively to veto this approval and rescind the transaction except in extremely limited circumstances (e.g. fraud).

Some Members suggest the proposed power to require the transferor to guarantee the obligations of the transferee is unworkable. The strict funding requirements in the normal course already require plan sponsors effectively to guarantee the funding of their plans. Requiring other members of a corporate group to guarantee a related party's plan would give rise to cost uncertainty, stifle legitimate corporate transfers and unnecessarily pierce the corporate veil. Furthermore, the potential for such a guarantee would dissuade sponsors from establishing or maintaining defined benefit plans in the first place.

Other Members submit that this power is appropriate in the context of transactions that are designed to isolate pension liabilities in an affiliate. These Members are of the view that the Superintendent should be cautious in the use of this power, but should have such a power.

## **Chapter 6 – When Plans Fail**

### *6.2 Enhanced Vigilance*

#### **45. Recommendation 6-1**

**The Superintendent should have the power to establish benchmarks that identify plans “at risk of failure;” to order additional valuations and reports by such plans, if the benchmarks are met; and to require such valuations and reports to be conducted or reviewed by independent auditors and actuaries, or by auditors, actuaries or other staff of the pension regulator, at the cost of the sponsor.**

Some OBA Members support this recommendation. Other Members submit that any action, beyond the normal requirement for annual valuations for under funded plans, should be in accordance with clearly defined and articulated criteria, and be implemented only after full discussion with the plan sponsor. However, such criteria may be difficult to generate due to the highly varying natures of plan sponsors; furthermore, such additional reviews conducted at the cost of the plan sponsor have the potential to create additional expense for a plan sponsor and a plan which already facing financial difficulty.

#### **46. Recommendation 6-2**

**The Superintendent should have the power to (a) approve arrangements to reset the funding obligations of single-employer plans at risk of failure, including contributions, payment schedules, amortization periods and premiums to be paid to the Pension Benefits Guarantee Fund, and (b) authorize the provision of additional forms of security, to ensure that the plan does not fail and/or that the interests of plan members are better protected in the event that failure does occur. The Superintendent may exercise this power notwithstanding the provisions of plan documents.**

**Arrangements submitted to the Superintendent for approval must be agreed to by the plan sponsor and by a union or other organization authorized to represent active plan members and retirees. In the absence of a union or other authorized organization, the arrangements must be approved by a two-thirds majority of active and retired plan members voting by secret ballot. In the event that the arrangements affect Pension Benefits Guarantee Fund premiums or coverage, the administrator of that Fund must also approve.**

The OBA supports the recommendation that the Superintendent have flexibility to approve alternative funding arrangements when an employer is in financial difficulty. The OBA submits that the framework for such approvals be clearly described in legislation, including the form of additional security that may be required. In recommendation 4-22, we set out some alternative forms of security for funding.

Some Members are of the view that a consent requirement (whether positive or negative) is impractical and that other alternatives should be considered (e.g., letters of credit, more stringent reporting requirements, etc.) instead of the requirement to obtain member and retiree approval. Other OBA Members are of the view that member/retiree consent is essential.

If there is to be a requirement for member/retiree approval, such process must be carefully determined. While the approval of a union (or other organization) is envisioned, unions do not, typically, represent retirees and there may be significant differences of opinion between the two constituencies. With the framework as described, there may be union approval (or disapproval), but the retiree viewpoint may not be represented. Some OBA Members are of the view that a two-thirds majority would be too high a threshold for an employer to meet, especially when facing the communications issues that financial hardship causes. Moreover, the two-thirds majority, if accepted, should be of those plan members and retirees who choose to vote, not of the total membership; the difficulty is finding all plan members, especially in older plans, has been remarked upon elsewhere in the OECF Report. In addition, if the two-thirds majority process is to be implemented, the OBA is of the view that it should be of the aggregate member/retiree population who vote (as opposed to the requirement that there be two-thirds of members and two-thirds of retirees). Some OBA Members are of the view that requiring “positive” consent is too onerous a requirement and instead there could be requirement to provide notice and proceed provided that not more than two-thirds of plan members and retirees (as an aggregate class) object.

Additionally, in the view of some OBA Members, it is critical that if the administrator of the PBGF must approve any funding arrangement, the Superintendent as the authorizing authority should no longer be the administrator of the PBGF.

### **Recommendation 6-3**

**The Superintendent should have the power to initiate, facilitate and approve arrangements relating to all aspects of multi-employer plans at risk of failure or of significant benefit reduction. The Superintendent may exercise this power notwithstanding the provisions of plan documents.**

**Arrangements submitted to the Superintendent for approval must be agreed to by the plan sponsors and by a union or other organization authorized to represent active plan members and retirees. In the absence of a union or other authorized organization, the arrangements must be approved by a two-thirds majority of active and retired plan members voting by secret ballot.**

The OBA supports the recommendation that the Superintendent have the flexibility to approve alternative funding arrangements when an employer may be facing financial difficulties. The OBA submits that the framework for such approvals be clearly described in legislation, including the form of additional security that may be required.

We refer to our response to recommendation 6-2 with respect to the requirement for member/retiree consent. Additionally, for multi-employer pension plans, some OBA Members submit that employees and unions are, by definition, represented on the Boards of Trustees. Accordingly, so long as the Board of Trustees has consented to the arrangement, employee consent should be deemed to have been given and there should be no requirement to obtain the two-thirds majority.

47. **Recommendation 6-4**

**When a pension plan has been identified as “at risk,” the Superintendent should have power to approve the arrangements identified in Recommendations 6-2 and 6-3, conditional upon the suspension or cancellation of any agreement to improve plan benefits, and/or a prohibition on plan benefit improvements, until funding is restored to a specified level.**

The OBA submits that any such requirements should be clearly set out in legislation. Additionally, such suspension or cancellation may lead to difficulty in obtaining the required member consent, as discussed in our response to recommendations 6-2 and 6-3, above.

48. **Recommendation 6-5**

**When a plan fails and is being wound up, payments attributable to benefit improvements initiated up to five years prior to the date of the wind-up should be paid only after all pre-existing benefits are paid in full.**

The OBA supports this recommendation.

49. **Recommendation 6-6**

**The regulator should create an office of compliance to deal with the failure of sponsors to remit contributions and other violations of the *Pension Benefits Act* that imperil the security of pension plans and impede regulatory oversight of the pension system. That office should also maintain, for its own purposes and for the benefit of interested parties, an on-line register of delinquent sponsors and other offenders, and the measures taken to deal with them.**

The OBA submits that an office of compliance could be helpful to maintain the integrity of the pension system. However, the mandate and powers of the compliance office should be clearly outlined in legislation, and the office should remain as transparent as possible. Some OBA Members submit that the information contained in the on-line register should be restricted to stakeholders such as unions, members and retirees, or, be extremely limited in details similar to the current information available on FSCO's website.

*6.3 Fair Treatment of Pension Plans and Beneficiaries in the Event of Sponsor Bankruptcy or Insolvency*

50. **Recommendation 6-7**

**The government of Ontario should support recent federal legislation that gives priority to unpaid current pension service costs in the event of bankruptcy. It should also initiate discussions with the federal government concerning the possibility of extending similar priority to all special payments to fund both solvency deficiencies and unfunded liabilities owing to the plan by the sponsor at the time of insolvency.**

The OBA supports this recommendation. This recommendation should be a priority. The Ontario government should be encouraged to provide support to the recent federal legislation and particularly the amendments that have come into force and are applicable to provincially regulated pension plans under *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 (Bill C-55, 2005).

Bill C-55, 2005 amended the *Bankruptcy and Insolvency General Rules* (C.R.C., 1978, c. 368) by adding subsection 59.1 (b) that prescribes a pension plan regulated by an Act of Parliament or of the legislature of a province for the purposes of sections 81.5 (bankruptcy) and 81.6 (receivership) of the *Bankruptcy and Insolvency Act*. Sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* secures, for the purposes of defined benefit pension plans, the amounts deducted from the employees' remuneration for payment to the fund and the amount equal to the amount that would be the normal cost that was required to be paid by the employer to the fund. For defined contribution pension plans, sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* secure the amount equal to the sum of all amounts that would be required to be paid by the employer to fund the defined contribution pension plan. (See Rules Amending the Bankruptcy and Insolvency General Rules, online: C. Gaz. <<http://canadagazette.gc.ca/partII2008/20080723/html/sor223-e.html>> (date accessed: 2008 -01-12).

Although not in force at the time of this writing, subsection 59.1(a) of Bill C-55, 2005 prescribes a pension plan under subsection 60(1.5) of the *Bankruptcy and Insolvency Act* which would allow a court to approve a proposal for making payments on the amounts covered by sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act*.

Currently the federal legislation does not make it a priority to fund special payments for solvency deficiencies and unfunded liabilities owing to the plan. Some OBA Members are of the view that it would not be appropriate to extend the priority coverage beyond the scope of Bill C-55, 2005. Other OBA Members support the Ontario government urging the federal government to extend the priorities to special payments for solvency deficiencies and unfunded deficiencies owing to the plan. Nevertheless, the Ontario government could consider making it a priority to amend sections 57 and 86 of the PBA, as set out under Recommendation 6-10.

#### 51. Recommendation 6-8

**The *Pension Benefits Act* should be amended to permit the Superintendent to approve arrangements and changes in arrangements that involve the claims of pension plans under federal bankruptcy legislation.**

The OBA supports this recommendation. Although not in force as of the time of this writing, the recent amendment to subsection 6 of the *Companies' Creditors Arrangement Act* under Bill C-55, 2005, and *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act* and chapter 47 of the *Statutes of Canada*, 2005 (Bill C-62, 2007) could make this Recommendation a priority since it would require amending the PBA to allow for the Superintendent to have the authority to approve an agreement entered into by the relevant parties respecting the payment of the amounts referred to under section 6 of the *Companies' Creditors Arrangement Act*. For a defined benefit pension plan, the payment of the amounts could include "an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund... [and] an amount equal to the sum of all amounts that were required to be paid by the employer to the fund". For a defined contribution pension the amounts could include "an amount equal to the sum of all amounts that were required to be paid by the employer to the fund..."

#### 52. Recommendation 6-9

**Plan assets should be distributed on a pro rata basis. However, benefit improvements introduced within the last five years should be postponed until after other benefits are paid, in accordance with Recommendation 6-5, above.**

The OBA supports this recommendation. In accordance with recommendation 6-5, and depending upon the priority given to recommendation 6-7 and 6-8, this recommendation should be a priority. The Ontario

government is encouraged to make the approach to plan asset distribution on plan wind-up the same under a bankruptcy and insolvency situation, which would require that the reduction of pension benefits should be in proportion to the funded status of the plan. In addition, the same approach to postponing benefit improvements within the last five under a plan wind up should be adopted under a bankruptcy or insolvency situation as well

**53. Recommendation 6-10**

**The Ontario government should seek to persuade the federal government to amend its bankruptcy and insolvency legislation to give the pension regulator the right to intervene in proceedings under that legislation to defend the interests of any pension fund and its members. Provincial law should allow the pension regulator to act on behalf of, and to assert all the rights and powers of, the plan administrator in the context of bankruptcy and insolvency proceedings, if the regulator believes such action is warranted.**

The OBA supports this recommendation. As a result of recommendation 6-7, it would be a priority of the Ontario government to provide greater protection for pension claims where the sponsor may become insolvent or bankrupt by allowing the Superintendent, in his discretion to determine if such action is warranted, to intervene in, act on behalf of, and assert the rights and powers of the plan fund and the plan members as plan administrator in bankruptcy and insolvency proceedings.

However, to provide greater protection to pension claims at present, the deemed trust provision (section 57 of the PBA), the lien and charge against assets of the employer(s) providing the plan (subsection 86(1) of the PBA) and the Superintendent's right to be subrogated to the rights of the plan administrator provision (subsection 86(4) of the PBA) should be amended to make the related procedures less ambiguous and to give priority over other security claims of other creditors, by amending the Ontario *Personal Property Security Act*. In addition, amendments to the PBA's administrator's lien should be made to that of a trust company or plan member's lien.

