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VIA FSRA LINK

Financial Services Regulatory Authority of Ontario  
5160 Yonge Street  
16th Floor  
Toronto, ON M2N 6L9

**RE: Consultation on Guidance Relating to Missing Members**

Dear Sirs/Mesdames:

**Introduction**

We are pleased to provide this submission (“**Submission**”) on two Guidance documents: “Principles and Practices Regarding Missing Members” (“**Guidance on Principles**”), and “Waiver of Biennial Statements for Missing Former and Retired Members” (“**Guidance on Waiver of Biennial Statements**”) and collectively with the Guidance on Principles, the “**Missing Member Guidance**”) issued by the Financial Services Regulatory Authority (“**FSRA**”). The Submission is made on behalf of the Pensions, Benefits & Executive Compensation Group (“**Pensions Group**”) at Blake, Cassels & Graydon LLP (“**Blakes**”). The Pensions Group consists of lawyers in Toronto, Montreal, Calgary and Vancouver whose practices are devoted to pension, benefits and compensation law. The Pensions Group is supported by lawyers with pensions and benefits sub-specialties in the employment, corporate tax, litigation and securities law practice groups at Blakes.

We appreciate the opportunity to comment on the Missing Member Guidance. Our Submission has been made from the perspective of practicing lawyers in the pension law field. We are not writing on behalf of, or to express the views of, any client of Blakes. Accordingly, our Submission is focussed on the legal and regulatory issues relating to missing members of registered pension plans. Nothing in this Submission is intended to express any legal opinion or legal interpretation of existing or proposed legislation.

Our comments are set out below.

**Guidance on Principles**

The Guidance on Principles focuses on the plan administrator’s obligation to make efforts to locate missing members and specific steps that can be taken to find such members. The Pensions Group agrees with the principles-based approach and the recognition that “one size does not fit all” reflected in the Guidance on Principles.

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Further, we are pleased to see an acknowledgement in several sections of the Guidance on Principles (including, for example, section 2.4) that reasonable limits apply to the obligation to search for missing members. The Guidance on Principles states in section 3.3.1 that the standard of care applicable to a plan administrator includes this obligation. The standard of care applicable to a plan administrator is a prudent person standard as indicated in section 22 of the Pension Benefits Act (“PBA”), which is generally understood to encompass an obligation to act in the best interests of the group of persons entitled to payments from the pension fund under the terms of the plan, but not necessarily an obligation to act in the best interests of any particular individual member of the group. Locating missing members can be time consuming and costly and it will not always be in the best interests of the plan beneficiaries as a whole for the administrator to be incurring significant expenses and expending considerable time and effort to find individual former members. We support deference to the judgment of plan administrators, with the assistance of recordkeepers and other service providers and advisors, as to when, how and how frequently to search for missing members.

Notwithstanding the reasonable best efforts of a plan administrator, some missing members cannot be found. The Guidance on Waiver of Biennial Statements addresses one particular plan administration issue that arises if a member is unlocatable, but it would be helpful if FSRA were to provide additional guidance, either by expanding the Guidance on Principles or in separate, targeted guidance documents similar to the Guidance on Waiver of Biennial Statements, relating to other situations in which the plan administrator may have a need or obligation to communicate with a former member who is missing, such as on a plan wind-up or annuity purchase under section 43.1 of the PBA.

### **Guidance on Waiver of Biennial Statements**

We welcome the very clear confirmation in section 2.6 of the Guidance on Waiver of Biennial Statements that if an administrator has already received a waiver of the obligation to send biennial statements under the prior Financial Services Commission of Ontario policy, that waiver will continue to apply, and, absent a change in circumstances relating to the missing member, the administrator does not need to incur costs to replace it with another waiver under the new requirements outlined the Guidance on Waiver of Biennial Statements.

Regarding the waiver application described in section 4.1 of the Guidance on Waiver of Biennial Statements, while it is implicit that each missing member in respect of whom a waiver is being sought should be identified in the application, it would be helpful if section 4.1 specified whether the relevant individuals should be named in the application or whether they can be identified by a number or some other identifier that is less personal than their names.

Section 4.1.4 of the Guidance on Waiver of Biennial Statements states that “upon revocation of an approved waiver, communications to those located former or retired members should immediately recommence”. However, this Guidance is concerned only with biennial statements and depending on when in the biennial statement cycle the missing member is located, it could be almost two years before the next statement is due to be issued, or if the missing member is found very close to the date for distribution of the biennial statements under the administrator’s regular process for such statements, there may not be time to produce a statement as part of that regular process. We suggest that the clause referenced above be replaced with a provision that specifically addresses FSRA’s

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expectations as to when recently located missing members should receive their first biennial statements after they are no longer missing.

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The Pensions Group appreciates the opportunity to provide input on the Missing Member Guidance. Should you have any questions, please do not hesitate to call any member of our group.

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Yours very truly,

**“BLAKES”**

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