Report

Whistle-Blowing

Task Force on Whistle-Blowing

December 2006

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Memorandum

To: All Fellows, Affiliates, Associates and Correspondents of the Canadian Institute of Actuaries

From: Mo Chambers, Chairperson
Task Force on Whistle-Blowing

Date: December 20, 2006

Subject: Whistle-Blowing

Mandate

At its meeting on December 14, 2005, the CIA Board decided to establish the Task Force on Whistle-Blowing with the following mandate:

“To consider whether, in what circumstances, and to whom, an actuary should be obliged to report adverse findings (discovered either as a result of the actuary’s work or otherwise) or conclusions, and what legal protection for the reporting actuary may be appropriate.”

The task force members, approved at the CIA Board meeting held March 8, 2006, are Allan Brender, Mo Chambers (chair), Randy Dutka, Steve Eadie, Brian FitzGerald, Jacques Lafrance and Paul McCrossan.

Recommendations

As a result of its discussions, the task force has reached the following conclusions:

- Whistle-blowing responsibilities should be imposed upon the actuary only when he/she serves in a “reserved” role as defined by legislation (e.g., as the appointed actuary of an insurance company).

- To be effective for actuaries, whistle-blowing responsibilities must be accompanied by legislative protection from civil action when the actuary has performed his/her responsibilities in good faith.

- Whistle-blowing responsibilities for the pension actuary in a “reserved” role should be restricted to actuarial matters unless the “reserved” role for the plan actuary is extended to become a continuing role (as opposed to the current intermittent role).
Having concluded its deliberations, the task force presents a number of recommendations to the CIA Board.

1. The CIA should actively engage the Department of Finance to amend §370(2) of the Insurance Companies Act to extend the protection therein to the independent actuary in respect to his/her report required by §247.

2. The CIA should approach the Canadian Association of Pension Supervisory Authorities (CAPSA) to explore the possibility that the role of the pension actuary in Canada be modified into a continuing responsibility for the pension plan.

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Background

The task force has documented and considered the issue of whistle-blowing in the context of the Insurance Companies Act, the findings of the UK’s “Morris Report”, and the Canadian pension legislation, as well as the CIA’s Rules of Professional Conduct. The task force has assumed that its mandate is limited to the potential application of whistle-blowing to situations where the actuary serves in a role defined by legislation, a “reserved role” (e.g., appointed actuary of an insurance company and valuation actuary of a registered pension plan). Accordingly, the committee has not discussed the potential application of a whistle-blowing requirement where the actuary provides “non-reserved” services, such as insurance premium development, actuarial peer review, expert witness testimony, or pension plan administration.

CIA Rules of Professional Conduct

The elements of the CIA’s Rules of Professional Conduct that are pertinent to the issue of whistle-blowing are presented in Appendix A of this report.

All of these conduct requirements, except Rule 1, apply within the context of the actuary providing professional services. With the exception of Annotation 1.1, Rule 1 is operative in a more general context. While Rule 1 requires the member not to be associated with anything that is false or misleading, nor to engage in professional conduct that involves dishonesty, deceit or misrepresentation, there is no requirement that the actuary report such conduct engaged in by others, except where those others are members or enrollees of the CIA (as embodied in Rule 13).

Insurance Companies Act

Appendix B documents the portions of the Insurance Companies Act (ICA) that deal with whistle-blowing required of the appointed actuary (identified in the ICA as the “actuary of the company”).

The ICA, in §369, requires the appointed actuary to whistle-blow to the regulator when the company is faced with a situation that threatens its future viability and for which rectification measures have not been taken. Also, in §363, the terminated appointed actuary may, in preparing the required report to the regulator on the reasons for that termination, be perceived to whistle-blow. In both these cases, the ICA provides protection for the appointed actuary in §370.