**54. Recommendation 6-11**

**The regulator should be specifically empowered to replace the administrator of a plan whose sponsor is involved, or is deemed at risk of being involved, in bankruptcy or insolvency proceedings. The Ontario government should ask the federal government to amend the relevant legislation to ensure that the new administrator so appointed can participate in all proceedings on behalf of the plan.**

The OBA supports this recommendation provided that appropriate criteria are established for the exercise of this power. This recommendation should be a priority.

**55. Recommendation 6-12**

**The Ontario government should explore with the federal government the amendment of relevant federal legislation so as to ensure that pension plans, beneficiaries and organizations representing them can participate as of right in bankruptcy and insolvency proceedings. It should also explore ways to facilitate the collective participation of pension litigants in such proceedings by means of representation orders or otherwise. And it should amend the *Pension Benefits Act* so as to enable courts to order pension plans to reimburse beneficiaries and representative organizations for successfully defending the interests of the plan.**

The OBA supports this recommendation. This recommendation should be a priority. The Ontario government is encouraged to collaborate with the federal government on making sure that pension plan

stakeholders, including beneficiaries and organizations that represent them, can participate in bankruptcy and insolvency proceedings, whether it is on a collective basis or by means of representation orders.

In addition, it is recommended that the PBA be amended to allow "courts to order pension plans to reimburse beneficiary and representative organizations for successfully defending the interests of the plan." It is suggested that subsection 24(1) of the *Financial Services Commission of Ontario Act* needs to be amended to allow payment out of the pension fund for litigation related to the plan in order to make such reimbursements. The legislation could be amended to require the Financial Services Tribunal to make this determination. It could be based upon whether the claim was legitimate and successfully awarded.

#### *6.4 Mitigating the Effects of Plan Failure: The Pension Benefits Guarantee Fund*

##### **56. Recommendation 6-13**

**The Pension Benefits Guarantee Fund should be continued in its present form, but with the improvements proposed in Recommendations 6-14 to 6-17 for at least five years or until completion of the review proposed in Recommendation 6-18, whichever is later. On the basis of the findings of that review, the government should determine whether to continue, amend, replace or discontinue the PBGF.**

Some OBA Members support this recommendation. These Members note that such schemes exist in the U.S. and U.K. as a necessary protection of benefits and a key element of a balanced package extending solvency relief.

Other OBA Members are of the view that if one of the primary goals is uniformity of pension legislation across the country, the PBGF should be re examined and perhaps eliminated. These members note that pension guarantee funds in the U.S. and the U.K. face significant challenges.

Furthermore, given that it is widely acknowledged that the PBGF in its current form is not sufficient to support even one large under-funded pension fund, its usefulness is questioned by some OBA Members.

Our comments on recommendations 6-14 to 6-19 are made based on the assumption that a determination is made to continue the PBGF.

##### **57. Recommendation 6-14**

**The Pension Benefits Guarantee Fund should be administered, preferably at arm's length from the pension regulator, by an agency with a mandate to:**

- **manage the Fund so as to enhance its capacity to evaluate the individual and collective risks of plans whose performance is guaranteed by the Fund;**
- **fix levies, subject to the approval of the Minister, in amounts sufficient to meet claims arising from those risks;**
- **collect such levies and hold and invest them on behalf of the Fund; and**
- **undertake systemic analysis to assist the regulator in reducing the number and aggregate value of claims on the Fund.**

**The regulator's mandate should be extended to include protection of the Pension Benefits Guarantee Fund, and the mandate of the Fund should include specific reference to its obligation to assist the regulator.**

The OBA supports this recommendation.

**58. Recommendation 6-15**

**Benefit improvements agreed to within five years prior to the failure of a plan should be ineligible for payment out of the Pension Benefits Guarantee Fund.**

The OBA supports the concept of excluding from PBGF coverage benefit improvements made within five years. However, even if excluded, benefit improvements made within five years before plan failure can still result in a burden to the PBGF. Benefit improvements made within five years reduce a plan's funded ratio by draining funds away from other longer-standing benefits. We recommend that, unless all other benefits are fully funded, benefit improvements made within five years be excluded from plan benefits.

**59. Recommendation 6-16**

**The risk assessment protocol by which levies are established for the Pension Benefits Guarantee Fund should be studied and revised to include not only the funding status of plans but other risk-generating factors such as the asset/liability match within the plan and the sponsor's financial health.**

The OBA supports this recommendation.

**60. Recommendation 6-17**

**The level of monthly pension benefits eligible for protection by the Pension Benefits Guarantee Fund should be increased to a maximum of \$2,500 to reflect the effect of inflation on the original maximum of \$1,000.**

**The Superintendent (or other agency responsible for the administration of the Pension Benefits Guarantee Fund) should recommend to the Minister of Finance within one year:**

- **the formula by which benefit levels should be determined on a going-forward basis;**
- **the basis on which the levy paid by sponsors should be calculated;**
- **procedures for ensuring that both the benefits and the levy are adjusted at regular intervals; and**
- **any other matter relevant to the implementation of this recommendation.**

**The recommendations should be accompanied by a statement concerning the anticipated effects of any such adjustment. The Minister should act promptly upon receipt of these recommendations and the accompanying statement.**

The OBA supports the concept of increased PBGF protection. However, we note that increasing PBGF levies would increase costs for pension funds and pension plan sponsors. This increase could be a disincentive to pension plan sponsorship. Currently, the PBGF levy is low in comparison to its funding needs. Financing should be carefully considered to balance costs to sponsors with the appropriate level of

protection. Where appropriate, large plans should be subject to a separate procedure or consideration in providing coverage.

The OBA notes that some large participants in the PBGF have restructured with the aid of public funds. Some OBA Members are of the view that this model of restructuring is preferable to restructuring through use of the PBGF. Other OBA Members are of the view that the PBGF should be self-supporting and public funds should not be used to bail out under-funded private pension plans. Provision needs to be made however for the possibility of a large failure and the disappearance of the PBGF. It would be inequitable if the PBGF was not available to all potentially affected plan members, as all employers have been making contributions.

**61. Recommendation 6-18**

**The Ministry of Finance or some other agency, either alone or in cooperation with other Canadian pension authorities, should initiate a study of possible alternatives to the Pension Benefits Guarantee Fund. Unless and until such an alternative that provides comparable or better protection for active plan members and retirees can be identified, the Pension Benefits Guarantee Fund should continue to exist in the form proposed in Recommendations 6-14 to 6-17.**

The OBA supports this recommendation.

**62. Recommendation 6-19**

**The Pension Benefits Guarantee Fund should be governed by the following principles:**

- **The Fund should be self-financing.**
- **It should not receive government grants or subsidies in order to meet its obligations.**
- **It should be allowed to borrow funds from the government on a commercial basis, for defined purposes and at defined times.**
- **The terms on which the Fund itself should be deemed insolvent, and the effects of such insolvency, should be clearly set out in the *Pension Benefits Act*.**

The OBA supports this recommendation.

## **Chapter 7 – Regulation**

### *7.2 Establishing Norms of Pension Regulation*

**(a) Recommendation 7-1**

**So far as possible, substantive rules intended to define the rights and responsibilities of participants in the pension system should be set out in the *Pension Benefits Act* or rules and regulations made pursuant to it. If feasible as a matter of statutory drafting, the Act should convey the intention of the legislature that the Act should be treated as the exclusive source of pension law.**

As a general principle, the OBA agrees with recommendation 7-1. Some OBA Members are of the view that the various aspects of pension regulation requiring immediate codification are those where resort to the courts has been most pronounced (e.g. surplus entitlement). The OBA is of the view that the recent proposed amendments in Bill 133 of the current session, the Family Statute Law Amendment Act, 2008,

which proposed amendments deal with the division of pension assets on marital breakdown, are a step in the right direction in terms of bringing greater clarity to pension rules.

63. **Recommendation 7-2**

**As a medium-term project, the PBA and regulations should be re-drafted so as to clearly articulate both (a) general principles applicable to all types of pension plans, and (b) comprehensive codes applicable to specific plan types.**

The OBA supports recommendation 7-2. There is a wide body of case law available to assist the Legislature in crafting the general principles that would apply to all types of pension plans and the comprehensive plan-specific codes needed to avoid unnecessary litigation down the road. MEPPs, defined contribution plans and the proposed new target benefit plans should have their own comprehensive codes as they are sufficiently different from SEPPs.

64. **Recommendation 7-3**

**Revisions to the *Pension Benefits Act* should be drafted to provide both rules-based and principles-based approaches, as appropriate. In particular, minimum standards with respect to benefits should generally be rules-based; some aspects of investment, plan governance and innovation are more appropriately regulated by a principles-based approach; and funding requirements should likely involve a mixture of the two.**

The OBA supports recommendation 7-3. To the extent possible minimum standards with respect to benefits should be consistent with the minimum standards adopted by the majority of other Canadian jurisdictions in order to minimize administration compliance costs.

65. **Recommendation 7-4**

**The government should accept ultimate responsibility for ensuring that all standards governing the conduct of professional and other participants in the pension system are appropriate and in the public interest.**

**The *Pension Benefits Act* and regulations should make clear provision for the adoption by reference of standards established by professional governing bodies such as the Canadian Institute of Actuaries. In addition, the pension regulator should work closely with professional governing bodies to ensure that the standards they establish, amend and apply to their own members from time to time are consistent with Ontario's pension law and policy. To the extent that they are not, they should be replaced with more appropriate standards laid down in the Act or by regulation.**

The OBA supports recommendation 7-4. OBA Members agree with the OECP that clear statutory terms outlining the standard of care to which professional third-party service providers must adhere would help to alleviate the confusion surrounding the obligations and responsibilities of these professional third-party service providers.

Some OBA Members strongly believe that providing clear regulation through an explicit standard of care to which professional third-party service providers must adhere is not enough. To some Members, the Ontario pension regulator should not abdicate the regulation of professional third party service providers to professional self-regulatory bodies by simply incorporating the standards set by self-regulatory bodies into the PBA by reference. These Members submit that the Ontario pension regulator should actively engage with the self-regulatory bodies governing professional service providers to set standards, as well as participate in the disciplinary process of professional service providers.

Some OBA Members stress that any adoption of recommendation 7-4, (which proposes to give the Ontario pension regulator the authority to engage professional service provider's self-regulatory bodies to discuss standards), also include the OECF Report proposal to give the Ontario pension regulator the authority to lay down more appropriate standards where professional self-regulatory bodies do not adequately establish standards satisfactory to all of the Ontario pension stakeholders. These OBA Members submit that giving the Ontario pension regulator the authority to engage, but not regulate the standards of third-party service providers would leave the Ontario pension regulator without the tools to properly fulfill its mandate.

**66. Recommendation 7-5**

**Legislation should provide standard-form or template plans, particularly for the use of small- and medium-sized enterprises, and the regulator should develop simplified registration and filing requirements for such plans.**

The OBA supports recommendation 7-5. The OBA is of the view that the inclusion of simplified and specimen plans will remove barriers and encourage employers to participate in Ontario's regulated voluntary pension system.

**67. Recommendation 7-6**

**Simplified registration and filing requirements should be adopted for designated or individual pension plans for senior executives. In addition, a protocol should be developed to identify a minimum membership threshold for plans below which the regulator should react to complaints, but not provide its normal level of regulatory oversight.**

Some Members do not support recommendation 7-6.

Recommendation 7-6 contains two different recommendations, both of which some Members object to. Recommendation 7-6 recommends that the Ontario pension regulator reduce its regulation of individual pension plans. The OECF based this recommendation on the observation that members of individual pension plans are often senior executives and should therefore be able to protect their own rights and interests. The OBA submits that not all individual pension plans are set up by employers for the benefit of their senior executives. Some employers set up individual pension plans for middle management, who may not have the same experience or access to expertise that would make regulatory oversight unnecessary for senior executives. These employees should be able to rely on the Ontario pension regulator to oversee the administration of their pension benefit, whether they are executives or not.

