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**CONSUP**  
COUNCIL OF NOVA SCOTIA UNIVERSITY PRESIDENTS

A Response To:

**The Nova Scotia Pension Review Panel's  
Discussion Paper**

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July 4, 2008

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## INTRODUCTION:

This is the submission of the Council of Nova Scotia University Presidents (CONSUP) in response to the Nova Scotia Pension Review Panel: Discussion Paper. The views and concerns expressed represent those of all 11 universities in Nova Scotia.<sup>1</sup> Given the growing concern that pension law and regulation are not keeping up with the changing needs and conditions of today's society, we appreciate this opportunity to contribute to the discussion on such a timely and important project.

It is possible for both defined contribution (DC) and defined benefit (DB) pension plans to continue to exist and even to flourish in Nova Scotia. However, to ensure that this potential is realised, CONSUP strongly supports some fundamental changes to the Nova Scotia *Pension Benefits Act* (PBA). Current legislation and regulation focuses almost exclusively on protecting the benefits and rights of plan beneficiaries. Important though these issues are, this singular focus increasingly has the consequence of deterring plan sponsorship.

Universities are important participants in the pension world, and their circumstances warrant particular consideration by the Panel. This submission focuses on the changes to the PBA that CONSUP recommends to provide a sustainable environment for university pension plans, thus enabling Nova Scotia universities to compete with universities operating in other Canadian jurisdictions and internationally as educators, employers and innovators.

Universities in Nova Scotia offer a wide variety of pension programs; however, the basic concerns regarding the regulation and administration of these plans are consistent. Key priorities include the reform of pension plan funding rules, the introduction of safe harbour rules for DC plan sponsors, and regulatory reform.

## THE UNIVERSITY SECTOR IN NOVA SCOTIA:

CONSUP represents the 11 degree-granting post-secondary institutions in Nova Scotia. The university sector has unique needs with respect to pension planning and pension reform. Factors that inform CONSUP's concerns with the current pension regulatory scheme and which guide this submission include:

- The important role universities play in Nova Scotia's economy.
- The competitive nature of the University sector across the country and internationally and the impact of provincial legislation on the ability of Nova Scotia Universities to compete.

It is important to recognize the role our Universities play not only as educators, but as contributors to Nova Scotia's economic, social and research development. The University sector in Nova Scotia is a \$1 billion industry. In 2006 greater than sixty percent of domestic spending on research and development was performed by the Higher Education sector.<sup>2</sup> Universities are

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<sup>1</sup> See the "Schedule of Participating Institutions" following the conclusion for complete list of members.

<sup>2</sup> Statistics Canada, Domestic spending on research and development (GERD), performing sector, by province: <http://www40.statcan.ca/l01/cst01/scte02d.htm>. Total domestic spending on R&D in NS = \$464 million; Total of domestic spending on R&D performed in the Higher Education sector = \$298 million. This amounts to 64% of R&D spending being performed in the Higher Education sector.

important contributors to the economy, employing thousands of Nova Scotians. University pension plans operate on a large scale and have the ability to invest in the type of assets or opportunities that an average individual investor or small employer would not. As such, universities are important contributors to the economy as investors.

Universities stand apart from other private sector employers. Universities are stable, mature institutions. The risks of instability or closure that face other private sector employers do not threaten universities. Many provinces, including Nova Scotia, have recognized the stability of universities and have made changes to pension legislation specific to their needs. Nova Scotia previously lengthened the amortization period applicable to solvency payments for university DB plans. Other provinces have gone further. Universities in Alberta, Quebec and Manitoba are currently exempt from solvency funding valuations.<sup>3</sup> The absence of comparable relief for universities in Nova Scotia offering DB Plans is a competitive disadvantage. It diverts operating expenses that should be spent improving academic achievement and enhancing the student experience.

The university sector in Nova Scotia competes with its peers beyond the borders of our province. To be nationally and internationally competitive, Nova Scotia universities must be able to attract students, faculty and research opportunities. CONSUP supports legislative change that fosters competitive universities in Nova Scotia.

#### **KEY PRIORITIES FOR REFORM:**

##### 1. Pension Funding Rules for DB Plans

- Universities should be exempt from solvency funding valuations due to the nature of the pension programs (large, stable, and low risk), the competitive needs of the institutions, and the competitive environment in which they exist.
- Alternatively, legislation should allow greater flexibility for university DB plan sponsors to provide solvency funding relief, such as:
  - Solvency Accounts should be permitted, with solvency contributions separated from the main fund, thereby limiting volatility and amounts of employer contribution requirements.
  - Legislation should be amended to lengthen the amortization period over which Universities are required to pay solvency deficits.
  - Sponsors should be permitted to use letters of credit as assets for funding solvency deficits.
- The province should request that the federal government amend the *Income Tax Act* to allow greater contributions to pension programs by plan sponsors.