As a result of changes made to the ICA and to related actuarial practice subsequent to its initial adoption in 1992, new designated roles for actuaries have been identified. Currently, specific responsibilities are imposed upon the “independent actuary” (§247(2)) and upon the actuary who peer reviews the work of the appointed actuary. The former of these new responsibilities has the potential to place those individuals in situations that require them to whistle-blow, or at least exposes them to potential future civil action even if they have fulfilled their responsibilities in good faith. However, the ICA provides them no protection comparable to that provided in §370. In the case of the peer reviewer of the work of the appointed actuary, since there is no legislative requirement for that activity, there is no available medium through which to provide legislative protection.
The Morris Report in the UK

The issuance in 2005 of the Morris Report on the actuarial profession in the UK has caught the attention of actuarial organizations and financial regulators around the world.

In his report, Sir Derek Morris identified that whistle-blowing responsibilities should be imposed upon the actuary, but only in circumstances where

a) the actuary serves in a “reserved” role, i.e., the special role is defined by legislation,

b) the “reserved” role requires actuarial expertise, i.e., where only an actuary can fill the role,

c) the legislation provides protection to the actuary performing the role in good faith.

The Morris Report also noted that it is unacceptable for the pension actuary to consider that he/she is working exclusively for the employer. Consequently, if the actuary is aware of a conflict of interest, it must be disclosed to all parties. There is an extensive section of the Morris Report that is devoted to conflict of interest in connection with the dual role of pension actuaries. This places very high legal requirements on actuarial firms who face conflict of interest situations. The Morris Report did not, however, make decision-makers of actuaries. In this field the UK is moving toward the advent of professional pension trustees.

Canadian Pension Legislation and the Actuary

Under the existing pension legislation in Canada, the reserved role for the actuary is an intermittent one. The actuary is called upon to perform a valuation of the obligations of the pension plan at least once every three years. In certain circumstances, the valuation may be required annually. In many instances, an actuary is asked to perform a reserved function upon an informal request of the plan sponsor and without being formally appointed to the role of plan actuary by the plan’s administrator. However, no continuing role is defined for the actuary, so that a whistle-blowing responsibility comparable to that in the insurance industry is not feasible under the current pension regime.

In these times of rapidly changing economic conditions, it may be unreasonable and inappropriate for the Canadian public, as members of public and private pension plans, to be relying upon potentially stale information, including actuarial certificates based on potentially out-of-date knowledge, to inform them of the current health of their pension security. This task force suggests that the time has come to consider increasing the frequency of actuarial valuations and opinions, and to create a broader perspective around the periodic valuation role of the pension actuary, i.e., creating a continuing role in managing the financial health of the pension plan. This will, of course, require careful consideration of the role of the pension plan sponsor in the continuing financial health of the pension plan. Additional guidance for the actuary may need to be developed before this continuing role can become truly effective.

To our knowledge, there is not currently any whistle-blowing requirement that applies specifically to actuaries in the pension legislation of any Canadian jurisdiction. However, there has been, at least in Québec, a whistle-blowing requirement for the accountant performing the annual audit of a pension fund.
In 2004, the CAPSA proposed a number of general regulatory principles for a model pension legislation, among them, Principle 40, Reporting by Advisors. Principle 40 suggested a whistle-blowing requirement for all advisors to a pension plan. Obviously, the actuary would be among the advisors upon whom the requirement would be imposed. Considering the complexity and the detailed rules of pension legislation, Principle 40 had far-reaching implications since its whistle-blowing proposal suggested an obligation to report “circumstances that indicate there has been or may have been a material contravention of the Act or regulation.”

The CIA appointed a task force to prepare a response to the CAPSA suggestion and that response was delivered in 2005. (A copy of the response is provided in Appendix C.) This current task force has reviewed that response and, in general, agrees that the timing and context of the CAPSA proposal was not such that the proposal should have elicited the CIA’s support. This task force supports the portion of the response that suggested entering into discussions with CAPSA regarding more efficient alternatives to increase confidence in compliance with pension standards.

More recently, Bill 30 was tabled in Québec. Included in Bill 30 are the following proposals:

- whistle-blowing requirement for the service providers of the pension committee (new §154.2);
- the service providers are selected by the pension committee (new §154.1);
- service providers would be subject to the same standards (e.g., fiduciary, conflicts of interest) as the pension committee (§153);
- no exclusion or limitation of service providers’ liability (new §154.4);
- the actuary must perform a full or partial actuarial valuation every year (§118).

