



Barbara Palk, CFA, President

TD Asset Management Inc.
TD Canada Trust Tower
161 Bay Street, 35th Floor
Toronto, Ontario M5J 2T2
T: 416 982 6681 F: 416 308 9916
barbara.palk@tdam.com

March 16, 2009

Diane Lafleur
Financial Sector Policy Branch
Department of Finance
L'Esplanade Laurier
20th Floor, East Tower
140 O'Connor Street
Ottawa, Ontario K1A 0G5
E-mail address: pensions@fin.gc.ca

Dear Ms. Lafleur:

**Re: Comments of TD Asset Management Inc. on January 2009
Consultation Paper on Federal Regulation of Private Pension Plans
(the "Consultation Paper")**

TD Asset Management Inc. is pleased to submit this comment letter to the Department of Finance ("you") in connection with your efforts to help the Government of Canada (the "Government") to improve federal regulation of private pension plans.

We are submitting this letter in our capacity as a leading investment manager of pension plan assets. We are a wholly-owned subsidiary of The Toronto-Dominion Bank and are one of Canada's largest asset managers. We are a fully integrated investment manager and offer a wide range of investment products and solutions, including pooled funds, mutual funds and segregated accounts, to pension plans, endowments, foundations, trusts, corporations and individuals. Together with our affiliates, we managed over \$172 billion of assets as of February 28, 2009, including over \$37 billion for pension plan clients.

COMMENTS

General Comments

We fully support the need for and purpose of defined-benefit pension plans ("DB plans") in Canada. They are good for employees, employers and the country as a whole. As noted in the Consultation Paper, DB plans are attractive because they provide more predictable retirement income for plan members.

Unfortunately, DB plans across Canada are under unprecedented strain. In our view, this is primarily due to risk asymmetry, improper regulation and obtuse accounting/actuarial principles. Those factors and others are responsible for the growing number of defined-contribution pension plans ("DC plans") and hybrid plans. If DB plans are to remain



viable, Canada needs to have sound rules on DB plan funding, and the investment of DB plan assets in particular.

As noted in the Consultation Paper, DB plans represent the overwhelming majority of federally regulated pension plan assets. Accordingly, our comments below focus mostly on how the Government can help solve the problems that DB plans face.

Specific Comments

1. The Government should remove the current quantitative investment limits and protect plan members by improving the prudence requirement.

The pension fund of a DB plan exists to grow the contributed amounts in a way that, over time, will fully or substantially pay for the amounts that have been promised to the plan members.

Under the *Pension Benefits Standards Act, 1985* (the “Act”), a plan administrator must invest the assets of the pension fund within prescribed quantitative limits, and in a manner that a prudent person would apply in respect of a portfolio of investments of a pension fund. The current rule is intended to provide ‘belt and suspenders’ protection, but does not protect plan members properly.

The current rule correctly protects the members of a plan by holding the plan administrator accountable to an objective standard: the amount of care that a prudent person would exercise. In addition, the rule correctly recognizes that the conduct of a prudent person arises in a portfolio context. Unfortunately, the rule adopts the wrong context.

The conduct of a prudent person should not be measured in the context of a hypothetical investment portfolio whose other components are unknown, or a pension plan for which the payment amounts and timing are unknown. Instead, the conduct of a prudent person should be measured in the context of the investment portfolio of the pension fund at issue, and the payment obligations of the plan at issue. A degree of caution that is appropriate for one plan can be too cautious for another, and can prevent a plan from achieving the investment returns that are needed to fully satisfy the pension promise.

Together, the current approach to prudence and the current quantitative limits obstruct plan administrators from making decisions that are objectively sound for their plan. The quantitative limits are under siege in several provinces that previously adopted them. The limits impose compliance costs on plan sponsors and investment managers, and indirectly on the plans themselves. It has become clear that the costs exceed the perceived benefits.