##### 2. Safe harbour rules

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<sup>3</sup> See Appendix A for a more detailed review of legislation and pension relief in the other provincial and federal jurisdictions.

- Pension legislation should adopt safe harbour rules with respect to DC plans, similar to those in effect in the United States. A plan stakeholder who meets certain clearly stated criteria would then have a measure of protection from legal liability.

### 3. Regulatory system reform

- Additional resources should be provided to the office of the Superintendent of Pensions.
- The legislation should provide an internal right of appeal from a proposed order of the Superintendent to a separate administrative body (eg. Utilities and Review Board).
- Harmonization of minimum standards legislation should be sought either throughout Canada or, at least, throughout Atlantic Canada.

### SPECIFIC DISCUSSION QUESTIONS:

The questions in the Nova Scotia Pension Review Panel Discussion Paper on which CONSUP has chosen to comment are itemized below in the order of their appearance in the paper.

#### **3.0 Pension Plan Legislation:**

*Should pension legislation and regulation have goals other than those listed?*

Yes. The goal of pension legislation and regulation should include promotion of a regulatory environment which makes pension plans more feasible and attractive to employers.

In 2006, thirty eight percent (169,134) of employees in Nova Scotia participated in a registered pension plan. Of the total number of participants, forty four percent (75,118) were participating in the private sector plans governed by the PBA.<sup>4</sup> Interestingly, while seventy eight percent (132,340) of all those participating in registered pension plans were in defined benefit plans, only twenty eight percent (47,975) were participating in a private defined benefit plan. Participation in registered pension plans has declined since 1996, especially the number participating in private defined benefit plans. In contrast, the number of employed workers in Nova Scotia has risen steadily.<sup>5</sup>

The goal of legislation should include the provision of a framework in which participation is not only a possibility but an attractive option. This will require a balancing of competing interests: those of plan sponsors with those of plan beneficiaries.

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<sup>4</sup> Statistics Canada, Registered pension plan (RRP) members, by area of employment, sector and type of plan (NS): <http://www40.statcan.ca/101/cst01/famil119d.htm>; Statistics Canada, "Registered pension plans (RPPs) and members, by jurisdiction of plan registration, sector and type of plan (Nova Scotia): <http://www40.statcan.ca/101/cst01/famil117d.htm>

<sup>5</sup> Nova Scotia Pension Review Panel Discussion Paper, May 2008, at 6-7.

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### 3.1 Types of Plans

*Are there plan designs not in use that would provide the benefits of a defined benefit (DB) plan while minimizing the risk?*

*Should new forms of DB pension plans be permitted to enhance their availability?*

*Should new forms of hybrid pension plans be permitted to enhance their availability?*

The challenge for DB plans today is to achieve security and protection of benefits while managing funding risk, volatility and the cost and complexity of plan administration. Pension legislation, including the federal Income Tax Act, must recognize that the current regulatory system does not adequately encourage plan sponsors to provide DB or DB-type pension plans to their employees.

The focus with respect to DB plan funding should be on minimum funding rules that are flexible enough to meet the needs of different types of pension plans and plan sponsors, and which do not discourage the establishment and continuance of DB plans.

**Solvency Accounts-** Universities who sponsor DB plans are concerned about solvency based funding. CONSUP's primary position is that solvency funding should be eliminated for the university sector. This position is discussed further in Section 4.2, below as an alternative position. CONSUP proposes the creation of Solvency Accounts. Employer contributions made for solvency purposes would be held separately from the rest of the pension fund in a separate solvency account. Solvency accounts would be an account separate from the assets of the employer and the other assets of the pension plan but available to meet benefit obligations where the rest of the pension fund is not adequate.

Solvency Accounts help in managing volatility. If later not required to secure or provide benefits, the funds contained in Solvency Accounts could be released back to the sponsor with notice to the Superintendent and the members. In this way, they do not discourage plan sponsors from contributing to the plan in a more generous fashion than otherwise as there is no risk that payments made cannot be retrieved if not required.

**Multi- Unit Plan-** The multi-unit plan is a type of multi-employer plan. It is presently offered to the employees of two or more affiliated employers under the Alberta legislation. The participating employers may appoint one of their number to act as plan administrator, or may administer the plan through a board of trustees. The legislation provides for the plan to be set up in one of several ways, as agreed to by the participating employers. As an example, plan assets may be pooled, or held in separate accounts. CONSUP suggests the introduction of a similar concept into the PBA. The withdrawal of a participating employer from a multi-unit plan should not constitute a partial wind-up. Members moving from one participating employer to another within a certain time frame should not be forced to terminate membership and lose their vested status. The multi-unit arrangement would permit a group of employers to benefit from economies of scale.

**Target Benefit Plan-** We believe a broader array of tools and possibilities for managing and sharing risk, beyond the pure DB and DC models, is desirable. For plan sponsors of DB plans, who do not underwrite pension guarantees as their main business activity, the unpredictability of pension costs can overwhelm their main line of business.