Second, recommendation 7-6 also provides for a reduction in the regulatory oversight of plans below minimum membership thresholds. Small employer plans with few participants would likely include employees who would, typically, be unable to protect their own rights and would not have access to the expertise to do so. This would likely require the hands-on approach of a normal level of regulatory oversight, not a relaxed level of regulation that only reacts to complaints. The OBA suggests that if small plans are to receive a different level of regulatory oversight, that decision also be based on some analysis of the plan's population, i.e., whether they are truly able to protect their own interests.

*7.3 Functions of the Pension Regulator*

As a general statement, the OBA supports the principles expressed in recommendations 7-7 through 7-13, subject to one important caveat. It is reasonable to assume that the Ontario pension regulator's resources will be limited, and that not every recommendation can be implemented at the same time. To this end, we

feel that it is important to prioritize the activities listed in section 7.3 of the report and have accordingly attempted to do so below in our comments.

It is our belief that a vast majority of plan sponsors and plan administrators are committed to complying with the PBA. They merely require more clarity about the pension regulator's interpretation and application of the statute. We believe that the prioritizing of activities under section 7.3 should reflect this. Specifically, we believe that highest priority should be given to initiatives that directly enhance stakeholders' understanding of the PBA and how it is applied. To this end, we would give highest priority to Recommendations 7-9, 7-10, and 7-13. However, the OBA recognizes that to implement 7-9, 7-10 and 7-13 at least a minimum of regulatory infrastructure needs to be established to determine the policies and procedures. In this respect, the OBA recognizes that the reform of the regulator is a "package" that is integrated and will require implementation in the medium and long terms.

The OBA submits that the pension regulator should focus on initiatives which make the pension system more accessible to employees, employers, administrators and their advisors. Getting more information to these persons on a timely basis will enhance the administration and operation of pension plans. It will provide stakeholders with more clarity (one of the underlying principles of the report) and openness (another underlying principle). Efforts to enhance research and development for the benefit of the pension regulator should not be as critical in the short term as compared to addressing the immediate needs of stakeholders.

**68. Recommendation 7-7**

**The pension regulator should develop filing requirements, processes and review procedures that enable it to better discharge its compliance, risk assessment and data-gathering mandate. It should develop an electronic system for the timely review of filings and for the development of useful interrelated databases and reports.**

We understand the need for the pension regulator to take the measures set out in these recommendations, which assist it in measuring and understanding pension plan trends. This will, no doubt, enhance the pension regulator's effectiveness in overseeing pension plans. However we believe that to the extent that resources are limited, these measures should initially be given a lower priority. Activities undertaken to support policy research and development, such as the collection of data through filings with the pension regulator, can be labour intensive and should not divert resources from activities that directly address stakeholder needs. Activities that are currently being undertaken to assist stakeholders, such as the annual report summarizing AIS filing results, which actuaries tell us is helpful, should continue.

**69. Recommendation 7-8**

**The present Notice of Proposal procedures should be repealed.**

**Applications seeking approval for major plan transactions should be dealt with in accordance with Recommendations 5-17 to 5-22.**

**Applications involving routine processing of other matters should be dealt with on the basis of a file review by the Superintendent. Other, more important matters should be dealt with pursuant to the procedures proposed in Recommendation 7-15.**

**The Superintendent should have power to approve, disapprove or issue directives concerning the matter at hand. Decisions of the Superintendent should be subject to appeal to and enforceable by the proposed Pension Tribunal of Ontario.**

In relation to oversight initiatives involving the review and approval of pension plan transactions, we agree with recommendation 7-8 to the extent that it will help to simplify the process and speed up decisions. See our further comments in relation to recommendations 5-17 through 5-22.

**70. Recommendations 7-9 and 7-10**

**7-9 The pension regulator should issue policy statements indicating how it views and intends to process all standard pension transactions. Before doing so, it should give notice of its intention to issue such statements, and provide stakeholders with an opportunity to submit comments. After doing so, while not bound by such statements, the regulator should depart from them only for good reason and, preferably, by way of an amending statement rather than in the context of a particular proceeding.**

**7-10 The pension regulator should have power to provide opinion letters and advance rulings in connection with proposed or pending transactions. The regulator should feel free to disregard such letters or rulings in subsequent proceedings if the applicant has not made full disclosure of relevant facts; if they adversely affect other parties who have not had a prior opportunity to be heard; or if they contravene legal rules or regulatory policies that were not in force when the letter or ruling was issued.**

The OBA supports these recommendations.

Of highest priority, the pension regulator should continue to issue and update its written policy statements regularly and provide reliable, non-binding, telephone advice by trained and qualified individuals. In addition, we agree that new means of providing clarifications should be introduced, including the opinion letters and advance rulings referred to in recommendation 7-10. This should also be of high priority. To the extent that it makes sense, the pension regulator may be able to establish measures that would allow it to recoup all or some of its costs for preparing and issuing rulings. We note that the Canada Revenue Agency levies fees for advance tax rulings. In order to provide authoritative opinions and rulings, the pension regulator must ensure that it has staff with appropriate expertise. That staff must not only have experience within the regulator in applying the statute, but it must also have knowledge and understanding of the world outside of the regulator.

In relation to written policy statements, the OBA agrees with the principles enunciated in recommendation 7-9; namely, that policy statements should be issued, that stakeholders should be given an opportunity to submit comments on proposed policy statements and that the regulator should apply them consistently until amended. The regulator should seek industry input on policy and compliance issues.

**71. Recommendation 7-11**

**The regulator should:**

- **develop a program of proactive monitoring, auditing, inspections and investigations directed especially at plans whose profiles, sponsors' profiles or sectoral location suggest that they may be at risk of failure or of significant under-funding;**
- **expand and update its existing systems for monitoring risks, ensure that these systems are designed and administered by expert staff, and supplement them with other strategies for detecting plans at risk; and**

- **be empowered to undertake remedial measures based on the results of its proactive monitoring.**

The OBA supports this recommendation.

For any self-regulation model, the monitoring of compliance, risk and outcomes is important. We agree that recommendation 7-11 merits some priority. The pension regulator should have the means to determine those plans that are at greater risk and to follow this up with proactive auditing, inspection or investigation. This is particularly relevant in ensuring the security of pension plans – that, for example, they are being properly funded and invested. However, as stated above, we believe that the vast majority of plan sponsors and plan administrators strive for compliance. By de-emphasizing its focus on compliance for plans that are not at risk, the regulator may be able to free up resources that can be used elsewhere, such as in helping the various stakeholders learn about compliance, through fielding phone inquiries, issuing policy statements and providing opinions and rulings.

## 72. **Recommendations 7-12 and 7-13**

**7-12 The regulator should develop a set of internal controls to better understand the provenance, track the processing and evaluate the outcome of inquiries and complaints; use the results of this process to improve its performance; and communicate those results to stakeholders.**

**7-13 The regulator should appoint a Complaints Officer with a mandate and supporting staff to assist complainants and persons making inquiries to secure the information they seek and the recourse to which they are entitled; to ensure the timely and responsive processing of inquiries and complaints; and to advocate on behalf of complainants within the regulatory process, where appropriate.**

The OBA supports these recommendations.

Recommendation 7-13 discusses the appointment of a Complaints Officer and supporting staff to assist complainants and persons making inquiries. In many cases, this currently falls to staff at the regulator who may be designated as a pension officer or assistant pension officer. While we would caution that the allocation of resources to this function needs to be measured, we agree that the processing of complaints and inquiries must be more timely than currently and that this recommendation therefore merits priority. In terms of resources, the appointment of a Complaints Officer and some supporting staff should free up some time for existing FSCO staff who currently have responsibility for this role (e.g., pension officers and assistant pension officers), so that they can do other work on a timelier basis. In other words, the compliance staff would no longer be handling complaints and inquiries, except for those that can be resolved more easily. Also, we assume that recommendation 7-12 is tied into recommendation 7-13, namely that the appointment of a Complaints Officer and some supporting staff would lead to the establishment of better tracking processes for inquiries and complaints.

## 73. **Recommendation 7-14**

**The *Pension Benefits Act* should clearly establish the right of unions and other representative organizations to participate in regulatory proceedings on behalf of individuals whom they represent, and of individuals to represent themselves. The Pension Tribunal of Ontario should be given discretion to order the sponsor or the plan to reimburse all legal and other costs necessarily incurred in the course of such participation in appropriate cases when claims or complaints are meritorious.**

The OBA supports this recommendation, as it facilitates access to justice. It would also likely expedite the proceedings and assist in reducing the number of complainants without counsel. OBA Members also support the detailing of how costs are to be awarded by the Tribunal as it is important to weed out payments from funds for frivolous claims while ensuring meritorious claims are properly assessed.

74. **Recommendation 7-15**

**The *Pension Benefits Act* should grant the Superintendent power to:**

- **hold hearings, require the production of documents and the giving of testimony, receive and rely on valuations and reports submitted in the regular course of his or her oversight functions, and order the preparation of and rely upon special valuations and reports;**
- **make interim orders with effect for not more than 30 days — unless extended by the proposed Pension Tribunal of Ontario — on the basis of written documents, valuations, reports and submissions, where necessary to preserve the assets of a pension plan; and**
- **make any final order necessary to secure compliance with the Act or with regulations and rules made pursuant to the Act.**

**The Superintendent should provide all affected parties with as full a right to be heard as is feasible given the urgency of the situation.**

**Orders of the Superintendent should be enforceable by the Pension Tribunal of Ontario. All decisions and orders of the Superintendent should be subject to appeal to the Tribunal.**

The OBA supports this recommendation. The OBA supports an efficient and expedient adjudicative process and recognizes that the Superintendent requires sufficient and, where possible, specific powers to give effect to his mandate.

With respect to the proposed Pension Tribunal of Ontario, there was no consensus amongst OBA Members on whether such a tribunal should have exclusive jurisdiction over all pension matters, in so far as it is constitutionally possible.

Some OBA Members supported appeals from a pension tribunal to Divisional Court, and cite the important role courts have played in the development of pension law in the past 20 years.

Other OBA Members would support exclusive jurisdiction of the proposed Pension Tribunal of Ontario, suggesting that courts do not always have the capacity or expertise to adjudicate pension matters, especially where they involve significant technical detail.

More OBA Members would support a tribunal with exclusive jurisdiction when there is confidence that this Tribunal is staffed with independent experts with a significant background in pension and administrative law, and on a full-time basis.

Establishing new powers for the Superintendent and a new pension tribunal are significant changes to the current system that must be coordinated with establishing a new regulator, re-drafting pension legislation and staffing both the regulator and the tribunal. We believe that these changes are medium-term changes.

However, we believe that the government can begin the process of identifying the key participants in the new pension regulator, including potential key roles in the proposed Pension Tribunal and senior roles in the regulator in the short-term.

75. **Recommendation 7-16**

**The regulator should improve its internal and external data collection and reporting activities and implement a program of rigorous self-evaluation that will contribute to the identification of possible improvements in its regulatory functions. It should make the results of this self-evaluation publicly available. The regulator should be given the human and material resources necessary to pursue this approach.**

The OBA supports this recommendation. The OBA encourages and supports availability of information about the regulator and its objectives and performance. The OBA is of the view that this self-evaluation and reporting function is a key to improving stakeholder relations and understanding of the regulatory function and process.

Some OBA Members raise the concern that these functions should not come at an increased cost to industry participants, and that the resources necessary for these self-evaluation and communications be provided from government revenues.

This recommendation is necessarily a medium-term objective that should be built into new pension legislation or policy describing the functions of the new pension regulator, and will be implemented in the long-term and on an on-going basis as the new regulator seeks to engage with stakeholders.

