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NEW GUIDELINES PROPOSED FOR CAPITAL ACCUMULATION PLANS

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The Joint Forum of Financial Market Regulators has just released proposed Guidelines for Capital Accumulation Plans (CAPs) for public comment. CAPs include all employer-sponsored savings plans which allow employees to make investment choices. There are four primary CAP investment vehicles: defined contribution plans, Group RRSPs, deferred profit sharing plans and stock purchase plans.

The guidelines describe the duties and responsibilities of CAP sponsors including:

- The prudent selection and supervision of service providers and the documentation of their applicable roles and responsibilities.
- The degree of diversification, liquidity and level of risk associated with investment option.
- Providing a reasonable opportunity to transfer between investment options at least once a month.
- Providing adequate plan disclosures, investment information and decision-making tools to employees to assist in making investment decisions.

The guidelines also require a CAP sponsor who does not possess the necessary knowledge and skills to carry out its responsibilities set out in the guidelines and other legal requirements to enlist the services of appropriate service providers. A CAP sponsor may also be required to select a service provider to provide investment advice to members.

Although the risks and potential employer liability have generally been associated with defined benefit plans, sponsors of CAPs should be aware that such retirement investment vehicles may pose even greater fiduciary risks and potential employer liability. Often the employer is involved in the essential parts of the investment decision process by determining the type, quality and range of investment options and choice of investment managers.

Such determinations amount to at least indirect investment control by the CAP sponsor that may incur liability.

In light of the poor economic climate, an employer who sponsors a CAP may encounter employees' dissatisfaction relating to poor investment performance or investment losses. Such dissatisfaction could evolve into large and costly class actions based on such grounds as: failing to provide adequate and accurate information to employees to make informed investment decisions; the employer did not prudently select or monitor the investment alternatives and investment manager; employees were provided with an insufficient range of investment option to permit adequate diversification; and the employer provided inaccurate or improper investment advice.

Although the proposed guidelines do not carry the same weight as statutory or regulatory requirements, nevertheless it would be prudent for CAP sponsors to address the potential ramifications of the proposed guidelines and focus on risk management strategies to limit their potential exposure to liability. A court will certainly focus on whether a plan sponsor followed the guidelines in making a determination on liability.

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