Canadian Life
and Health Insurance
Association Inc.

Association canadienne
des compagnies d'assurances
de personnes inc.

July 21, 2014

Sent by e-mail to: insolvency-insolvabilite@ic.gc.ca

Mr. Paul Halucha
Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor, East Tower
Ottawa, On
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Dear Mr. Halucha:

The Canadian Life and Health Insurance Association (CLHIA) appreciates the opportunity to provide input on the Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*.

Established in 1894, CLHIA represents companies which together account for 99 per cent of Canada's life and health insurance business. The industry, which provides employment to more than 150,000 Canadians and has investments in Canada of $646 billion, protects more than 27 million Canadians through products such as life insurance, annuities, RRSPs, disability insurance and supplementary health plans. It pays benefits of over $76 billion a year to Canadians and administers about 60 per cent of Canada's pension plans.

This letter provides brief comments on a variety of the topics raised in the Discussion Paper. While most of our comments relate to the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA), we also suggest how the *Winding-up and Restructuring Act* should be treated.

Consumer Exemptions: Registered Savings Products

The CLHIA supports the extension of enforcement exemptions to registered education savings plans (RESPs) and registered disability savings plans (RDSPs) in a similar manner to the protection afforded to registered retirements savings plans (RRSPs). This protection would be

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consistent with the intended purpose of these programs, which is to help ensure that personal/family savings are used to provide funding for post-secondary students or the disabled. As noted in the Discussion Paper, there is potential for abuse but we agree with the identified mitigators for RDSPs. In addition, RESPs are subject to annual contribution limits and there is a lifetime contribution limit of $50,000 for each beneficiary with tax penalties for excess contributions, which would help minimize opportunities for abuse.

Consumer Exemptions: Federal Exemption Lists

The provincial Insurance Acts contain exemptions, in the context of insurance, that are essentially the same across Canada. These exemptions are well known and federal law should continue to incorporate them by reference.

If a federal list were considered, then, as a minimum, the federal exemption relating to insurance products should equal or exceed the level of protection provided by the provincial Insurance Acts.

Unfunded Pension Contributions

Life insurance companies are a significant source of long-term commercial mortgages and other secured and unsecured commercial loans in Canada. The amendments to the BIA and the CCAA which would create a super-priority for unfunded pension contributions would have an impact on secured lenders and may affect the availability of credit. Where super-priority status continues to be provided for unremitted employee and unpaid employer pension contributions, the claim of the secured creditor should continue to have a preferred claim for the amount by which this super-priority reduces proceeds available to it. The industry also supports the continued treatment of unfunded pension liability claims as unsecured debt as these amounts can be significant and difficult for a lender to assess or manage.

Marshalling of Charges

The Discussion Paper invites stakeholders to provide input as to whether it would be appropriate to amend the insolvency legislation to codify the doctrine of marshalling of charges. Such codification would have an impact on the rights of secured lenders and would affect the availability of credit. Junior creditors are aware of their position when they provide funds on a junior basis and should not be in a position to control the senior lender's discretion to realize on its security in a manner that it deems most appropriate.

Ss. 13.4(1) of the BIA

Another limitation that would be problematic for secured lenders is the additional requirement in the proposed wording of subsection 13.4(1) of the BIA that a trustee acting for a secured creditor must obtain an opinion from legal counsel who has not acted for the secured creditor in the previous two years. This would be an unworkable concept for most institutional lenders that engage many different law firms in their various lines of business, including for transactions, litigation, corporate governance, tax and other matters unrelated to the secured claim. The professional obligations of lawyers are governed by their respective law societies and there

should be no reason why a firm that has provided advice to the lender cannot provide such an opinion.

Derivatives and Eligible Financial Contracts

We have two comments in this area. First, it should be noted that life insurance companies are active participants in the derivatives marketplace and use derivatives to manage risk. The derivatives market is a global market and it is critical to participants that the treatment of derivatives in insolvency and bankruptcy proceedings not be subject to stay provisions, super-priorities, assignment or discretionary treatment by the courts as such provisions will create a barrier for Canadian participants in derivatives markets.

Second, we have a serious concern with respect to the suggestion that certain eligible financial contracts (EFCs), such as credit default swaps (CDS), may not fit within the original intention of the EFC safe harbour provisions and that therefore derivatives could be made subject to the CCAA stay of proceedings, except with leave of the court, and that a process could be put in place to determine whether particular EFCs should be stayed or disclaimed. Although it is acknowledged that CDS could be used for purposes not in keeping with the original intent of the safe harbour provisions, CDS also serve a legitimate and useful function as being one of a variety of tools that are used for counterparty risk management (such as hedging) and for replication strategies to reproduce permissible investments.

Either the general removal of safe harbour provisions for CDS (and other derivatives that may be considered to fall outside of the intended scope of the safe harbour provisions) or requiring that the safe harbour provisions be delayed pending a court ruling would likely have significant damping effect on the legitimate use of these derivative. This is particularly so given the international nature of derivative counterparties and transactions and the efforts made by the International Swaps and Derivatives Association (ISDA), which was instrumental in having safe harbours adopted by various developed countries in the first instance, to have a consistent approach in all developed countries on this very issue of the existence of safe harbours and their availability to legitimate users of these derivatives. If Canada were to stand apart from the international community in this regard, it may have an impact on the willingness of foreign counterparties to enter into these types of derivatives with Canadian counterparties.

Winding-up and Restructuring Act

The Discussion Paper asks for comments on the future of the *Winding-up and Restructuring Act* (WURA) and suggests that there are at least two options available. The first option is that WURA be amended to apply only to financial institutions; the second option is that WURA could be merged into a unified insolvency Act.

The CLHIA prefers the first option (i.e., a separate statute for financial institutions) but acknowledges that a unified insolvency Act is workable as well. From our perspective, the key component to either approach is that the insolvency rules for life and health insurers should be modernized and then kept up to date. In order to achieve this, and in order to ensure that there is consistency with the BIA and the CCAA, whichever approach is used, we recommend that the

rules be reviewed periodically, at the same time as the other insolvency statutes. In this regard, a periodic review provision should be included, as is the case now under the BIA and the CCAA.

Should you have any questions or require further information, please contact the undersigned.

Yours very truly,

"Frank Zinatelli"

Frank Zinatelli
Vice President and General Counsel