76. **Recommendation 7-17**

**The *Pension Benefits Act* should include a “purpose clause” that will provide guidance to its interpretation and implementation. That clause should include reference to the need to maintain a balance among stakeholder interests, to keep pensions both secure and affordable, to both protect and promote the pension system, and to encourage innovation within the system.**

The OBA supports this recommendation.

In its submissions to the Commission, the OBA recognized an ongoing uncertainty regarding the rights and obligations of stakeholders in pension plans and specifically called for the clarification and codification of the law governing pension plan funding to assist in remedying this uncertainty.

A purpose clause would be consistent with the OBA’s support for the clarification and codification of pension plan laws as an aid in interpreting ambiguous provisions in the PBA. A purpose clause is also consistent with the use of principles-based legislation, to the extent it is implemented in accordance with other recommendations in the OECR Report. A purpose clause provides guidance to the regulator and to stakeholders in interpreting the legislation and rules and policies pursuant to it.

The precise content of the purpose clause is the key consideration for this recommendation. Although OBA Members have some difference, in general, members support a purpose clause that balances the rights and obligations of members and sponsors in a voluntary pension system. The language of the recommendation reflects this balance and OBA Members support the use of similar language in drafting a purpose clause.

We believe this recommendation must be implemented with the new pension legislation.

**77. Recommendation 7-18**

**An independent pension regulator — the Ontario Pension Regulator — should be established with budgetary, staffing and other powers of self management comparable to those of the Ontario Securities Commission.**

The OBA supports this recommendation.

The OBA Submission made it clear that Members want to see a regulator with the discretionary authority to fashion creative solutions that satisfy the needs of stakeholders which would shift the focus away from the courts in a cost effective manner. The OBA is of the view that this is high priority recommendation.

The OBA will have more comments on specific aspects of this regulatory model as they are presented and would be pleased to provide comments on any specific proposals. The OBA also supports in principle the use of the OSC model, with accountability to an independent board that contains bi-partisan members with industry expertise, and that uses a similar five-year budget and strategic planning tool.

This objective is a short to medium-term objective. The OBA is of the view that the government can in the short-term, identify key roles in the new pension regulator and begin to establish the structure of the new regulator in new legislation and policy made pursuant to it.

**78. Recommendation 7-19**

**The Ontario Pension Regulator should comprise five commissioners — the Superintendent of Pensions and four independent, part-time commissioners with extensive experience in pensions regulation or policy. The commissioners should act as a board of directors with general power to:**

- **oversee and direct the functions of the Ontario Pension Regulator;**
- **approve its budget and administration;**
- **approve policies and issue policy statements relating to regulatory approaches;**
- **adopt procedural rules; and**
- **report annually to the Minister of Finance concerning the operations of the Regulator.**

**The commissioners should not perform operational regulatory functions involving individual plans.**

This is primarily a policy decision of the form of the corporate oversight of the new pension regulator. The OBA would support this structure in principle, and supports the qualifications and mandate of the Commissioners.

OBA Members also support the staffing of this board with independent, non-partisan, experts in the pension industry and regulation. The OBA is of the view that these leadership staffing decisions will be crucial to the successful implementation of the new regulator.

Establishing these new Commissioners is a short to medium term objective. Key roles can be identified early and the structure of the Commission should be established in new legislation. The government can identify and articulate these decisions to stakeholders in the short and medium terms.

79. **Recommendation 7-20**

**The Ontario Pension Regulator and the Superintendent of Pensions should exercise all pension-related functions now exercised by the Financial Services Commission of Ontario and the Superintendent of Financial Services, respectively, together with the additional functions recommended in this report.**

The OBA supports this recommendation in principle, keeping in mind specific comments on the other aspects of the proposed new regulator and tribunal.

This recommendation is consistent with the establishment of a new regulator and tribunal. OBA Members support both in principle, subject to the comments made above.

This is a significant change from the current regulatory scheme, and is an important, if not central, short to medium-term objective. This objective could be announced in the very short term, however, and used to guide further stakeholder consultation as the new regulator and tribunal are developed.

80. **Recommendation 7-21**

**The new Ontario Pension Regulator should assist in the development of pension policy by collecting data, contributing its experienced-based insights into the operation of the regulatory system and refining and reflecting on the exercise of its statutory powers. However, it should not be assigned primary responsibility for overall pension policy development.**

There is no consensus among OBA Members on this recommendation.

Some OBA Members are of the view that a mechanism that would allow the Ontario pension regulator to participate in the development of policy would provide greater guidance, in turn giving stakeholders a measure of certainty. In addition, certain OBA Members believe that allowing the Ontario pension regulator to participate in the development of policy would encourage appellate courts to grant greater deference to the Ontario pension regulator.

However, OBA Members do emphasize that any mechanism granting the Ontario pension regulator the ability to draft policy should also provide that the regulator must actively engage the stakeholders in the development of any such policy.

81. **Recommendation 7-22**

**The Ontario Pension Regulator should have greater control over its budget and hiring practices so that it can recruit, train and retain the professional and expert staff it needs to discharge its enhanced regulatory functions. With the approval of the Lieutenant Governor in Council, the Regulator should be able to fix levies on plans according to plan size or type, to charge user fees for particular regulatory transactions and to retain for its own purposes administrative fines levied by the new Pension Tribunal of Ontario.**

The OBA supports this recommendation. The Ontario pension regulator should be able to hire, recruit and train the expert staff required to discharge its regulatory functions. An expert staff, who are able to participate in policy development, will lead to more deference at the appeal level, and therefore more certainty for stakeholders.

The OBA does not have a unified submission on how the practicalities of this recommendation should be funded.

82. **Recommendation 7-23**

**The Ministry of Finance should supplement the budget of the Ontario Pension Regulator to enable it to perform functions such as data collection and analysis, which support policy-making and other non-regulatory functions.**

There is disagreement amongst OBA Members as to whether or not the Ontario pension regulator should be tasked with participating in policy development. However, if the Ontario pension regulator is to participate in policy development, it should be given the budget to collect and analyze data from the stakeholders in order to provide efficient and relevant policy.

The OBA does not have a unified submission on how the practicalities of this recommendation should be funded.

83. **Recommendation 7-24**

**The pension regulator should facilitate the introduction of a program of enhanced risk-based regulation by consulting closely with stakeholder groups concerning the collection and analysis of standard data on which risk assessment can be based, and it should subject its own risk-assessment systems to rigorous self-evaluation and to critical comment by stakeholders.**

There is no consensus among OBA Members on this recommendation.

Some OBA Members do not wholly support recommendation 7-24. Some Members question the current and proposed regulator's ability to determine potential risks. Other OBA Members support the development of more resources by the regulator and the implementation of those resources in a clear, responsive manner. These Members draw attention to the UK regulator in this regard.

However, if the Ontario pension regulator is to take on this task, it is critical that any risk-based regulation system should be developed in consultation with the stakeholders and submitted to regular and rigorous re-evaluation.

84. **Recommendation 7-25**

**The new Ontario Pension Regulator should have power to make rules in order to define and lend greater specificity and clarity to its governing statute and regulations. It should exercise this power only after giving stakeholders notice of, and an opportunity to comment on, proposed rules. Rules adopted pursuant to the use of this power should have the force of law so long as they are made in accordance with the statute and regulations and do not purport to contradict or derogate from them.**

The OBA supports recommendation 7-25. Given the complexity of pension operation, and given the voluminous gaps in the governing legislation, rules would help to give certainty to the stakeholders. Nonetheless, OBA Members emphasize that the Ontario pension regulator should develop any rules in consultation with industry and should do so under a clearly articulated principles based mandate.

## 7.5 Adjudication and Appeals

### 85. Recommendation 7-26

**The pension jurisdiction of the Financial Services Tribunal should be transferred to a new Pension Tribunal of Ontario. The Tribunal should have power to hear and decide specified matters at first instance, and to hear and decide all appeals from orders made by the Superintendent.**

There is no consensus among OBA Members on this recommendation.

Some OBA Members are of the view that the FST should be eliminated and appeals to decisions of the Superintendent should be made directly to the courts, whereas other OBA Members are of the view that an expert tribunal should replace the existing FST. These OBA Members support the creation of an expert tribunal with exclusive involvement in pensions to ensure that the decisions are granted greater deference by the courts.

The comments on recommendations 7-27 to 7-31 are made assuming it is determined that the new Pension Tribunal of Ontario should be established.

In terms of priority, the OBA is of the view that this should be a medium to long-term objective.

### 86. Recommendation 7-27

**The Pension Tribunal of Ontario should comprise a Chair who is a jurist of stature, two members with a background in law (or equivalent), and two members with a background in actuarial science (or equivalent). Appointments to the Tribunal should be recommended by a bipartisan nominating committee with a view to ensuring that the Tribunal enjoys the confidence of both sponsor-side and member-side stakeholders and is perceived to be balanced and neutral.**

**The Chair and members of the Tribunal should be allowed to serve part-time, but not to hold concurrent employment that might involve, or be seen to involve, them in a conflict of interest. All members of the Tribunal should possess expertise in pensions or some closely related field.**

The OBA supports this recommendation.

The Pension Tribunal of Ontario should be comprised of individuals with specialized knowledge of pensions and who have no conflict of interest with their concurrent employment. However, some OBA Members cite concerns with the costs of attracting and remunerating such specialized individuals to be Tribunal members.

The OBA supports an expert Tribunal to permit greater certainty and reliability of the decisions of first instance. An increase in the deference afforded to these decisions by the courts would create a greater reliability of the pension decision making process and hopefully minimize the lengthy litigation seen in recent pension cases.

### 87. Recommendation 7-28

**The Chair of the Pension Tribunal of Ontario should be allowed to sit alone to hear and decide cases relating to specific provisions, such as the enforcement of orders made by the Superintendent. In more complex matters that may require specialized actuarial or legal knowledge, the Chair may designate the two members with backgrounds in those fields to serve on a hearing panel. If in the**

**opinion of the Chair both types of knowledge are required, all four members may be designated to serve.**

The OBA supports this recommendation.

**88. Recommendation 7-29**

**The Pension Tribunal of Ontario ought to have all powers necessary to dispose of matters before it.**

The OBA supports this recommendation.

**89. Recommendation 7-30**

**The Pension Tribunal of Ontario should exercise exclusive and ultimate jurisdiction over all matters arising out of or incidental to the interpretation of the *Pension Benefits Act*. Decisions of the Tribunal should be final and binding, subject to appeal to the Divisional Court only if they involve a denial of natural justice, a misinterpretation of the applicable law so serious as to amount to jurisdictional error, or a violation of the constitutional rights of a party.**

See response to Recommendation 7-26.

**90. Recommendation 7-31**

**The Tribunal should have plenary power, upon enforcing or hearing an appeal from any order made by the Superintendent, to make any order required to secure compliance with the *Pension Benefits Act*, including but without limiting its general power, the power to:**

- **require the doing of any act required by the statute and the cessation of any act forbidden by it;**
- **order the payment of contributions, benefits or premiums wrongly withheld, together with interest thereon;**
- **require the disclosure of information and the provision of documents to the regulator, active and retired plan members, unions and representative organizations and others entitled to such information or documents; and**
- **impose administrative fines for non-compliance with the *Pension Benefits Act*.**

There is no consensus among the OBA membership on the enforcement authority of the Tribunal. Some Members support this set of recommended powers and a general planning power as an appropriate enforcement and remedial tool. Others oppose the extension of remedial powers. All Members agree that the Tribunal should operate with due process and in a manner that will be given deference by the courts.

## **Chapter 8 – Governance**

### *8.2 The Synergy between Regulation and Governance*

**91. Recommendation 8-1**

**The regulator should establish benchmarks or performance indicators covering the broadest possible range of governance issues, including funding, benefits, expense ratios, administrative costs**

**and service to members and retirees. Plan administrators should provide, and the regulator should collect and analyse, data relevant to these indicators.**

**The results of this exercise should be made publicly available so that sponsors, administrators and beneficiaries can evaluate the performance of their plans as against the performance of specific comparator groups and of the whole system.**

There is no consensus among OBA Members on this recommendation.

