

The Dentons logo, consisting of the word "DENTONS" in white, uppercase, sans-serif font, enclosed within a white arrow-shaped graphic pointing to the right. The background of the slide is a blurred image of pink cherry blossoms, partially obscured by a large, semi-transparent purple shape that covers the left and top portions of the frame.

DENTONS

The latest on pension plan governance

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Grow | Protect | Operate | Finance

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Agenda

CAP Guidelines

- Introduction
- Overview
- Current Guidelines
- Revised CAP Guidelines

Emerging Canadian Litigation

Emerging US Litigation

CAP Guidelines

Who is CAPSA?

- The Canadian Association of Pension Supervisory Authorities (“**CAPSA**”) is a *quasi-regulatory* association of Canadian pension regulators
- CAPSA’s mission is to facilitate an efficient and effective pension regulatory system in Canada, which it does through various mandates including:
 1. establishing common regulatory expectations for pension plan administration across Canada;
 2. strengthening pension plan supervision; and,
 3. regulatory collaboration.

CAP Guidelines

What are the CAPSA Guidelines?

Guideline	Published	Purpose
1. Flexible Pension Plans	April 30, 1999	Summarizes the recommendations of the Task Force on Flexible Pension Plans in order to address various issues related to flexible pension plans
2. Electronic Communication in the Pension Industry	May 8, 2019	Provides a framework to apply the provisions of e-commerce legislation and applicable pension legislation to pension communications sent electronically from a pension plan administrator and/or pension plan sponsor that are required under pension legislation.
3. Capital Accumulation Plans	May 28, 2004	Reflects the expectations of regulators regarding the operation of a capital accumulation plan, regardless of the regulatory regime applicable to the plan
4. Pension Plan Governance	December 2016	To assist pension plan administrators in fulfilling their governance responsibilities by achieving and maintaining good governance practices.

CAP Guidelines

What are the CAPSA Guidelines? (cont'd)

Guideline	Published	Purpose
5. Fund Holder Arrangements	March 1, 2011	Highlights good governance practices related to fund holder arrangements of the pension plan and pension fund.
6. Prudent Standard	November 2011	Provides guidance to plan administrators on how to demonstrate the application of prudence to the investment of pension plan assets.
7. Pension Plan Funding Policy	May 7, 2021	This Guideline is intended to provide guidance on the development and adoption of funding policies for pension plans that provide defined benefits or target benefits.
8. Defined Contribution Pension Plans Guideline	February 2019	Developed as part of CAPSA's strategic initiative to review current approaches to regulating and supervising defined contribution (DC) pension plans.
9. Searching for Un-locatable Members of a Pension Plan	February 7, 2019	Outlines best practices and options with respect to searching for un-locatable members.

CAP Guidelines

Other CAPSA Guidelines

- **NEW CAPSA Guideline: Pension Plan Risk Management**
 - Intended for DB plans, DC plans, Pooled registered plans, target benefit plans and hybrid plans
 - Originally released as three separate guidelines on June 9, 2022:
 - Leverage and Effective Management of Associated Risks
 - Environmental, Social and Governance (ESG) Considerations in Pension Plan Management
 - Cyber Risk for Pension Plans
 - Revised consolidate guideline released June 28, 2023 (stakeholder consultation closed on September 30, 2023 and included special topics:
 - Special Topics: Third-Party (Outsourcing) Risk, Cyber Security, ESG, Use of Leverage, Target Pension Arrangements and Investment Risk Governance

CAP Guidelines

CAPSA Guideline No. 3

- Initially released in 2004
- First consultation started in May 2022 and closed in October 2022
- Second consultation
 - 2023 revised CAP Guidelines are **not** currently in effect but bring about significant changes that plan administrators should be aware of are incoming and may choose to implement now as a best practice
 - April 10, 2024 Joint Forum of Financial Regulators annual meeting: CAPSA announced it expects a finalized version to be released during the summer of 2024

CAP Guidelines

What is a CAP?

- The CAP Guidelines apply broadly to all “tax-assisted investment or savings plans that permit its members to make investment decisions in respect of the investment of their individual accounts among two or more investment options selected by the CAP sponsor”
- Includes:
 - Defined Contribution (DC) Pension Plan
 - Registered Retirement Savings Plan (RRSP)
 - Deferred Profit Sharing Plan (DPSP)
 - Locked-in Retirement Account (LIRA)
 - Registered Retirement Income Fund (RRIF)
 - Tax Free Savings Plans (TFSA)

CAP Guidelines

Who is a CAP Sponsor?

- **Current definition:**

- “...employers, trade unions, associations or combinations of these entities that establish CAPs...”

- **Revised definition:**

- “A CAP may be established by an employer, trade union, association, board of trustees, licensed administrator of a Pooled Registered Pension Plan (PRPP) or Voluntary Retirement Savings Plan (VRSP), or any combination of these entities for the benefit of its employees or members or the employees of participating employers.”

CAP Guidelines

What do the CAP guidelines require?

- Clearly define and document for plan members the purpose of the plan;
- Provide investment information and decision-making tools to the plan members;
- Select and monitor investment options. Ensure that a range of options is available;
- Disclose all fees, expenses and penalties borne by plan members;
- Allow for reasonable transferability among investment options;
- Establish and adhere to criteria for the periodic review of service providers.

CAP Guidelines

DRAFT CAP Guidelines

- The new guidelines vastly expand the obligations of employers and service providers in several specific areas:
 - **Standard of care:** There is now an explicit statement that all CAP sponsors have some level of standard of care towards plan members and, in some instances, fiduciary responsibilities
 - This was previously a requirement reserved for registered pension plans (i.e. DB and DC plans)
 - **Governance:** Establishing and documenting a governance framework for the administration of the CAP, including potentially establishing a code of conduct, risk management framework and process for addressing member complaints. Establishing a process for the regular review of the CAP's governance process.