To provide greater flexibility and choice, it is necessary to expand the existing "pure DB versus pure DC" paradigm, and to accommodate a wider variety of solutions. For instance, a Target Benefit Plan, whereby (a) the sponsor's obligation to contribute would be limited to a specified rate (the rate may change from time to time via agreement among the parties to the plan, but there is no onus to contribute beyond the current commitment), (b) the benefits available would be limited to those that could be provided by the assets in the pension fund, and (c) financial risks would be pooled among plan members, would present a mixture of both DB and DC elements that would provide individual members a level of benefit predictability and group investment opportunities and oversight, while at the same time restricting the risk borne by the plan sponsor.

Regardless of the framework determined, the nature of the deal must be clearly communicated, documented, regulated and adhered to. At this time, for single employers there is the defined benefit deal, the defined contribution deal and the hybrid "greater of" version. Allowing for Target Benefit type plans would expand the possibilities for providing pensions in Nova Scotia, and allow another way to share or manage risk.

#### **4.1 DB plans versus DC plans – Policy Issues.**

*Should the current trend towards less DB plans be accepted, or should regulators permit DB plans that may be more attractive to employers by reducing funding risks?*

Pension plans and retirement benefits are valuable components of employment compensation packages. Compensation packages are an important part of the recruitment and retention of employees. CONSUP believes that regulators should be neutral as to the format of retirement plans. The PBA should defer to employers to assess the appropriate retirement savings mechanism for their work force, whether it be DB, DC, or otherwise.

CONSUP believes that the present regulatory environment discourages DB pension plans and that this should be resolved through legislative amendment. DB plans offer employees valuable security and retirement planning options. Changes are required to enable the continued viability of DB pension plans.

Competition and the ability to be competitive is an important issue for CONSUP members. Each university in Nova Scotia competes with other academic institutions across Canada and internationally. They compete to attract the top faculty, staff, students, research and benefactors. Competitive compensation packages are an important part of the recruitment and retention of talented faculty and researchers.

As is the case in DC plans, the importance and value of DB plans extends beyond the scope of employment relationships. DB plans play an important role in the financial market and national economy. Large DB plans engage in complex investing practices and have the ability to invest in the type of assets that the average investor would not consider.<sup>6</sup> The Ontario Teacher's Pension serves as an excellent example of the economic impact and role pension plans can play in the national economy. Providing a regulatory environment that supports the continuation of DB plans is important on the provincial, regional and national scale.

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<sup>6</sup>David Dodge, speech presented to l'Association des MBA du Quebec (AMBAQ) in Montreal, Quebec, 9 November 2005.

Another benefit of DB plans is the intergenerational risk sharing that they allow. In DB plans, the sponsor and employees may increase contributions to fund a deficit that results from low investment returns. Older workers nearing retirement will bear only a small portion of this funding burden while the younger workers bear more<sup>7</sup>.

Despite these benefits, statistics indicate that DB plans are on the decline. Commentators suggest this decline is due to changes in the labour force and cost related disincentives to operating DB plans. Current funding rules are a significant component of this problem.

Funding risks in a DB plan arise primarily through self-insuring mortality risk and investment risk. These risks may be reduced or they may be transferred in whole or in part. Risk can be transferred by pooling the investment risk among plan members or reduced by better matching of assets and actuarial liabilities. The ability to reduce risk, through a better matching of assets and liabilities or through "offloading" a portion of it via an annuity purchase, already exists in current legislation. The ability to transfer risk by pooling it among plan members does not presently exist. Thus the real question is not whether regulators should permit DB plans that reduce funding risk – since the ability to reduce risk exists already – but whether we should permit plans that better distribute risk amongst all stakeholders.

Reducing risk in a traditional DB plan comes at a cost. A better matching of assets and actuarial liabilities, for instance, will lend greater certainty to the sponsor's contributions. However, these contributions are likely to be higher than has traditionally been the case. Thus the cost of reducing risk is expressed in the form of higher cash contributions over time.

Transferring risk could be accomplished through the Target Benefit Plan concept mentioned earlier. Risk does not disappear, but greater cost certainty is introduced for plan sponsors. These types of arrangements should be permitted by legislation. It is important to note that these arrangements do not preclude the additional funding (by employers and/ or employees) of deficits rather than reduction of target benefits. However, additional funding would be a result of discussion and/or negotiation among stakeholders, and a solution would be agreed upon rather than mandated by a funding law.

Currently, DB plans have become a less desirable option administratively. Pension reform must address funding risk and relief for employers if DB plans are to continue to be a viable option.