Some Members have several concerns with respect to this recommendation. Chief among these, is some Members' belief that appropriate governance of a pension plan is both contextual and evolving and that there is no universal standard or benchmark applicable to all plans. These Members believe rather, governance should reflect the needs and characteristics of each individual plan.

These concerns include:

- plan size will be a factor in fees benchmarks;
- service providers will not provide the information;
- publishing benefit levels will encourage employees to negotiate higher benefits;
- plan sponsors should not be required to fund to any target other than that in legislation; and
- this already exists from private service providers.

However, other Members support the regulator providing such benchmark information to provide guidance and clarity for sponsors and administrators evaluating their plans and making decisions. It would also be of significant interest and assistance to other stakeholders in participating in and evaluating the pension industry as a whole. These Members also submit that this benchmarking information is a core element of good governance, and publicly-available benchmark information could be a cost saving to plans.

## 92. **Recommendation 8-2**

**Unions should be encouraged to negotiate both the major substantive elements of pension plans arising out of collective agreements and the governing structures of such plans. The regulator should accord plans with joint governing structures a greater margin of regulatory discretion than would be available to plans lacking such structures.**

There is no consensus among OBA Members on this recommendation.

Some Members do not support recommendations that give deference to plans that have union involvement, or that have joint governance. These Members are of the view that an employer that decides to provide a pension plan ought not be required to have its delivery governed by any party other than itself, unless it determines (or agrees) otherwise. These Members also submit that good governance in this context can be encouraged by good disclosure and effective regulatory supervision.

These Members are also of the view that there should not be a relaxation of governance standards simply because a pension plan is jointly governed, as in their view union or employee involvement in plan governance does not necessarily result in better governance.

Other Members support this recommendation. The OECR Report indicated that a majority of plan members are in plans with which a union or similar collective bargaining agent is associated. Where there is plan member or union 'voice' in plan decision-making, these Members support a lower level of regulatory scrutiny.

93. **Recommendation 8-3**

**Unions that seek and accept a role in plan governance should be encouraged to ensure that both active and retired members have a voice in decisions that affect them. Unions should also develop the technical and analytical capacities necessary to support effective member participation in plan governance.**

The OBA supports this recommendation.

The OBA notes that where unions have accepted a role in plan governance, retired members are vulnerable to changes that are negotiated in the plans. In too many cases, retirees are not involved in the negotiations and are not consulted about their outcome.

The OBA draws attention to the Quebec scheme, whereby retirees are recognized as an entity and have a voice through a representative on any ongoing Pension Committee and/or at the bargaining table.

94. **Recommendation 8-4**

**Multi-employer and jointly sponsored pension plans should develop governance policies that ensure participation of representatives of both active and retired members in their governance, establish the means of selection of those representatives, fix their remuneration and lay down rules governing their conduct in office.**

The OBA supports this recommendation.

95. **Recommendation 8-5**

**Multi-employer and jointly sponsored pension plans should provide annual statements to all active, deferred and retired plan members, which include:**

- **a statement of the plan's current funded status;**
- **a reminder that benefits provided under the plan are not defined or guaranteed but subject to reduction while the plan is ongoing (in the case of multi-employer plans) or on wind-up (in the case of jointly sponsored plans);**
- **disclosure of any known events likely to lead to a reduction in benefits; and**
- **an indication of any procedure or formula specified by law or in the plan documents by which benefit reduction may be determined.**

The OBA supports this recommendation.

96. **Recommendation 8-6**

**Multi-employer and jointly sponsored plans should develop and abide by investment rules that prevent self-dealing either by the union that has negotiated them or by plan trustees.**

We agree that rules preventing such self-dealing should be included and spelled-out in the plan's Statement of Investment Policies & Procedures. We also note, however, that some self-dealing rules currently exist within the legislation that would address these concerns. Specifically, pursuant to sections 15, 16 and 17 of Schedule III to the *Pension Benefits Standards Regulation*, 1985, the board of trustees of multi-employer or jointly sponsored plan is prohibited from, directly or indirectly, lending the assets of the pension plan to, investing the plan's assets in, or entering into a transaction on behalf of the plan with a "related party" or a person who ceased to be a related party of the plan within the last twelve months. "Related party" is defined to include, *inter alia*:

1. The administrator or any member of the board of trustees or an agency, board, or committee or other body acting as the administrator of the pension plan;
- ...
4. An association or union representing members of the pension plan or an officer or employee of that association or union;
- ...
6. A member of the pension plan;
8. The spouse or child of any person referred to in paragraphs 1 - 7 above;
- ...

There are also rules under the ITA prohibiting investment by a pension plan in certain related parties (see Income Tax Regulation 8514).

#### 97. **Recommendation 8-7**

**All policies, statements or reminders required by current law or provided by multi-employer and jointly sponsored plans pursuant to these recommendations should be communicated to plan members and beneficiaries and filed with the regulator. The regulator should have the power to sanction violations of both statutory requirements and plan policies.**

The OBA supports this recommendation. It notes, however, that merely making more accessible the various types of documents that are required to be filed with the regulator will not necessarily result in the desired improvement in plan member awareness and understanding. Formal actuarial reports, plan financial statements and information returns that were designed for regulatory purposes are not well suited for member education. Disclosure of information that an administrator files with the regulator that may reasonably be regarded as commercially sensitive or that contains personal information should not be required to be disclosed to members.

Some OBA Members cite concerns with the costs associated with implementing this recommendation.

### 8.3 *Promoting Good Governance*

#### 98. **Recommendation 8-8**

**Any plan with some recognized form of joint governance and with the requisite capacity to make complex investment decisions (as defined by regulations) should be allowed to adopt a resolution**

**claiming an exemption from the 30% investment rule. The resolution should be filed with the pension regulator and have effect upon filing, unless and until it is successfully challenged.**

We addressed this recommendation in our letter dated February 6, 2009. Our response was as follows:

The second specific recommendation of the Expert Commission with regard to reform of the pension investment rules is the recommendation that certain pension funds should be permitted to invest in more than 30% of the voting shares of a corporation, thus being exempted from the so-called 30% investment rule. As mentioned above, the OBA is in favour of the elimination of the quantitative rules (including the 30% rule) and the implementation of rules/policy regarding prudence. The following comments are made in consideration of the specific recommendation of the Expert Commission.

The current rule prohibits a pension plan from investing the moneys of the plan in securities of a corporation to which are attached more than 30% of the votes that may be cast to elect the directors of the corporation (the "30% rule"). The stated reason for the proposal to exempt certain pension funds from the 30% rule is that permitting a greater than 30% voting interest in a business would allow a pension fund to become more of an active investor, rather than a passive investor as envisaged by the 30% rule (at the time it was introduced). Also, it has become evident that the 30% rule is so rudimentary in the way it was drafted it is both easily and frequently circumvented by pension funds and that the Ontario Superintendent of Financial Services currently lacks the tools to enforce the 30% rule in any meaningful way. There has been no judicial interpretation of the 30% rule, also making it extremely difficult for all parties to determine the intent and scope of this rule. The Expert Commission concluded that a jointly governed plan which has the requisite capacity to make complex investment decisions should be exempt from the 30% investment rule. Some OBA members are in full agreement with this conclusion.

In considering the 30% rule in isolation, the OBA notes that in practice, generally only the largest Canadian pension funds are active investors. While opinions may vary, it may be true that only pension funds with perhaps \$5-\$10 billion or more in assets would have sufficient resources to prudently manage an active investment portfolio. For pension plans registered in Ontario, this would currently limit the potential application of this rule to the largest jointly-sponsored pension plans for government employees (Teachers, OMERS, HOOP, OPSEU Pension Trust and the CAAT). As all of these plans are jointly sponsored, they would fit one of the criteria suggested by the Expert Commission for exemption from the 30% investment rule. The other criteria, namely the requisite capacity to make complex investment decisions, might be considered to be satisfied when the assets of a pension fund exceed a certain dollar threshold. The reasoning behind this threshold is that sufficient size provides a pension fund with the ability to maintain the necessary resources to be an active investor.

However, size is not necessarily the only robust indicator of “capacity” to undertake investments without the quantitative rules. Funds may also be able to demonstrate “capacity” by meeting a number of other criteria: obtaining adequate investment and other advisors, demonstrating investment policy that meets liability structures, ensuring sufficient external review and monitoring of decisions, and other criteria that would otherwise demonstrate “capacity”. Such criteria could be used to grant exemptions from the quantitative rules by the regulator in combination with some form of application and review process. We suggest that these criteria be articulated for comment and developed as guidance for the application of quantitative rules in a more targeted and responsive manner, assuming that the quantitative rules are retained in some form.

It should be noted that the origin of the 30% rule, as described in a 1986 paper presented to the Ontario government by the Pension Commission of Ontario entitled “Policy Recommendations for the Regulation of Pension Fund Investments” was to ensure that pension funds remained passive investors and prevent them from exerting significant influence over private sector companies. It appears that the Expert Commission concluded this original purpose is now outdated for some pension funds.

Most would agree that large pension funds can improve investment returns by adopting active investment policies, which often requires investing in more than 30% of the control of a business in order to influence management to make changes. Also, we agree it is now obvious that the existing 30% rule is so easily circumvented (albeit sometimes at additional cost to the pension fund) that it has become almost meaningless. The current rule is drafted so as to prevent pension funds from investing in more than 30% of the director voting shares, with no restriction on equity investments. Thus, as long as a pension fund does not have more than 30% of the director voting shares, it can hold more than 30% of the equity stake in a company. From a prudence perspective, there is very strong argument that it would not be prudent for an investor to take, for example, a greater than 50% equity stake in a company without some measure of voting control.

What is unknown is whether exempting certain large jointly sponsored pension funds from the 30% rule could in some circumstances prove disruptive to capital markets in Canada or to other aspects of Canadian fiscal policy or harmful to pension plan members. Some of the large jointly sponsored government pension funds are among the largest capital pools in Canada and have the potential to control large segments of the Canadian private sector. At the same time, these funds are potentially important sources of “patient capital” that increasingly face decisions to invest in, for example, local infrastructure. These concerns and pressures are beyond the scope of the Expert Commission’s report and the OBA is not qualified to address these impacts, but we believe that recommendations on these issues, based on research at the federal and provincial levels, are required in order to reach long-term solutions that make sense in the Canadian environment (perhaps as an initiative of the Federal/Provincial Working Group on Pensions through studies by

recognized experts). From a legal perspective, arriving at a stable, holistic set of rules that has the “buy-in” of all affected stakeholders is the most desirable outcome.

One important issue not discussed at length in the Expert Commission’s report is the tax treatment of pension funds versus other capital market players. There may be concerns arising from the fact that pension funds are subject to different tax rules than other segments of the Canadian economy. The OBA is of the view that this may be an important consideration for a separate study.

We would also caution that if the 30% rule were eliminated (or certain funds were exempt from its application), consideration would have to be given to any potential impact on existing provisions under the *Income Tax Act* (Canada).

### **Expert Commission’s Comments on Governance**

Although the Expert Commission did not make a specific recommendation on whether to eliminate the quantitative restrictions altogether and move to a “prudent person” standard, it is implicit in the comments in Section 4.14.3 that it was not in favour of such an approach on the basis that the “prudent person” standard, as it stands, is very vague. As set out above and as set out in our submission to the Expert Commission, the OBA supports a move to the prudent person standard and the elimination of the quantitative rules. However, we agree with the Expert Commission’s view that the current “prudent person” test is too vague and would recommend that as part of its review of the investment rules the governments give consideration to providing more detailed guidance on effective governance systems for the investment side of the operations of a pension plan. The OBA supports the implementation of the prudent person test with criteria outlined that must be considered in making any investments, but without any quantitative limits, similar to the structure of the *Trustee Act*.