If pension legislation is to require the actuary to whistle-blow, those responsibilities should be focused on the work that the actuary performs when fulfilling his/her reserved role and should be limited to actuarial matters unless the reserved role for the plan actuary is extended to become a continuing role.

If the whistle-blowing requirement is to deal with the identification of potentially adverse circumstances for the pension plan, that would suggest and embody a somewhat different role for the pension actuary than exists at present. Typically, in current Canadian pension legislation, the actuary has no responsibility beyond the triennial valuation (annual in certain jurisdictions when the plan’s solvency position is below a prescribed threshold). Indeed, this task force believes that the CIA should undertake an initiative to consider reform of the role of the actuary within the Canadian pension funding rules to create a system that involves significantly more and better monitoring of the plan’s financial position. To that end, the task force recommends that the CIA engage CAPSA to discuss the appropriateness and feasibility of the possible extension of the actuary’s role in the maintenance of Canadian pension plans to one that involves a measure of continuing responsibility. (If the CIA deems it appropriate, this report might provide useful background information to CAPSA at the time that discussions with them are initiated.) Without a continuing involvement with the plan, the actuary cannot be expected to assume whistle-blowing responsibilities beyond matters that are specifically actuarial.
APPENDIX A
PERTINENT RULES OF PROFESSIONAL CONDUCT

Rule 1
A member shall act honestly, with integrity and competence, and in a manner to fulfil the profession's responsibility to the public and to uphold the reputation of the actuarial profession.

Annotation 1-1 A member shall perform professional services with skill and care.

Annotation 1-2 It is the professional responsibility of the member not to be associated with anything which the member knows or should know is false or misleading.

Annotation 1-3 A member shall not engage in any professional conduct involving dishonesty, deceit or misrepresentation or commit an act that reflects adversely on the actuarial profession.

Rule 6
A member who performs professional services shall take reasonable steps to ensure that such services are not used to mislead other parties or to violate or evade the law.

Annotation 6-1 Material prepared by a member may be used by another party in a way that may influence the actions of a third party. The member should recognize the risks of misquotation, misinterpretation or other misuse of such material and should take reasonable steps to ensure that the material is clear and presented fairly, and that the member is identified as the source of the material.

Rule 7
A member shall not disclose to another party any confidential information obtained through a professional assignment performed for a client or employer unless expressly or implicitly authorized to do so by the client or employer, or required to do so under Rule 13, or required to do so by the Committee on Professional Conduct, an Investigation Team, a Disciplinary Tribunal or an Appeal Tribunal regarding any disciplinary matter arising under Section 20 of the Bylaws, or required to do so by Law.

Rule 8
A member shall perform professional services with courtesy and professional respect, shall avoid unjustifiable or improper criticism of other members, and shall cooperate with others in the client’s or employer’s interest.

Annotation 8-1 Differences of opinion among members may arise particularly in choices of assumptions and methods. Discussion of such differences, whether directly between members or in observations made to a client by one member on the work of another, should be conducted objectively and with courtesy and respect.

Annotation 8-2 A member, in the course of an engagement or employment, may encounter a situation such that the best interest of the client or employer would be served by the member’s setting out an alternative opinion to one expressed by another member together with an explanation of the factors which lend support to the alternative opinion. Nothing in the Rules should be construed as preventing the member from expressing such an alternative opinion to the client or employer.
Annotation 8-3  If a member is invited to advise a client or employer for whom the member knows or has reasonable grounds to believe that another member is already acting in a professional capacity with respect to the same matter or has recently so acted, it would normally be prudent to consult with the other member both to prepare adequately for the assignment and to make an informed judgment whether there are circumstances as to potential violations of the Rules which might affect acceptance of the assignment.