The quantitative limits should therefore be eliminated, and the prudence requirement strengthened. The Act should require the administrator of a DB plan to invest the assets of the pension fund in the best interest of plan members, and in a manner that a prudent person would apply in the context of the overall investment portfolio of the fund and the

payment obligations of the plan. When a plan administrator's duties of loyalty and care are formulated properly, those duties amply protect the plan members.

In connection with the current prohibition on a pension fund owning more than 30% of the voting shares of a company, potential concerns about a negative effect on Canada's capital markets are unfounded. The overwhelming majority of DB plans, especially single-employer plans, do not acquire shares with the intention of controlling a company. Moreover, transactions have been designed to sidestep the 30% voting limit. There is no way to sidestep the duties of loyalty and care.

Some people say that pension investment rules should only be amended in concert with investment rules in other financial sectors, such as the insurance sector and public mutual funds. We disagree. The restrictions in each sector are driven by different considerations. Pension fund investment decisions should be driven by the plan's obligations and not by artificial investment limits or hypothetical investment portfolios. Pension law reform is urgently needed and cannot afford to wait on reforms to other financial sectors.

The Government's decision in 2005 to repeal the quantitative limit on foreign content is a final reason why the remaining quantitative limits should be removed. The Government spent decades slowly increasing the amount of foreign content that a registered pension plan could have in its investment portfolio. Eventually, the Government realized that any quantitative limit on foreign content inherently obstructs the administrator of a registered pension plan from acting in the best interest of the plan. The Government therefore removed the foreign content limit altogether.

2. The Government should remove, rather than simply raise, the 110% ceiling on actuarial surplus under the *Income Tax Act*.

In our experience, where pension law discourages plan sponsors from building a significant surplus, they are strongly tempted to move away from the asset mix that would otherwise be best for the plan. We recognize the concern about tax deferral, but still believe that there should be no limit or taxation on the amount of surplus that a sponsor can build. Had plan sponsors been more able to save for a rainy day, many plans would have been in a stronger financial position at the start of the current recession.

3. The Government should work to create national pension legislation and a national pension regulator.

The impact of the *Income Tax Act* on private pension plans is part of a broader issue. The current approach to the division of powers between the federal and provincial governments causes problems for workers who move from one jurisdiction to another, for plan sponsors who have members in more than one jurisdiction, and for service providers. Efforts to harmonize the federal and provincial rules have not solved the problems. Because the problems exist across Canada, they call for a national solution.

The experience of the United States persuades us that Canada needs national pension regulation and a national regulator. The existing regulators could be used in some way to create the national regulator. A national approach to pension regulation would do a better job of ensuring that pension law works harmoniously with federal retirement income programs and with federal laws on taxation, bankruptcy and insolvency. No plan sponsor or plan member deserves to be at a disadvantage because of how regulatory authority was divided back in 1867.

4. The Government should amend the Act to require a full review of the federal regulation of private pension plans every five years.

Until national legislation and a national regulator are in place, the Act should require a full review of the federal regulation of private pension plans every five years. The reviews will help keep federal law up-to-date. A similar approach is taken under Ontario's *Securities Act*, and it has worked well.

5. The Government should amend the Act to reflect the differences between DB plans and DC plans.

We support your efforts to ensure that federal regulation reflects the differences between DB plans and DC plans, such as the difference between the investment of a pension fund under a DB plan, and the provision of investment options under a DC plan. Care must be taken to ensure that DC plan sponsors are accommodated in a way that does not increase the legal obligations of investment managers or other service providers. DC plan sponsors should remain subject to fiduciary duties of loyalty and care, but the duties set out in the Act should recognize that the investment role is different in the DB and DC contexts. Sponsors who select a sound default investment option for the plan should have a safe harbour from litigation if they have fulfilled their duties. The legislation should not set out a list of sound options; this would be a return to the old 'legal list' approach that was wisely abandoned.

CONCLUSION

Thank you for this opportunity to comment on the Consultation Paper. We would be pleased to make ourselves available if you have any questions about our comments, or if you wish to discuss these issues further.

Yours truly,



Barbara Palk
President