*In the case of DC plans, to what extent should an employee's right to make investment choices be limited, and by whom?*

As a plan administrator is responsible for monitoring the investments offered under the plan, the administrator should also be the one to choose the investments that are available. The choice of plan investments should be tailored to each plan, and depends on a number of factors. The pension legislation in Quebec sets out guidelines as to the types of funds that should be offered, and is a useful minimum standard. The CAP Guidelines also provide a useful guideline in this regard. Nova Scotia could adopt similar legislation to guide plan sponsors in meeting their fiduciary responsibility.

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<sup>7</sup> James E. Pesando, "Risky Assumptions: A Closer Look at the Bearing of Investment Risk in Defined Benefit Pension Plans." C.D. Howe Institute Commentary, No. 266, June 2008, available online: [http://www.cdhowe.org/pdf/commentary\\_266.pdf](http://www.cdhowe.org/pdf/commentary_266.pdf)



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*Should DC members have the ability to use different disbursement options, such as LIF-type payments, rather than be required to convert funds on their retirement date? (LIF = Life Income Fund)*

Yes. Flexibility of disbursement payment options for members would benefit both members and plan sponsors. A member required to convert to a life annuity or life income fund at the time of retirement may be adversely affected by current investment conditions, and have no opportunity to later recoup those losses. Providing for variable payment options from a DC plan as permitted under the federal *Income Tax Act*, for example, could increase the options available to a member. Retirees would be able to leave their funds in the pension plan and continue to enjoy the benefits of a group plan with respect to investment returns and fees.

#### **4.2 Pension Plan Funding:**

*Are current rules for measuring and remediation (the act of correcting a deficiency) of going concern and solvency deficits appropriate?*

*Should there be exceptions to the funding rules for universities, multi-employer pension plans and municipalities, or anybody else?*

Pension legislation and regulation should not penalize employers who voluntarily establish and maintain DB pension plans for employees; especially regarding solvency funding. The current rules for correcting solvency deficiency are in need of reform and they are the number one concern for Nova Scotia universities operating DB plans.

The current funding rules require accelerated funding as a remedy for solvency deficits. The purpose is to enhance and sustain the security of plan benefits in the event of wind-up. A residual effect is enhanced security on a going concern basis. Understandably, the potential for pension plan solvency deficits is a very serious funding concern. However, for large pension plans, a small solvency deficit can have a huge impact on cash-flow and operating budgets.

Universities are stable, mature organizations which present minimal funding risk. Valuing long-term, mature pension plans on a point-in-time basis under volatile market conditions can create chaos for management of the fund and business operations alike. Contribution rates set under these conditions are likely to have little or no bearing on actual funding requirements over the long term. The purpose of valuations is to provide security for beneficiaries; however, contribution rate changes under these conditions may not be in their best interest if it diminishes the employer's ability to operate.

University DB pension plans are large, relative to the size of the university. Small changes in interest rates can generate significant solvency deficits. Provisions for funding should recognize the long-term nature of the pension plan and its ability to endure variations in funding status related to the volatility of the market. University DB pension plans should be allowed to manage contributions using a longer-term approach to valuation of their assets and liabilities, and market conditions. As such, universities should be exempt from solvency funding valuations and from the requirement to contribute additional amounts into the plans to amortize solvency deficiencies.

University pension plans are an integral component of the compensation packages for faculty and staff and thus an integral component of employer-employee relations. Universities expect

their pension plans to be competitive in the marketplace, while faculty and staff expect them to be a secure source of retirement income. An increase in pension cost diverts money from the operating budget which would otherwise be attributed to the important public mandate of these institutions. Money diverted from university programs and activities impacts the university's strength and competitiveness.

Universities present minimal pension plan funding risk. The risk of a university plan winding up is extremely remote, and the risk of not meeting wind-up obligations is even more remote. There is no record of any university in Nova Scotia failing to meet pension obligations in over 50 years of offering formal pension plans to employees. Stability and predictability of contribution rates in a competitive environment is a more important public policy consideration for universities than never used short-term wind-up protection.

Other provinces provide exemptions and relief from standard funding which puts Nova Scotia at a competitive disadvantage. Faculty, staff, students and researchers are not confined to the geographical borders of our province and are free to pursue careers, education outside Nova Scotia. If Nova Scotia universities wish to continue providing competitive benefits they will need relief from the burdens currently imposed by solvency funding requirements. Universities in Alberta and Quebec are currently exempt from solvency funding valuations. The absence of funding relief for universities in Nova Scotia puts them at a competitive disadvantage.