Such guidance may include enumerating factors that will be considered in any regulatory review of prudence required in plan or fund decision-making. Prudence has been judicially considered in several contexts and may usefully be reviewed for “prudence factors”, and has also been considered in recent investigations by FSCO.<sup>2</sup> Possible factors may include, for example (and only by way of example):

- Established plan investment policies and objectives, including the SIP&P;
- Asset and liability structures and studies, as applicable;

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<sup>2</sup> FSCO, *Report of the Pension Plan Examination of the Ontario Municipal Employees Retirement System*, July, 2007.

- Specific plan history and experience, and special conditions or features of plan stakeholders (sponsors, employees, industry);
- Enhanced due diligence relating to PBA requirements for investments be documented, including sufficient documentation to support independent confirmation of conclusions;
- Sufficient documentation of investments for monitoring and compliance with the PBA;
- Sufficient monitoring of investments to ensure internal plan policies are followed;
- Ensure the SIP&P be amended to permit any new category of investment activity;
- All delegation be conducted according to transparent internal policies;
- All agents or related parties to a plan be governed by policies compliant with the PBA; and
- Criteria for related party transactions be reviewed for compliance with the purpose of those rules under the PBA.<sup>3</sup>

As prudence is also an important principle in a principles-based approach to regulation, we draw your attention to the U.K. Pension Regulator, which has developed regulatory guidance for industry participants that may be relevant to articulating guidelines in Canada.

99. **Recommendation 8-9**

**Plan sponsors who administer their own plan should be encouraged to reduce or eliminate inherent conflicts of interest by:**

- **ensuring, so far as possible, that those assigned to the role are given an unequivocal mandate to act in the best interests of the plan;**
- **providing representation for members and/or retirees and/or independent members on the plan's highest decision-making body; or**
- **retaining arm's-length professional advisors to administer the plan on their behalf.**

The PBA and the pension standards legislation of other common law jurisdictions anticipate that there can be a structural conflict the employer and administrator roles. In practice, the “two hat” basis has generally worked quite well. Within the framework of the “two hats”, it seems to us that a salient issue is the manner in which the conflict is addressed, rather than the elimination of the conflict. Reducing or eliminating conflicts of interest is desirable, and the extent to which the reduction or elimination of

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<sup>3</sup> Most of these factors were considered in the Borealis Report.

conflicts is prescriptive needs to be carefully considered, particularly in light of the relatively small size of some organizations that are both the sponsor and administrator of a pension plan. In this regard, the fundamentally voluntary nature of a pension plan is paramount. It follows that the parties to a pension plan should be free to design the plan as well as its administration and governance in a manner that suits their unique circumstances.

When an individual is acting in respect of the administration of the plan, as a matter of law and good practice he or she must act in the best interests of the plan. However, in many instances the organization is simply not large enough that individuals can be sequestered in such a way that their only roles concerning the plan are those of the administrator.

100. **Recommendation 8-10**

**Plans that appoint active or retired members to serve on their governing bodies should be encouraged to resolve potential conflicts of interest in advance by:**

- **adopting clear policy statements in the plan documents;**
- **ensuring the significant representation on those bodies of groups with divergent interests;**  
**or**
- **appointing some trustees or governors unaffiliated with any group whose members are covered by the plan.**

The appointment of representation of groups with divergent interests presupposes that one or more persons is unable to consider the interests of each group without the participation by representatives of those groups. The world outside of pensions functions without each interest group having its own representative and it follows that pension plans should be able to do the same.

For those that choose to include representatives of the various interest groups, procedures to address conflicts of interest are generally desirable. In particular, retirees have a unique relationship to a pension plan from which they are paid a pension. If retirees behave in a manner that is economically rational, their sole interests should be the amount of increases to pensions in payment and the security of funding. These are legitimate interests, but because retirees are otherwise removed from the employment relationship that gives rise to the pension plan, retirees do not have the same interest as active members in looking at the global interest of the plan as a whole. By comparison, active members are also interested in the quantum of pension and security of funding, but have more a more complex relationship to the pension plan. This includes being at risk of their contributions acting as an intergenerational subsidy for deficits in respect of retired members that is only subject to a true up under the 50% test on termination or retirement.

With respect to the use of policy statements, we are supportive of this. They should not be included in the documents that are traditionally captured by the concept of “plan documents”, as such statements likely speak more to implementation.

The ideal of appointing trustees or governors who are unaffiliated with any group points in the direction of “expert” trustees and governors. It would be appropriate to consider the experience of the use of professional (i.e., experts in the pension area) in other jurisdictions.

101. **Recommendation 8-11**

**The Pension Champion, proposed in Recommendation 10-5, should work with stakeholders to identify approaches to the resolution of conflicts of interest appropriate to their particular circumstances.**

The OBA supports this recommendation, subject to the comment that not all OBA Members support the idea of creating a separate body to serve as the “Pension Champion”. Some OBA Members believe this function could be assumed by the Pension and Income Security Policy Branch of the Ministry of Finance.

102. **Recommendation 8-12**

**The pension regulator and/or the proposed Pension Champion should initiate consultations with stakeholders and with representatives of the relevant professional governing bodies in order to ensure that their members provide services in the pension context in a manner consistent with the good governance and proper regulation of pension plans.**

**These consultations should focus on rules governing the conduct of professionals in pension practice, and on the redesign of regulatory and governance structures and processes — in both cases, with a view to ensuring the honest and transparent administration of pension plans.**

The recommendation seems to assume that services provided to pension plans are not consistent with the good governance and proper regulation of pension plans nor is the administration of pension plans honest and transparent. The general experience of our Members is that employers, administrators and their advisors seek to do what they believe to be the right thing and that there are relatively few attempts to act in ways that are contrary to good governance, proper regulation or honest and transparent administration.

In our experience, the more problematic behaviour among advisors occurs in two realms: individuals who are not part of a regulated profession and professionals in one area who purport to render advice and services in the area of another profession. Both pose systematic risk to sponsors, administrators and members. The resolution of these problems does not lie in holding consultations.

103. **Recommendation 8-13**

**The pension regulator and/or the proposed Pension Champion should initiate consultations with stakeholders and with representatives of the relevant professional governing bodies in order to clarify:**

- **which participants in the governance of pension plans are bound by fiduciary duties;**
- **the scope of such duties;**
- **whether such duties can be assigned to professional advisors and agents;**
- **whether advisors and agents are themselves bound by the same duties; and**
- **whether fiduciaries, their advisors and agents can enter into exculpatory contracts and indemnification agreements in order to limit their liability to the client or third persons.**

We are in favour of the role of the Pension Champion, although we believe that if the legislation were clarified to include that one of the regulator’s tasks is to encourage the creation and maintenance of

pension plans and/or the mandate of the Pension and Income Security Policy Branch of the Ministry of Finance was broadened, a separate body may not be required.

With respect to the various clarifications that are suggested above, we agree that these are timely and relevant issues. We expect that many of these issues would be addressed in a more robust codification of the law as set out in a revised PBA.

With respect to the establishment of a separate Pension Champion, we are mindful of the dramatic change in the finances of government and employers since the OECP Report was released. Successful and widely supported change tends to occur at the margins rather than by the wholesale destruction of existing structures and creation of new structures. While few question that the pension system in Ontario can be improved, there already exist structures which, with appropriate modification, might be more suitable to the needs of Ontario.

The amount of funding that is contemplated both for the Pension Champion as well as a revised regulatory structure needs to be considered in light of the proposed self-funding nature of the regulatory structure. The current economic environment is imposing severe financial strain on many employers (and, depending on the cost sharing structure, employees) in defined benefit pension plans. The regulatory structure needs to take this into account. In light of this, it would be easy to assert that additional funding should be provided from government revenue by virtue of the general social benefits that are associated with pension plans. Given what appears to be a rapidly deteriorating economy and a corresponding deterioration in government finances, it is not clear that there is support for a regulatory structure that costs significantly more than it does today.

#### 104. **Recommendation 8-14**

**Following such consultations, the pension regulator should draw up codes of best practice for the guidance of all participants in the governance process. The regulator should urge the governing bodies of professions whose members are involved in the pension field to**

- **adapt this code to the particular circumstances confronted by their members;**
- **implement the code, as adapted, through revision of their own professional standards, if required; and**
- **educate — and if necessary, discipline — their members in order to ensure compliance with the new standards.**

There is already a considerable amount of material concerning governance best practices, including that issued by individual regulators as well as joint bodies of regulators, such as CAPSA. It is not clear to some OBA Members whether a “made in Ontario” set of governance best practices will meaningfully add to the base of knowledge and information. Other OBA Members are of the view that good governance of pension plans is critical and that the existing guidelines are too vague to be of use to plan sponsors.

The proposal that governing bodies of professions could adapt and implement the codes suggests that the codes would be sufficiently detailed that it would have implications for various professions. Governance codes of such sweeping scope concerns us. Although there are various principles that apply in governance, whether corporate governance or pension governance, the application of those principles to a particular plan or organization is typically heavily fact based because of the unique circumstances of each organization and plan. Indeed, the case law that has considered governance reflects this sensitivity.

105. **Recommendation 8-15**

**All persons responsible for providing valuations, reports or other documents that are filed with the regulator, or provided to active and retired plan members, should be required to certify that all such documents have been prepared in accordance with the law and with relevant professional standards.**

We will be interested in the responses provided by the actuarial profession and various actuarial firms to this recommendation. It is one thing to say that a valuation or report has been prepared in accordance with the PBA, ITA and professional standards applicable to the person who prepared the report. It is quite another thing for the professional to state that the valuation or report complies with law. Actuarial science is an area that is very much left to the actuaries (a point that perhaps supports the self-governing nature of that profession). Even if there are lawyers who consider themselves competent to advise an actuary whether a valuation report has been prepared in accordance with the law, the nature of the law is that many issues are not entirely clear and therefore not amenable to such a certification

The recommendation refers to “All persons responsible for providing valuations, reports or other documents ... to active and retired plan members, should be required to certify ...”. This appears to extend to the administrator of the plan in providing a report or valuation to a member. The administrator relies on the professional who prepares actuarial and accounting reports, and is not in a position to certify legal and professional standards compliance. To the extent that a document has been accepted for filing by a regulator, we believe that the acceptance should be sufficient for provision of the document to others.

With respect to “other documents”, this could refer to a multitude of things, including plan texts, funding agreements, member communications, etc. This would be a significant change from the current structure under which the administrator certifies legal compliance to the regulator on a basis of knowledge and belief basis.

106. **Recommendation 8-16**

**An early task for the proposed Pension Champion should be to consult with pension stakeholders, relevant professional bodies, educational institutions and the pension regulator with a view to determining what lay and professional participants in plan governance ought to know about pension plans and the pension system, how they might best acquire such knowledge, and to what extent its acquisition should be a necessary qualification for service as a trustee or administrator of, or advisor or service provider to, a pension plan.**

The articulation of these issues is laudable. Pension governance is an issue that crosses jurisdictional lines, both within Canada and outside. We expect that much of the information already exists in other Canadian material that has been previously prepared and circulated in the public realm and that there is considerable material available from other jurisdictions that would provide a robust starting point for these considerations.

107. **Recommendation 8-17**

**Following the consultations outlined in Recommendation 8-16, the Pension Champion ought to develop standards for educational programs for all participants in pension governance. The Pension Champion ought also to determine how educational programs should be provided and at whose expense, and whether acquisition of appropriate educational qualifications should be mandatory and, if so, for the performance of what functions.**

In general, the OBA supports this recommendation, subject to co-ordination of the Pension Champion with existing resources. The OBA submits that informative educational programs on pension plan administration and governance are being offered regularly by colleges and universities, professional associations and commercial providers. Many plan administrators as part of their governance process attend these programs. The OBA further submits that pension plans vary in size and membership and thus, it is important to keep in mind that there should not be a one size fits all approach to such educational programs. Finally, the OBA notes that when plan administrators do not have all of the relevant expertise either individually or collectively, they discharge their responsibility by ensuring that the knowledge of service providers is acquired (e.g. actuarial firms, law firms, investment consulting firms etc.). Thus, while it is important to ensure that adequate training is offered, such training should be optional as opposed to mandatory.