CAP Guidelines

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Member education and communication:

- Extensive listing of disclosure requirements to plan members at the time of enrollment and on an ongoing basis, including:
 - Enrollment information, such as the benefits of not delaying enrollment, opting out of the plan and automatic features;
 - How members can take advantage of CAP features to improve potential outcomes;
 - Description of member borne fees and expenses for each investment option and how these fees and expenses can affect potential outcomes;
 - Available decision-making tools;
 - Retirement income options available within the CAP; and
 - How to transfer money to products outside of the CAP and an explanation of the nature of each type of product.

CAP Guidelines

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Other Membership education requirements

- Available investment options and default options, and for each available investment option, providing the following information:
 - Description of the investment option including type of investment and its objective;
 - Description of the risks associated with the investment option;
 - Investment restrictions or limitations associated with the investment option;
 - Cost of holding the investment option;
 - (If available) the historical performance of the investment option, the historical performance of an appropriate benchmark and a statement that past performance may not be repeated and is not necessarily indicative of future performance; and
 - (If applicable) where a member can obtain more information about the option.

CAP Guidelines

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Member statements should contain additional information, including:

- Notice of any upcoming ability for a member to commence retirement income;
- Reminder of any plan features the member is not currently taking advantage of; and
- Information regarding the total level of fees and expenses payable by the member with respect to each investment option elected by the member.

CAP Guidelines

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- ***Asset allocation and retirement planning tools:***
 - periodically reviewing assumptions underlying asset allocation tools and retirement planning tools and communicate these assumptions to members.
- ***Investment and financial planning advice:*** Clearly communicating to members:
 - the nature of the advice from the service provider,
 - how the service provider is compensated,
 - who is paying for their services,
 - any limitations in the service provider's mandate or scope of services, and
 - any real or perceived conflicts of interest or lack of independence arising from the CAP sponsor's involvement in selecting, retaining and/or compensating the service provider.

Extended list of criteria a CAP sponsor should consider when selecting service providers to provide investment advice or financial planning.

Emerging Litigation – Canada

Overview

- As fiduciaries, pension plan administrators have always been exposed to liability for breach of fiduciary duty
- The CAP guidelines clarify that all CAP sponsors (often employers) have some level of common law fiduciary responsibility towards CAP members that varies based on a number of factors including whether members contribute; the authority of sponsors to make decisions on behalf of members, etc.
- Recent case law suggests that good governance, including following the practices set out in the CAP Guidelines, can minimize exposure to liability or provide as a defence to plan changes or other decisions made by CAP sponsors
- *In other words, good governance and compliance with the upcoming revisions to the CAP Guidelines are key to minimizing exposure to liability*

Emerging Litigation – Canada

Larkin v Johnson, 2023 BCCA 116

- Plaintiffs claimed that the trustees of a MEPP breached their fiduciary duty in relation to plan amendments made to increase the normal retirement age from age 62 to 65;
 - failed to consider all relevant factors;
 - failed to warn Members about a solvency deficit in the Plan's funding; and
 - failed to appoint a non-employer to the Board
- BC Supreme Court granted the Trustee's application for summary dismissal
 - Claim was dismissed primarily because of the trustee's good governance practice
 - Meeting minutes of the trustees demonstrated that their duties and options had been extensively considered and the documentation of all processes was thorough
- Upheld by the BC Court of Appeal and leave to appeal to the SCC was refused

Emerging Litigation – Canada

Union of British Columbia Performers v Morton, 2023 BCCA 57

- Union constitution was amended to permit members to transfer from one plan to the other, but Trustees did not want to amend Trust Agreement to reflect Union constitution on the basis that the change was not in the best interests of the trust beneficiaries
- BC Supreme Court held that trustees had discretion to not give effect to change implemented by Union
- BC Court of Appeal reversed the decision, holding:
 - The Trustees' fiduciary obligation to act in best interests of beneficiaries does not permit trustees to act inconsistently with the express terms of the trust agreement
 - A trustee's general fiduciary obligation must be applied within the confines of the terms of the governing trust agreement and the trustees had an obligation to amend the trust agreement to bring it into line with the constitution
 - SCC dismissed leave to appeal on October 12, 2023

Emerging Litigation – United States

- While plan changes can trigger liability, so too can ongoing management of investments
- Cases have recently emerged in the United States
 - *Hughes v Northwestern University* (2022 decision by the US Supreme Court)
 - Supreme Court found that the duty of prudence under ERISA included a context-specific inquiry of the continuing duty of fiduciaries to monitor investments and to remove certain investments for members with “unnecessary” management fees (specifically, the plan members challenged the fiduciaries’ selection “retail-class” mutual funds which were identical to “institutional class” funds available at a lower cost)
 - The fact that plan members made the final investment choice was insufficient to excuse investment decisions made by the plan fiduciaries.
- This is part of a larger trend of “excessive fee” litigation

Emerging Litigation – United States

- Several US claims have also targeted fiduciaries who select low fee options, without consideration of the ability to generate return which have targeted the BlackRock LifePath target date funds
 - While many of these “low-fee” cases involve BlackRock, the actual claims are brought as against the employer fiduciaries
 - Many of the claims are brought by the same law firm and involve similar language that "Any objective evaluation of the BlackRock TDFs would have resulted in the selection of a more consistent, better performing, and more appropriate TDF suite."
 - Different US courts have taken different directions, although the cases generally have not made it past the motion to dismiss stage