To provide an example to illustrate the competitiveness point, Dalhousie University is among the 'Group of Thirteen' ("G-13") research intensive universities in Canada<sup>8</sup>. Of the thirteen universities represented in this group, five presently operate in jurisdictions where universities are exempted from solvency funding (University of Alberta, University of Calgary, Université Laval, McGill University, and Université de Montréal). Assuming that British Columbia and Alberta regionally standardize their pension legislation at the recommendation of the Joint Expert Panel in those provinces, six universities (University of British Columbia) will be included in this list. This issue is presently before the Ontario expert panel as well. **Should the Ontario government elect to follow suit, all of the G-13 universities except Dalhousie will be exempt from this onerous funding obligation.**

Given the important public policy objectives served by Nova Scotia universities, the very different risk profile of the university sector, and the competitive environment in which universities operate, we believe it is not in the Province's interest to impose accelerated funding requirements inherent in the traditional solvency test on university-sponsored defined benefit plans. Going concern funding recognizes is more relevant, and provides greater stability with respect to university operating budgets. Going concern funding recognizes future expected market experience – returns, interest rates, mortality and risks. The result is a more stable long term financial plan. It is CONSUP's position that universities should be exempted from solvency based funding valuations and corresponding funding obligations.

Alternatively, if universities are not exempt from solvency funding valuations, other conceptual alternatives that the Panel should consider include:

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<sup>8</sup> The G-13 universities are: University of Alberta, University of British Columbia, University of Calgary, Dalhousie University, Université Laval, McGill University, McMaster University, Université de Montréal, University of Ottawa, Queen's University, University of Toronto, University of Waterloo, University of Western Ontario

(a) Lowering the threshold for accelerated funding. In the present environment, accelerated funding must occur when the plan's funded ratio (measured on a solvency basis) falls below 1.0; this could be lowered to 0.8 for university plans.

(b) Extended amortization periods for solvency deficits.

In addition to proposed alternatives to accelerated funding, CONSUP proposes the PBA explicitly permit the use of letters of credit to fund solvency deficiencies and the use of Solvency Accounts.

**Letters of Credit-** Pension sponsors should be allowed to use letters of credit as assets for solvency contributions. A letter of credit guarantees that the issuer will honour the demand for payment made by the third party beneficiary (pension plan) under the specified conditions. Minimum standards should address the conditions of use of letters of credit, financial rating of the issuer, and credit status of the sponsor. Allowing letters of credit will enable pension sponsors to address fluctuations in solvency status resulting from the volatility of the market and reduces the strain on cash-flow. Solvency funding is achieved without immediately removing funds from the operating budget or negatively impacting benefit security. To date, the Federal government, Alberta, and Quebec have provided allowance for the use of letters of credit in solvency funding.

**Solvency Accounts-** As discussed above, pension plan sponsors should be given the statutory right to establish Solvency Accounts regardless of current plan language.

If the provision of greater funding flexibility to plan sponsors is considered to be a public policy objective, then that public policy objective should be supported by legislation that gives sponsors the right to establish solvency accounts and use letters of credit.

As previously stated, we believe going concern funding is the most relevant for plans in the university sector, and accelerated funding in any circumstance other than those described above is inconsistent with a going concern approach and detrimental to the university sector's ability to manage their DB plans.

*Should going concern funding be a requirement?*

Yes. The current legislated requirements should be maintained.

*Should there be a requirement for full funding at windup?*

Yes. In a traditional single employer plan, full funding should be required at full wind-up. Different wind-up funding arrangements may be negotiated as, for example, in a Multi-Employer Plan. Legislation should exclude universities from partial wind-ups in circumstances where associated employers withdraw from the pension plan. For example, where a research affiliate achieves independence from the university, a partial wind-up should not be triggered.

*Is the idea of a province-wide pension plan for some public or private employers a good idea? Should such a plan operate as a multi-employer pension plan?*

Based on data which suggests that the plans that are financially healthiest are those with the largest pool of funds to invest, the introduction of broad based pension plans should be pursued on an optional basis only, principally for smaller employers. In addition to economies of scale,

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such plans would permit mobility of members between covered employers, and provide plan terms that are uniform, consistent and easy to understand, with improved communications between member and sponsor. It is anticipated that such a plan would operate as a multi-employer plan or a multi-unit plan. Such a plan would be voluntary, and should not be imposed on employers for whom there would be limited or no additional economies of scale.

### 4.3 Surpluses

*Should regulators speak to the question of the ownership of plan surpluses; if so, what should it say?*

Legislation should recognize the freedom of parties to negotiate and contract terms of an agreement. In recent years, significant pension reform has come by way of the courts. The courts have applied trust law principles to pension plans as opposed to contract law. As a result, the concept that pensions are negotiated employment benefits solidified by contract has been lost. The PBA must revitalize the freedom of parties to voluntarily contract pension benefits.

The present status of proprietary rights related to surpluses has contributed to a chronic state of underfunding by sponsors. Sponsors are reluctant to adequately fund plans due to the risk of creating a surplus to which they may not have any future rights.

Employee and beneficiary groups should be concerned by this outcome. Where case law favours these groups in the surplus decisions, the ultimate consequence is a general deterrence adequately funding pension plans and against providing them at all.

Surplus ownership should be clearly defined in the plan documents with broad minimum funding standards. The parties should have the freedom to negotiate future entitlements to surplus, ability to use surpluses for expenses, future contributions, etc., regardless of existing plan language.

