**VIA EMAIL**

May 29, 2015

Secretariat of the Financial Stability Board
c/o Bank of International Settlements
CH-4002
Basel, Switzerland
fsb@bis.org

**Re: Comments on "Consultative Document (2nd) - Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions - Proposed High-Level Framework and Specific Methodologies (4 March 2015)"**

The Global Pension Coalition ("Coalition")[1] appreciates this opportunity to provide comments to the Financial Stability Board ("FSB") and the International Organization of Securities Commissions ("IOSCO") on the above-referenced consultation (the "Consultative Document"). The Coalition represents a significant portion of the largest private defined benefit and defined contribution pension plans in the U.S., Canada and Europe, as well as, in some instances, the companies that sponsor those pension plans. The pension plans represented by the Coalition provide retirement benefits for over one hundred million individuals in more than a dozen countries.

The Coalition is pleased that FSB and IOSCO are considering excluding pension funds from the scope of its non-bank non-insurer ("NBNI") global systemically important financial institution ("G-SIFI") methodologies. As the Consultative Document states:

[1] The Coalition is comprised of the American Benefits Council, the Committee on Investment of Employee Benefit Assets, the ERISA Industry Committee, European Association of Paritarian Institutions, National Coordinating Committee for Multiemployer Plans, Pensions Europe, and the Pension Investment Association of Canada.

> *Regarding the proposed exclusion of pension funds, one rationale is that they pose low risk to global financial stability and the wider economy due to their long-term investment perspective. Pension funds are in general also covered indirectly through contractual relationships with asset managers [footnote deleted] or use of investment funds.*[2]

The Coalition heartily agrees and provides the comments in this letter to further explain the rationale for excluding pension funds from the scope of NBNI G-SIFI methodologies.

## I. Executive Summary

Pension plans, including those represented by the Coalition, are unlike other derivatives market participants. Pension plans exist solely to provide retirement security for pensioners. Because they serve this critical function, pension funds are already among the most highly regulated financial institutions requiring them to be prudently managed according to fiduciary standards and open and transparent in all dealings. As a result of this heightened scrutiny, pension funds are among the most highly creditworthy and stable of long-term "buy-side" investors. This reputation stands in notable contrast to many other market participants that take risks for business and competitive reasons, and thus are viewed as higher risk and less credit-worthy counterparties.

The Consultative Document's proposed methodologies understandably look past the likelihood of a NBNI financial entity's failure to the potential systemic impact that the entity's distress or disorderly failure could have on the global financial system.[3] The process of designating an NBNI G-SIFI, however, will be nothing more than an academic exercise and a waste of regulatory resources if the NBNI G-SIFI itself is unlikely to fail in the first place. Accordingly, the Coalition believes that FSB and IOSCO have wisely recognized the extremely low likelihood of a pension fund ever failing in proposing that pension funds should be excluded from the scope of NBNI G-SIFI methodologies altogether. Exhibits A, B and C summarize the key reasons that U.S.-regulated ERISA plans, Canadian pension plans, and pension plans established in European Union member states present little, if any, counterparty risk such that the NBNI G-SIFI designation would be inappropriate.

Even if a pension fund were to undergo distress or a disorderly failure, the Coalition agrees with the Consultative Document's assessment that the pension fund's failure would be unlikely to cause a systemic disturbance due to the long-term investment perspective of the fund. Additionally, pension funds are less interconnected and complex than other investment funds. For example, pension funds' use of derivatives is primarily limited to hedging those market risks which could jeopardize a pool of beneficiaries' retirement security. Furthermore, since pension funds are for the most part restricted in their borrowings, they do not employ any meaningful

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[2] Consultative Document at 5.

[3] *Id.* at 3, note 8.

leverage. As a result, pension funds are not appropriate NBNI financial entities to consider for purposes of the G-SIFI methodologies.