**108. Recommendation 8-18**

**The regulator should develop codes of best practice to guide plan governors, administrators and their agents. These codes of best practice should be based on the experience of successful plans, disseminated across the pension system and used to give meaning to the general statutory requirements for “prudence,” “care,” “diligence” and “skill.”**

If codes of best practices are adopted by the regulator, the OBA submits that the regulator should specify the legal effect of such codes (e.g. same effect as a regulator’s policy; analogous to the safe harbour defence in the United States; or simply an example that plan sponsors can look towards for informational purposes). The OBA further submits that there cannot be a one size fits all with respect to such codes of best practice given the variety of types and sizes of pension plans. It should be anticipated that more than one approach could qualify as a best practice for a given activity.

The OBA draws attention to the fact that CAPSA has published “Guideline No. 4 - Pension Plan Governance Guidelines and Self-Assessment Questionnaire”. Plan administrators may adapt the questionnaire to suit the needs of their pension plans.

Finally, the OBA notes that plan administrators are often interested in investment related issues. If any codes of best practice are adopted they should include educating plan administrators about the investment options available and the process to follow in selecting and monitoring investments.

**109. Recommendation 8-19**

**The regulator should make available on-line to active and retired plan members and their authorized representatives — without charge but subject to security arrangements — all plan documents as well as triennial, annual or other valuations and reports required to be filed with the regulator.**

The OBA supports this recommendation.

The OBA submits that it should be clarified whether the regulator would be providing only new documentation or would also be scanning prior documentation.

In addition, the OBA queries whether this would have any impact on the obligation of the plan administrator to allow members to view its pension plan files (i.e. would the obligation to provide documentation listed in Section 45 of Regulation 909 under the PBA be removed?)

110. **Recommendation 8-20**

**The regulator should develop guidelines and codes of best practice with regard to the provision of plan information to active and retired members in accessible form.**

The OBA supports this recommendation.

It should be specified whether this recommendation addresses solely a plan administrator's responsibilities or also those of the regulator to provide plan information (Section 29 and 30 of the PBA).

The OBA submits that there are clear guidelines under the PBA with respect to various employee communications:

- The content of various statements (e.g. retirement, termination, death etc.) are clearly delineated under the PBA.
- Employee booklets summarize the key terms of a pension plan in a more user-friendly format.
- Changes to the pension plan are communicated through notices and annual statements and the content of such documentation is also prescribed.

The OBA queries whether this recommendation is meant to address the method of communication as opposed to content of the communication. For instance, an area that needs to be analyzed is whether the requirements under the *Electronic Commerce Act* (Ontario) (refer to Policy A300-805) with respect to electronic communication are too stringent, and whether this could be addressed by way of an amendment to the PBA.

111. **Recommendation 8-21**

**Plan administrators should provide an annual information statement to active and retired plan members in easily understood language or languages. The statement should include:**

- **a simple description of how pensions are funded and benefits are calculated under the plan;**
- **information on the plan's funded status (including whether it is in surplus or deficit and whether a contribution holiday is in progress or contemplated);**
- **the potential impact of its funded status on active and retired members' pensions; and**
- **a telephone number and/or website address where further information can be obtained from the administrator or the sponsor, and similar coordinates for the pension regulator.**

The OBA supports this recommendation.

The OBA would like to highlight the use of the term "languages" in the plural form. Unless there exist statutory requirements to make documentation available in more than one language, there should be no requirement to provide statements in a language other than English.

The OBA notes that information on funded status is based on filed information. The OBA submits that this disclosure to active and retired members should not create a requirement to perform additional financial updates.

112. **Recommendation 8-22**

**Plan board members, governors or trustees should prepare, file with the regulator and make available to active and retired members at three-year intervals (or more often, if material changes have occurred) the plan's detailed governance, funding and investment policies. Particulars of the matters to be addressed by these policies should be developed by the pension regulator in consultation with the stakeholders. Template policy statements should be developed for the assistance of smaller plans.**

SIPP

The OBA notes that plan sponsors are already required to adopt a statement of investment policies and procedures ("SIPP") that meets the requirements of the federal investment regulations. A SIPP is no longer required to be filed with the regulator but must be made available to a plan member or former plan member who requests such documentation (Section 29 of the PBA and Section 45 of Regulation 909 under the PBA). Some Members are of the view that these documents should be filed if they are revised and used.

The OBA submits that the focus of any regulatory policies should be on educating administrators about the investment options available for pension plans, i.e., the process they need to follow in selecting and monitoring investment vehicles for their plan (in this regard, the OBA notes that the Ontario regulator has not issued guidance on investments since the federal rules were adopted).

Governance Document

Some OBA Members recommend that while a governance document could be made available to members it should not be filed with the regulator. The level of detail of such a governance document should also be discretionary (i.e. will vary depending on many factors such as the size of the plan, the type of industry etc.).

Other Members support the development and regular filing of a governance policy.

Funding Policy

Some Members submit that for single employer plans, the employer should not be required to disclose its policy given that for business reasons, a pension plan sponsor should be entitled to follow any funding policy that complies with minimum regulatory funding requirements. These Members submit that information about actual valuation results and actual contribution obligations should be sufficient. All Members submit that this recommendation is appropriate for all other plans.

113. **Recommendation 8-23**

**Plan statements of investment policy should reveal whether, and if so, how, socially responsible investment practices are reflected in the plan's approach to investment decisions.**

The OBA supports this recommendation.

*8.4 Participation in Governance by Active and Retired Plan Members*

**114. Recommendation 8-24**

**Except as provided in Recommendation 8-26, every pension plan should be required to establish a pension advisory committee (PAC). A PAC should comprise at least five members, including one representative selected by retired members and one by each class or group of active members.**

**When plan members are represented by one or more trade unions or equivalent organizations, such unions or organizations should nominate their PAC representatives.**

There is no consensus among OBA Members on this recommendation.

Some OBA Members support the establishment of PACs since they would provide a voice to retired members and groups of active members. These Members also support the idea of having trade unions or other organizations nominate their PAC representatives. Other OBA Members do not support the establishment of PACs because they would add administrative and cost burdens to pension plans, they would be difficult to facilitate, and as such, would provide another disincentive to the establishment or maintenance of private pension plans.

While OBA Members are unable to reach a consensus regarding the establishment of PACs, they do agree that practically, it may be difficult to survey retired pension plan members in order to get them to choose a representative for the PAC and that, if implemented, the pension legislation will need to be changed to provide for the formation of a PAC by every pension plan.

The OBA notes that under section 24 of the current PBA, a simple majority of members and former members of a pension plan may vote to establish a PAC. The fact that this rarely occurs suggests either that members and former members have little interest in establishing PACs, or that they are generally not aware of their right to do so. Therefore, one approach might be to maintain the voluntary nature of PACs and require annual disclosure to members of their right to form a PAC.

**115. Recommendation 8-25**

**The PAC should:**

- **be provided with effective means of communicating with all plan members, including retired members;**
- **have access to all information distributed to plan members or filed with the regulator;**
- **receive notice of all amendments, applications, proceedings or transactions involving the plan; and**
- **be informed of all votes or consultations designed to solicit the views of plan members.**

**The PAC should present annually to plan members a report on the state of the plan and an account of its own activities during the year. This report should be distributed with other information that the administrator is required to provide to plan members.**

As with the OBA's response to recommendation 8-24 above, some OBA Members support this recommendation and others do not. Members who support the establishment of PACs in general support recommendation 8-25, while OBA Members who do not support the establishment of PACs do not

support this recommendation. While OBA Members are unable to reach a consensus on this recommendation, they do agree that if this recommendation is implemented, the pension legislation will need to be changed to support this recommendation and that there will be costs associated with preparing an annual report for plan members by the PAC.

**116. Recommendation 8-26**

**No PAC need be formed when (a) a plan provides for the participation of active and retired member representatives on its governing body, (b) a collective agreement provides for a joint sponsor–member–retiree advisory committee, or (c) a majority of active and retired members vote in a secret ballot not to establish a PAC.**

If recommendations 8-24 and 8-25 are approved, then the OBA supports this recommendation.

**117. Recommendation 8-27**

**The sponsor of a single-employer pension plan may enter into an agreement with a trade union, or other union-like organization that represents plan members, to establish a jointly governed target benefit pension plan. Such plans should (a) be governed by a board of trustees or comparable body on which representatives of plan members and retirees should comprise not less than one-half of its members, (b) offer target benefits, and (c) be funded on the same going concern basis as multi-employer and jointly sponsored plans.**

The OBA supports this recommendation and submits that the legislation will need to be amended to provide for the establishment of jointly governed target benefit pension plans.

**118. Recommendation 8-28**

**The *Pension Benefits Act* should be amended to describe pensioners as “retired” rather than “former” plan members.**

The OBA supports this recommendation.

**119. Recommendation 8-29**

**Retired and deferred plan members should be assured effective access to all plan information available to active plan members.**

The OBA supports this recommendation and submits that the pension legislation be changed to provide specifically for this recommendation.

**120. Recommendation 8-30**

**Retired plan members should be eligible to participate in any plan governance process in which active plan members are eligible to participate. The extent of their representation and participation in governance should be determined by the governing body of each plan, but must be sufficient to ensure that their voice is heard and their interests protected.**

Some Members of the OBA support this recommendation while others do not. Generally, the OBA acknowledges that there are difficulties in facilitating participation of retired plan members.

In addition, the OBA submits that if this recommendation is implemented, the legislation should be amended in order to provide for the representation and participation in governance processes by retired plan members.

## **Chapter 9 – Innovation in Plan Design**

### *9.2 Promoting Innovative Plan Design*

#### **121. Recommendation 9-1**

**Innovation in plan designs should be promoted and facilitated by the proposed Pension Champion (see Recommendation 10-5).**

The OBA generally supports this recommendation, subject to our comments regarding recommendation 10-5. However, the OBA is of the view that amendments to the PBA to permit and facilitate new pension plan designs should not be contingent on recommendations by a new Pension Champion. Some OBA Members are of the view that the Ontario government should act quickly to amend the PBA to accommodate a broad range of new plan designs, including designs identified in the OECRP Report and other designs that the OECRP Report does not identify.

The OECRP Report identifies a number of pension plan designs that combine risk elements of DC and DB plans:

- Hybrid plans: DC benefits with a DB minimum.
- Cash Balance plans: DC benefits with an employer-guaranteed rate of investment return on individual accounts.
- Contingent Benefit plans: DB plans that pay certain benefits (e.g. indexing) only if the funded position of the plan meets or exceeds a certain threshold.
- Target Benefit plans: DB plans that promise a “target” benefit. Fixed (DC-style) employer contributions are determined on a best-estimate basis. The target benefit is adjusted as necessary to match available funding.
- Member-Funded plans: DB benefits with a fixed employer contribution and variable member contributions.

Some of these pension designs (e.g. Contingent Benefit and Target Benefit) may be provided in a multi-employer arrangement but not as single-employer plans. Others (e.g. Cash Balance and Member-Funded) are effectively prohibited under the PBA. As the OECRP Report notes, rules under the ITA are an obstacle to many viable pension designs. The plans identified above represent only a partial list of pension plan designs that should be available but cannot be registered under the PBA or under the ITA. Other kinds of plan designs that should be permitted and facilitated include the following:

- Pension plans that allow members to fund DB-style benefits in individual accounts, with or without employer contributions.
- Pension plans that allow individuals to fund to a target account balance, with or without employer contributions.

- DC pension plans in which responsibility for managing investments is delegated to employers or sponsors.