Legislation should provide for a mechanism to track and keep separate the stream of solvency contributions (Solvency Accounts).

Distribution of surplus on partial wind-up should not be required. Distributing surpluses on partial wind-up weakens the funding of pension plans for remaining plan members. It also contributes to the reluctance of plan sponsors to adequately fund the plan at the risk of generating a surplus.

#### 4.5 Policy Issue - Governance

*Should government attempt to define, audit and regulate "good governance"? Why or why not? If so, what types of governance issues should be regulated?*

**Governance-** The present principles-based model for governance is sufficient, subject to appropriate standards of care for administrators and their delegates. There are a number of best practices guidelines available to plan stakeholders, notably:

- Guideline #4: Pension Plan Governance Guidelines and Self-assessment Questionnaire published on October 25, 2004 by the Canadian Association of Pension Supervisory Authorities;
- OECD Guidelines for Pension Fund Governance adopted by the Organization for Economic Cooperation and Development on April 28, 2005; and
- 20 Questions a Director Should Ask About Their Role in Pension Governance published by the Canadian Institute of Chartered Accountants in 2003.

These identify good governance principles and best practices in order to assist plan sponsors in establishing the best governance structure for their individual plan. Each plan differs, as will its best means of governance.

A plan can expect to recover the costs of establishing and complying with good governance practices through improved administration.

**Fees-** The PBA should permit a plan administrator to recover its reasonable administrative expenses from the plan, regardless of historical plan and trust language. This is consistent with the general law of trusts, under which a trustee may be paid its reasonable expenses from the assets of the trust. Justice Gilese in the 2007 Ontario Court of Appeal decision in *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)* (on appeal to the Supreme Court of Canada) recognized this rule in finding that the default in a pension trust arrangement is for reasonable expenses to be paid from the fund: "Silence [in the Plan text] does not create a legal obligation on the company to pay [plan expenses]." This approach has also been adopted in the Province of Quebec.

#### 4.7 Role of Regulators

*Does the current regulatory system work effectively? Are there currently unnecessary rules and regulations in place? If so, what are they? Should the appeal process be changed? If so, how?*

**Funding-** The present regulatory system is reasonably effective. The 2006 Annual Report on the Administration of the Pension Benefits Act published by the Nova Scotia Pension Regulation Division shows that revenues from fees for the year ending March 31, 2006 were \$313,115 while direct operating costs were \$206,755. Under the present regime the Superintendent performs a number of roles, including plan regulation, advising members, issuing rulings, and the hearing of appeals of those rulings. Given the Division's responsibilities, it is understaffed.

**Appeal Process-** The PBA provides that the Superintendent must first issue a proposed order. To appeal a proposed order, an affected party may require the Superintendent to reconsider the

proposal. If dissatisfied with this appeal, the party may further appeal the Superintendent's reconsideration to the Nova Scotia Supreme Court. This process places the Superintendent in a very difficult position of being required to hear her own appeals. The requirement to hear each case twice is not an efficient use of scarce resources. In a number of other pension jurisdictions, some or all decisions of the pension regulator may be appealed directly to an administrative tribunal. This is the situation in five of the nine other pension jurisdictions. Only under the federal PBSA and in Saskatchewan and Newfoundland and Labrador is the first appeal made to the Superintendent. In our opinion the system in Nova Scotia could be improved by introducing an appeal process that provides for appeal to a second level of administrative decision maker, prior to any appeal being made to the courts.<sup>9</sup>

CONSUP's position is that the second level decision maker in this province should be the Nova Scotia Utilities and Review Board ("UARB"). The UARB is an independent, quasi-judicial body which has both regulatory and adjudicative jurisdiction flowing from the Utility and Review Board Act and reports to the Legislature through the Minister of Finance. The UARB would be appropriate for this role given its experience adjudicating matters of a financial nature and its history dealing with Nova Scotia taxation issues. The UARB most closely approximates the Financial Services Tribunal in Ontario which presently hears appeals.

As a longer term goal, it is CONSUP's position that a single second level decision maker should be introduced for the four Atlantic provinces. A new administrative tribunal should be created combining expertise from the four provinces. This panel should oversee the regulation of pension plans, regionally.

**Harmonization-** Although located in Nova Scotia, CONSUP members face competition for employees from employers across the country. There are many benefits in a uniform pension regulatory system for Atlantic Canada. Many Atlantic Canadian businesses have employees in more than one province in Atlantic Canada. There is mobility between Atlantic Canadian universities.

We further support the harmonization of pension legislation in all Canadian jurisdictions. The Proposed Regulatory Principles for Model Pension Law released by CAPSA in 2004 was a promising beginning, and received a great deal of input from pension stakeholders.

Harmonization, whether national or regional, would also hopefully result in the streamlining of unnecessary and or outdated rules and regulations.