The member who is the prospective new or additional advisor should request the client’s or employer’s consent to such consultation. When the client or employer has given consent, the original member shall cooperate in furnishing relevant information such as pertinent data, work papers and documents and may require reasonable compensation for the work involved in assembling and transmitting the relevant information. The original member shall not refuse to consult or cooperate with the member based upon unresolved compensation issues with the client or employer, unless such refusal is in accordance with a pre-existing agreement with the client or employer. A member need not include any items of a proprietary nature such as internal communications or computer programs.
APPENDIX B

ICA REQUIREMENTS

363. Statement of actuary — An actuary of a company who resigns or whose appointment is revoked shall submit to the directors of the company and the Superintendent a written statement of the circumstances and reasons why the actuary resigned or why, in the actuary’s opinion, the actuary’s appointment was revoked.

369. (1) Report to officers — The actuary of a company shall report in writing to the chief executive officer and chief financial officer of the company any matters that have come to the actuary’s attention in the course of carrying out the actuary’s duties and that in the actuary’s opinion have material adverse effects on the financial condition of the company and require rectification.

(2) Transmission of report — An actuary who makes a report under subsection (1) shall forthwith provide a copy of it to the directors of the company.

(3) Failure to take action — Where, in the opinion of the actuary of the company, suitable action is not being taken to rectify the matters referred to in subsection (1), the actuary shall forthwith send a copy of the report to the Superintendent and advise the directors that the actuary has done so.

370. (1) Qualified privilege for statements — Any oral or written statement or report made under this Act by the actuary or former actuary of a company has qualified privilege.

(2) No civil liability — The actuary or former actuary of a company who in good faith makes an oral or written statement or report under section 363 or 369 shall not be liable in any civil action seeking indemnification for damages attributable to the actuary or former actuary having made the statement or report.

1023. Offence — Every person who, without reasonable cause, contravenes any provision of this Act or the regulations is guilty of an offence.

1027. (1) Punishment — Every person who is guilty of an offence under any of sections 1023 to 1026 is

(a) in the case of a natural person, liable
   (i) on summary conviction, to a fine of not more than $100,000 or to imprisonment for a term of not more than twelve months, or to both, or
   (ii) on conviction on indictment, to a fine of not more than $1,000,000 or to imprisonment for a term of not more than five years, or to both; and

(b) in the case of an entity, liable
   (i) on summary conviction, to fine of not more than $500,000, or
   (ii) on conviction on indictment, to a fine of not more than $5,000,000.

(2) Order to comply — If a person has been convicted of an offence under this Act, the court may, in addition to any punishment it may otherwise impose, order the person to comply with the provisions of this Act or the regulations in respect of which the person is convicted.
(3) **Additional fine** — If a person has been convicted of an offence under this Act, the court may, if it is satisfied that as a result of the commission of the offence the convicted person acquired any monetary benefits or that monetary benefits accrued to the convicted person or their spouse, common-law partner or other dependant, order the convicted person to pay, despite the maximum amount of any fine that may otherwise be imposed under this Act, an additional fine in an amount equal to three times the court’s estimation of the amount of those monetary benefits.

1028. **Liability of officers, directors, etc.** — If an entity commits an offence under this Act, any officer, director or agent of the entity who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and liable on summary conviction or on conviction on indictment to the punishment provided under paragraph 1027(1)(a) for the offence, whether or not the entity has been prosecuted or convicted.
APPENDIX C
CIA RESPONSE TO CAPSA

40. Reporting by Advisors

— A person retained or employed by the administrator to carry out aspects of the administration of the plan shall report to the administrator immediately when, in the course of their duties respecting the plan, they become aware of circumstances that indicate there has been or may have been a material contravention of the Act or regulation.

— A person retained or employed by the administrator to carry out aspects of the administration of the plan shall report to the regulatory authority any matter reported to the administrator where there has been or may be a contravention of the Act or regulation that in the opinion of the person is material and has not been corrected within thirty days after the date the matter was first reported to the administrator. In so doing, a person acting in good faith incurs no civil liability.