The OBA agrees with the OECP Report's recommendation that pension rules enable "plan designs not now permitted". However, OBA Members do not have consensus regarding what new plan designs should be implemented. Some Members submit that target benefit plans should be permitted even if not jointly-governed by employers and workers. These Members submit that the legislation be amended to permit all governance models, including:

- Joint governance by members and employers
- Governance by an employer acting alone
- Governance by a professional, trade or member association
- Governance by a private sector service provider offering pension plan membership on a subscription basis, as some jurisdictions now permit for simplified pension plans.

Other Members support the recommendation as drafted, providing new plan designs, but certain plan designs in association with certain governance models. These Members agree with the OECP Report that target benefit plans provide a useful alternative, and as a significant feature, should include joint governance. These Members draw attention to the current MEPP model as a useful comparator to these proposed "JGTBPs".

The OBA agrees with the OECP Report's recommendation that the Ontario and federal governments should enter into a dialogue regarding changes that need to be made to the federal income tax rules. Nevertheless, the OBA is of the view that legislative change in Ontario should not be contingent on obtaining agreement in advance from the federal government to amend income tax rules to allow new pension plan designs under an amended PBA.

The OBA recognizes that this could lead to a situation in which Ontario legislation would permit plan designs not permitted under federal tax law. However, the fact of such inter-jurisdictional inconsistency would in effect create a strong impetus for the federal government to amend income tax rules to accommodate pension plan designs permitted under Ontario law and perhaps, to undertake a comprehensive and long-overdue review of federal tax rules for deferred-income retirement saving.<sup>4</sup>

We note that when Quebec introduced its new member-funded pension plan design in 2006, the federal government acted quickly to amend the Income Tax Regulations to accommodate this new design. With this in mind, the OBA believes that if the Ontario government takes the initiative to amend the PBA to facilitate and permit a broad range of new plan designs, there is a strong likelihood that the federal government will respond with amendments to the ITA and Regulations to accommodate new plan designs permitted under an amended PBA.

### *9.3 Promoting Larger Plans*

#### **122. Recommendation 9-2**

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<sup>4</sup> For a discussion of how federal income tax rules could be reformed to improve private sector workers' ability to save for retirement, see the recent C.D. Howe Institute study "A Pension in Every Pot" at [http://www.cdhowe.org/pdf/Commentary\\_275.pdf](http://www.cdhowe.org/pdf/Commentary_275.pdf).

**Pension policy and legislation ought to facilitate the growth and operation of large-scale pension plans or to enable and encourage cooperation among small- and medium-sized plans.**

The OBA supports this recommendation. Pension plans can operate much more efficiently on a large scale. As discussed in the OECF Report and in our response to recommendation 9-1 above, large pension plans can achieve very significant economies of scale through asset pooling. If designed and governed appropriately, they can also pool risk effectively.

*9.4 A new Strategy for Ontario's Occupational Pensions System*

**123. Recommendation 9-3**

**Legislation and regulations should be enacted to enable and promote large commingled target benefit plans that might provide affordable pension coverage to Ontarians who do not presently have pensions or for whom the costs of obtaining a pension are unnecessarily high.**

The OBA supports this recommendation. The OBA notes that less than 25% of Ontario's private sector workers have pension coverage whereas in the public sector, more than 80% of workers do. One major impediment to coverage in the private sector is that pension plan membership is unavailable to workers whose employers do not sponsor pension plans.

The OBA is of the view that every worker – including the self-employed – should be able to join a pension plan. This means the PBA and the ITA must be amended to remove restrictions that prevent workers from joining pension plans that are not sponsored by an employer and to facilitate employer contributions to any pension plan their employees may join.

The OECF Report suggests that large, commingled pension plans should provide “target” benefits. The OBA submits that large, commingled pension plans should not be limited to providing target DB benefits. They should be permitted to provide benefits in a variety of forms including as DC benefits, DB-style benefits with individual member accounts and DB-style benefits with individual employer accounts.

*9.5 Ontario's Long-term Pension Strategy: Stakeholder Views and Additional Possibilities*

**124. Recommendation 9-4**

**The government of Ontario should investigate the advantages and disadvantages of expanding the mandate of the Canada Pension Plan, or creating a comparable provincial plan, so as to enhance pension coverage, control costs and improve benefit portability.**

The OBA supports this recommendation. The OBA supports any initiative focussed on increasing pension coverage. It is very important for the Ontario government to critically assess the merits of innovative plan designs such as the creation of a Supplemental Canada Pension Plan Account or a stand-alone Ontario-wide plan as potential strategies to increase pension coverage in Ontario while minimizing costs. We note that the government of British Columbia has already announced in its most recent budget the creation of an Alberta British Columbia plan (“ABC Plan”) designed to allow workers in the private sector to save in a large-scale defined contribution pension plan.

**125. Recommendation 9-5**

**The government of Ontario should support the call for a national pension summit whose agenda should extend to all ideas for significantly expanding pension coverage, including the innovative proposals contained in this report.**

The OBA supports this recommendation. The OBA strongly endorses the idea of a national pension summit with a mandate encompassing all types of pension plans and the innovative plan designs.

## **Chapter 10 – The Future of Defined Benefit Pensions and Pension Policy in Ontario**

### *10.2 Optimism and Pessimism about the Future of Ontario's Defined Benefit System*

#### **126. Recommendation 10-1**

**The government should:**

- **considerably improve the collection of data concerning all aspects of the pension system;**
- **regularly produce analyses of pension coverage, the funding status of pension plans, the contribution of pension plans to capital and labour markets, the performance of the pension regulator and other indicators of how Ontario's pension system is working;**
- **use such analyses to support periodic and ongoing review of pension policy and the regulation of the pension system; and**
- **make pension data and analysis readily available to stakeholder, professional and academic users.**

The OBA supports this recommendation. The OBA notes that there are serious deficiencies in data collection regarding pension plan membership, pension plan coverage, retirement savings behaviour and retirement savings accumulations of Ontario residents. Lack of adequate statistical information about pension coverage and retirement savings sufficiency continues to be a serious impediment to developing pension policy and legislation targeted toward improving retirement income adequacy for Ontario workers. The OBA recommends that the Ontario government act quickly to improve collection of data related to pension and retirement saving and that it develop closer relationships with federal government entities – particularly the Canada Revenue Agency and Statistics Canada – to improve the collection and analysis of data.

#### **127. Recommendation 10-2**

**A Pension Community Advisory Council should be formed comprising representatives of all significant stakeholder groups together with other interested parties such as professionals, service providers, academic researchers and business and social advocacy groups. It should be provided with access to data and interpretative studies on Ontario's pension system, invited to advise on significant policy initiatives, and used as a forum to promote an informed and ongoing exchange of views on pension issues.**

The OBA supports this recommendation. However, the OBA notes that this PCAC could be challenging to implement. It is not clear how members of the council would be selected or how they would be remunerated. As proposed, the role of a PCAC would overlap with the role of the Pension Champion (proposed in recommendation 10-5) and with existing advocacy organizations. The OBA suggests that the roles of the Pension Champion and the PCAC should be combined, or that they be clearly delineated to avoid overlap of responsibilities.

128. **Recommendation 10-3**

**The *Pension Benefits Act* and regulations should be drafted in such a way that changes can be made with all deliberate speed to facilitate the introduction of new types of pension plans, to enable rapid regulatory responses to significant changes in the social and economic environment, and to safeguard the interests of sponsors and plan members.**

**Significant changes in pension law should be accomplished through regulation-making. Except in emergencies, the process of regulation-making should provide for timely notice to and comment by stakeholders and other interested parties, and for advice by the proposed Pension Community Advisory Council.**

The OBA supports this recommendation.

129. **Recommendation 10-4**

**Ontario's pension policy, legislation and performance should be comprehensively reviewed every eight years.**

The OBA generally supports this recommendation, subject to the caveat that there should be ongoing review of pension policy and legislation, as recommended elsewhere in the OECF Report.

*10.3 Making Change Happen: A Pension Champion for Ontario*

130. **Recommendation 10-5**

**Ontario should identify an agency or unit of government as its Pension Champion with responsibility for conducting research into the pension system, for working closely with the stakeholders and the proposed Pension Community Advisory Council, for promoting and facilitating innovation in the pension system and for leading policy development efforts in the pension field.**

The OBA supports this recommendation. The Ontario government should be encouraged to identify an agency or unit of government as a Pension Champion such as the Ministry Finance, or establish a new one, with the broad responsibilities set out under this recommendation that include conducting research, collaborating with stakeholders and the proposed Pension Community Advisory Council, promoting and facilitating innovations in the pension system and leading pension policy development.

While the OBA, in our submissions, had identified that FSCO and the FST do not have all the resources needed to perform the functions of the envisioned Pension Champion, it is suggested that if FSCO's Pension Plans Branch were provided with the resources necessary to be able to provide advance rulings and greater policy-making functions with respect to regulation, then FSCO could provide such input to whichever stakeholders and/or agency or unit of government was designated as the Pension Champion.

While FSCO has the power to make recommendations to the Minister on matters affecting the regulated sectors (section 3 of the *Financial Services Commission of Ontario Act*), it is suggested that the Pension Champion should have direct access to the Minister on all pension related matters.

In terms of priority, the OBA is of the view that a pension specialized regulator is a more urgent requirement. The implementation of a Pension Champion could be a short to medium-term objective.

131. **Recommendation 10-6**

**The new Pension Champion should be provided with highly qualified and sufficient staff and resources adequate to undertake its assigned functions.**

The OBA supports this recommendation. The ability of the Pension Champion to consult with stakeholders and the proposed Pension Community Advisory Council effectively will depend on the Pension Champion having the appropriate resources both in terms of having qualified and sufficient staff to rely upon to get the work done at an appropriate level and proper supplies and services available to perform its required duties successfully.

132. **Recommendation 10-7**

**The Minister of Finance for Ontario should promote and support a meeting, at the earliest feasible date, of provincial and federal ministers responsible for pension issues with a view to discussing:**

- **the possible implications of further divergence in provincial pension policies, legislation and regulatory arrangements if, as and when the recommendations in this report, and in the reports of other provincial pension commissions, come forward for consideration, enactment and implementation by the governments involved;**
- **the need for the provinces to act collectively in order to secure changes in federal legislation, particularly the raising of pension contribution limits under the *Income Tax Act* and the more favourable treatment of pension plans and members under federal bankruptcy and insolvency legislation; and**
- **the potential for some greater standardization of procedural and technical requirements in provincial pension legislation, in light of recommendations contained in the reports of the three current pension commissions and an anticipated report from the Canadian Association of Pension Supervisory Authorities.**

The OBA supports the harmonization of Ontario pension law with the law of other jurisdictions in Canada, but there is no consensus among its Members as to the priority that should be attached to this issue. The OBA supports action to raise the pension contribution limits under the ITA.

The OBA would also refer you to our letter dated February 26, 2009 in which we set out certain broad issues for a provincial-federal working group on pensions to consider.

*10.5 Getting From Here to There*

133. **Recommendation 10-8**

**The government should maintain momentum in pension reform by moving as rapidly as possible to determine whether or to what extent it wishes to implement the recommendations in this report. Having established its basic direction, the government should then identify issues for priority treatment. An early priority for the government should be to put in place appropriate agencies and officials who can carry forward the ongoing work of reform.**

The OBA strongly supports this recommendation. There is an urgent need for pension reform. Immediate action by the government is necessary. At the outset of this submission, we have identified certain issues for priority treatment. The OBA would be pleased to assist in identifying other issues for priority treatment or providing further submissions on specific issues of interest to the government.

134. **Recommendation 10-9**

**The government should identify recommendations that will require phased implementation as well as transitional measures to allow stakeholders to bring themselves into compliance with the new regulatory regime over some reasonable period of time. However, it should be vigilant to ensure that arguments favouring phased implementation and transitional measures are not used to obstruct reforms that the government believes to be necessary and appropriate.**

The OBA supports this recommendation.

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