#### **4.9 Unlocking Funds**

*To what extent should regulators attempt to regulate an employee's right to access funds?*

Current legislation should be maintained. Access to pension funds (DB and DC) should be severely restricted and limited only to extreme situations. The public policy behind locking in pension funds is to ensure that pension plan assets are available to benefit the employee at retirement. The Province has an interest in ensuring that employment sponsored pension benefits are available for employees in retirement, because otherwise they become a burden on the state.

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<sup>9</sup> See Appendix C for a Chart comparing the Appeal process in other minimum pension standards legislation across Canada.

Unique to DB plans is the traditional benefit of sharing longevity risk. Longevity risk is shared amongst the larger group of participants. The increased demand on the pension fund resulting from some members living longer than expected is offset by the reduced demand where other members do not live as long. Permitting access to pension funds before the eligibility date reduces the benefit of shared longevity risk and reduces the pool to the cost of the remaining beneficiaries.

Allowing employees access to pension funds before their eligibility date also has the negative effect of increasing the volatility of the fund liabilities. It presents challenges for accurately assessing the actuarial cost of accrued benefits. Pension funding is calculated to support individuals through their anticipated life span. The consequence is not only a negative impact to the pension sponsor, but also fellow beneficiaries.

#### **4.10 Grow-in Benefits**

*Should the legislation require grow-in benefits to be provided on plan windup?*

CONSUP takes the position that grow-in benefits should be removed from the legislation. Grow-in is not provided in any other jurisdiction with the exception of Ontario. It competitively disadvantages Nova Scotia universities relative to universities operating in other Canadian provinces. Grow-in or similar benefits should be left to the parties to negotiate as terms of the pension plan.

#### **5.1 Safe Harbour Rules**

*Should safe harbour rules be established that would give DC plan sponsors and administrators protection from litigation?*

Yes, we believe that pension legislation should adopt the idea of a safe harbour with respect to DC plans. A plan stakeholder who meets certain clearly stated criteria would then have a measure of protection from legal liability.

A safe harbour is not designed to remove all fiduciary obligations from a pension plan sponsor. Instead, its purpose is to provide a measure of protection and certainty for a sponsor whose actions can be objectively perceived as reasonable and prudent under the circumstances. The safe harbour criteria must be clear and easy for all stakeholders to understand. It would be essential that adherence to the criteria be relatively simple for sponsors and that the safe harbour procedures be voluntary for sponsors.

The Joint Forum of Financial Market Regulators' Guidelines for Capital Accumulation Plans is a useful outline of industry best practices with respect to capital accumulation plans. We recommend that these guidelines be used in designing the criteria, although the criteria themselves should certainly be more specific and fewer in number than the CAP Guidelines. The criteria should be broad-based so as to allow flexibility from plan to plan, and address all important areas of DC plan good governance as do the CAP Guidelines.

Reference should also be made to the U.S. experience with safe harbour protection under the Employee Retirement Income Security Act (ERISA). An important safe harbour offered under ERISA is the relief from liability for investment losses extended to a plan sponsor who meets all

legislated requirements. This should also form one of the safe harbours offered under the Nova Scotia PBA.

As is the case under ERISA, three distinct safe harbours should be provided: 1. A committee directed safe harbour, 2. A participant directed safe harbour and 3. A fiduciary adviser safe harbour.

Plan sponsors should have the comfort of knowing that if they comply with certain statutory requirements, they will have a measure of protection from legal liability. Including safe harbour provisions in the PBA would be an important step towards encouraging employers to continue to offer pension plans to their employees.

## 5.2 Phased Retirement

*What other issues are raised by phased retirement and what should be the regulatory position of Nova Scotia?*

The flexibility of the new phased retirement provisions under the Income Tax Act (Canada) should be maintained under the PBA. In particular, the PBA should permit employers, on a fully optional basis, to implement phased retirement as follows:

- Benefit accrual may be at any percentage of the member's accrued pension, to a maximum of 60%
- There is no requirement for a member to take a reduction in work time or in salary, subject to negotiation between the employer and the employee
- Participation may be negotiated between employers and employees on a one on one basis at the discretion of the employer, thereby avoiding the requirement to extend the program to an entire class of employees

Phased retirement will benefit universities, given the nature of their workforce. Universities must be able to offer flexible work options to be competitive. The availability of phased retirement under the PBA may help to offset the financial impact on universities of the elimination of mandatory retirement. The precise conditions of a sponsor's phased retirement program, subject to the Income Tax Act requirements and protection of the member's accrued benefits, should be left to each individual plan sponsor, based on its particular requirements.

## UNSOLICITED ISSUES

*Income Tax Act*- Although commentary regarding the *Income Tax Act* maximum pension funding rules was not sought by the Discussion Paper, it is CONSUP's view that the Nova Scotia Government should be encouraged to request that the Federal government increase the current *Income Tax Act* 110% maximum for funding.