Principle 40 Reporting by Advisors would introduce a requirement that no pension legislation in Canada has at this time: any person who provides services to the plan administrator must report any material contravention of the pension legislation to the plan administrator, and then to the regulatory authority if the contravention is not corrected within 30 days. We believe that it is inappropriate, at this time, to introduce such a new requirement. The pension system in Canada is in a very difficult state largely due to economic and demographic factors, and a challenging regulatory environment, and not because plan sponsors and administrators are breaking the rules.

The introduction of “whistle-blowing” would be a significant additional irritant for plan sponsors and administrators which would likely contribute to the decline in pension plans.

Plan members may believe that such “whistle-blowing” duty will provide some additional assurance of sound administration practices. However, it would significantly increase liability exposure for service providers, with the negative consequences mentioned in our comments on principle 6 Plan Administrators’ Duties.

The “whistle-blowing” rule would essentially be asking professionals, including actuaries, to carry out investigations for the regulatory authority. We don’t believe that this is appropriate.

Principle 40 Reporting by Advisors would protect the professional who blows the whistle from civil liability. This is very positive from a legal perspective. However, it does not provide any protection to the professional in the situation where it is deemed that the professional should have blown the whistle and he/she did not.

It is unclear who determines the materiality of the contravention, and what criteria are to be used for determining if the contravention is material or not. Pension legislation is an extremely complicated body of law, and there are numerous situations where it is unclear whether or not a particular activity is in contravention of the legislation. Will the advisor be expected to apply resources to investigate the “grey” areas of the law before reporting the possible non-compliance? If so, this will put an unreasonable burden on the advisor, both financially and legally.
We submit that there is great value to pension plans and members by having a professional involved in most aspects of the plan. To make advisors, including actuaries, subject to policing activities would seriously undermine the trust and the amount of information which many plan sponsors and administrators place in their advisor. This would be detrimental to the pension environment, as advisors would be excluded from discussions and knowledge of plan activities, thereby reducing their ability to provide proper advice to sponsors and administrators. It is possible that non-compliance would actually increase as a result of requiring advisors to police plans.

In the event a whistle-blowing requirement is ever to be created, we strongly recommend that the scope of the investigation and the reporting required be limited. It should also specify that the professional is not required to investigate any further than his/her normal duties and mandate from the client would require. The non-compliance items covered by any whistle-blowing rule should be clearly defined and limited to elements that have a significant impact on the plan’s financial soundness or the members’ benefits or rights. Moreover, for each such item, the rule should identify which professional or advisor would be responsible for investigating and, if necessary, blowing the whistle, in order to avoid additional investigations by advisors who are not directly involved in the activity in question.

In the UK, the Pensions Act 1995 has imposed a “whistle-blowing” duty to the plan actuary. We have no indications how the enforcement of this requirement has helped in reducing material contraventions to the pension legislation in the UK. However, we are aware that the Faculty of Actuaries and the Institute of Actuaries have spent significant effort in developing professional requirements relating to the whistle-blowing duty. Consequently, we are concerned that the enforcement of the whistle-blowing duty contemplated by principle 40 Reporting of Advisors would cause significant work from the professional bodies and the regulatory authorities for designing the framework that would govern its application.

We also wish to note that actuaries who practice in Canada must comply with the rules of professional conduct of the CIA. The following rules deal with the integrity of the work performed by a member of the CIA:

- Rule 1: A member shall act honestly, with integrity and competence, and in a manner to fulfil the profession’s responsibility to the public and to uphold the reputation of the actuarial profession.
- Rule 6: A member who performs professional services shall take reasonable steps to ensure that such services are not used to mislead other parties or to violate or evade the law.

Compliance with these rules should give the regulators and the public a high level of comfort concerning the integrity of the actuary’s work.

In summary, we doubt that any benefits resulting from the enforcement of a whistle-blowing rule would justify the extra costs, concerns and inefficiencies caused by its application. Therefore, we suggest not adopting this rule. The CIA would be pleased to enter into discussions with CAPSA regarding more efficient alternatives to increase confidence in compliance with pension standards.