Limiting contribution levels inhibits plan sponsors from contributing greater in prosperous time to cushion against deficiencies in rough times. Where assets are at or above 110% of liabilities, sponsors are unable to further contribute during times when they are most able to contribute.



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The maximum contribution provision in the *Income Tax Act* is yet another deterrent for sponsors from funding pension plans adequately.

Amid concerns that DB plans specifically, and pension savings generally are on the decline, reform efforts should focus on fostering pension planning as an attractive option for sponsors. Increasing the maximum contribution allowed would provide sponsors one incentive to better fund pension plans. While the *Income Tax Act* is a federal statute, at present it impedes prudent funding of pension plans which is a concern for all provincial jurisdictions. CONSUP supports increasing the maximum.

**Electronic Communication-** CONSUP supports the explicit recognition of electronic communication with pension plan members by the *PBA*.

### **CONCLUSION:**

While protection of employee rights should continue to be an important goal of pension legislation, it should not be the only goal. Rather, legislative reform should also address the rights and needs of plan administrators and plan sponsors which have previously been underserved by the present regulatory scheme. Protection for employee rights has come at the expense of the viability and attractiveness of providing such benefits in the first place. Policies that foster under-funding of DB pension plans do not protect employees and do not benefit employers.

It is CONSUP's position that regulatory change is required to benefit university pension plans and support the broader public policy objectives which universities serve. CONSUP supports the introduction of relief with respect to DB funding, safe harbours for DC plans, as well as the simplification and (at least) regional harmonization of the legislative environment in which our members' plans operate.

Overall, CONSUP members look forward to a regulatory environment that enables the development of pension plan options, rather than limiting the ability to provide retirement planning alternatives.

The changes we have suggested will place Nova Scotia universities in a healthy competitive position on the national and international stage. CONSUP's proposals will contribute to the continuing good health of employer-sponsored pension plans, to the health of the university sector and to the economic and social development of the province of Nova Scotia.

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## **MEMBER INSTITUTIONS**

Acadia University  
[www.acadiau.ca](http://www.acadiau.ca)

Atlantic School of Theology  
[www.astheology.ca](http://www.astheology.ca)

Cape Breton University  
[www.cbu.ca](http://www.cbu.ca)

Dalhousie University  
[www.dal.ca](http://www.dal.ca)

University of King's College  
[www.ukings.ca](http://www.ukings.ca)

Mount Saint Vincent University  
[www.msvu.ca](http://www.msvu.ca)

Nova Scotia Agricultural College  
[www.nsac.ca](http://www.nsac.ca)

NSCAD University  
[www.nscad.ca](http://www.nscad.ca)

Université Sainte-Anne  
[www.usaintanne.ca](http://www.usaintanne.ca)

St. Francis Xavier University  
[www.stfx.ca](http://www.stfx.ca)

Saint Mary's University  
[www.smu.ca](http://www.smu.ca)

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## APPENDIX A – Legislative Relief for Universities Across Canada

### **Alberta**

- Universities are required to disclose their solvency position but are not subject to solvency funding except where the employer terminates the plan or withdraws from the plan under circumstances specified in s. 73(3) of the Act.
- The *Employment Pension Plans Regulation*, Alta. Reg. 35/2000 provides for the use of letters of credit to fund solvency deficiencies for all employers other than specified multi-employer plans. The Regulation reads:

**48.1(2)** An employer, other than a participating employer under a specified multi-employer plan, may, instead of making some or all of the required solvency deficiency payments, use or continue to use a letter of credit to secure those solvency deficiency payments for a particular year if and only if the letter of credit and the bank obligated under the letter of credit satisfy the requirements of this section.

Specific guidelines for plans that qualify and when/how these letters can be used are included in the provision.
- Member employers of the Universities Academic Pension Plan (UAPP) include:
  - University of Alberta,
  - University of Calgary
  - University of Lethbridge,
  - University of Calgary Faculty Association,
  - Athabasca University,
  - Banff Centre, and the
  - UAPP Trustees Office.
- Schedule 0.1 to the *Employment Pension Plans Regulations* provides additional exemptions for the UAPP in relation to:
  - a) participation agreements
  - b) certain actuarial valuation reports and cost certificates
  - c) benefits and entitlements on plan termination
  - d) entitlement of employees to join the Plan (employees employed under a term contract of employment entered into before January 1, 2001 not entitled to become members)
  - e) locking-in
  - f) solvency limits on transfers of assets
  - g) certain funding requirements contained in s. 48 of the Act and in s. 48 of the Regulations. In addition, the solvency tests and plan funding rules are treated differently for the UAPP.<sup>10</sup>

### **British Columbia**

- There are no legislated exceptions for plans sponsored by universities. University DB plans are subject to the same funding rules as all other DB plans in the province.<sup>11</sup>

<sup>10</sup> COU Submission – Appendix B

<sup>11</sup> NS Discussion Paper at 14.