## II. Pension Funds Are Unlikely to Fail

### A. Pension Funds are Inherently Risk Averse

Unlike some other market participants that may take risks with derivatives for business and competitive reasons, pension plans exist solely to provide retirement security for pensioners and thus do not have such business or competitive motivations that might lead them to make risky investments which could jeopardize pensioners' retirement security—*e.g.*, utilize derivatives for purposes other than hedging market risks.[4] Both regulators and the global marketplace have recognized the low-risk nature of pension funds. As then CFTC Commissioner Scott O'Malia stated:

> Financial end-users are hedge funds, private equity funds, endowments, and other financial entities that do not generate revenue from commercial activity, but take speculative positions in the market. Retirement end-users consist of entities whose sole obligation is to preserve capital and generate returns for the retirement benefit of others. This category includes ERISA plans and pension funds. They generally use the swaps market to hedge the fixed income exposure associated with their bond portfolios and to gain customized exposure to certain asset classes.[5]

It is noteworthy that banks and other dealers, who conduct extensive credit analyses to protect themselves against client defaults, have concluded that pension plans are low-risk counterparties that do not pose material default risk.[6] Indeed, current practice is that dealers rarely, if ever, require the pension funds represented by the Coalition to post an independent amount (*i.e.*, initial margin) to transact in the over-the-counter derivatives markets. In fact, some pension funds represented by the Coalition even collect one-way independent amounts from their dealer counterparties for certain transactions.

As further evidence that pension funds are inherently less risky investment vehicles, regulators increasingly are exempting pension plans from new requirements brought about in the

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[4] Although pension plans in some jurisdictions may at times use derivatives to gain market exposure, as described above, the predominate use is for hedging purposes. In some other jurisdictions, pension plans are expressly prohibited from using derivatives to gain market exposure.

[5] Remarks of CFTC Commissioner Scott O'Malia, "Not All-End Users Are Created Equal" (May 11, 2011), http://cftc.gov/PressRoom/SpeechesTestimony/opaomalia-6.html.

[6] *See, e.g.*, Franzen, D. (2010), "Managing Investment Risk in Defined Benefit Pension Funds," OECD Working Papers on Insurance and Private Pensions, No. 38, OECD Publishing. Franzen writes that "[t]here is consensus that opposite banks, pension funds do not pose a systemic risk." *Id.* at 22. Franzen's statement is based in part on the fact that private pension funds are highly regulated, they are not for-profit businesses, and "pension funds have – at least in principal – a sponsor as guarantor and protector." *Id.*

past several years by financial reform legislation aimed at making derivatives markets more transparent and less risky. For example, European regulators have determined to exempt pension plans in the near term from mandatory clearing requirements.[7] Likewise, no capital charges are imposed on banks for their uncleared derivatives trades with pension scheme arrangements.[8]

Because pension funds are risk averse by their nature, they are unlikely to fail and therefore should not be considered under the methodologies.

### B. The High Regulation of Pension Funds Ensures Their Low-Risk Nature

As mentioned above, pension funds are among the most highly regulated of participants in global markets. The kinds of restrictions placed on pension funds, outlined in Exhibits A, B and C, include investment restrictions, diversification requirements, concentration limits, and restrictions on borrowings. This regulation ensures that pension plans are prudently diversified, conservatively managed, minimally leveraged, and financially transparent to regulators. Furthermore, pension plan asset managers are subject to the highest fiduciary standards and therefore face the threat of significant financial penalties for failure to comply with relevant provisions of applicable law. Based on this high level of regulation and deterrence for mismanagement, the theoretical risk of a pension plan bankruptcy is very remote. In fact, some jurisdictions have no provisions of law that would allow a pension plan to file for bankruptcy or reorganization in order to avoid financial obligations to counterparties.[9] And in the U.S. and Canada, for example, even the voluntary termination of a pension plan would not relieve the plan of its financial obligations to counterparties.[10]

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[7] Article 89 of Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July, 2012 on OTC derivatives, central counterparties and trade repositories. Based on the European Commission's latest extension, pension funds will remain exempt from mandatory clearing requirements in the EU until at least August 2017. We note, however, that in some other jurisdictions, including the United States, pension plans are not exempt from the central clearing mandate. *See* 7 U.S.C. § 2(h)(7). Regardless, the counterintuitive result of this recognition in the EU is that all of an EU pension fund's derivatives would be counted towards the "complexity" indicator if the proposed methodologies were applied to pension funds, despite the fact that European regulators already have determined that pension funds at least for the next few years do not pose counterparty risk that is great enough to necessitate mandatory clearing. *See* Consultative Document at 42.

[8] Article 382(4)(c) and Article 482 of the Capital Requirements Regulation ((EU) No 575/2013) (the European implementation of Basel III) states that the credit valuation adjustment charge should not be applied to transactions with pension scheme arrangements as defined in EMIR for as long as the transitional arrangements in Article 89 of EMIR apply.

[9] *See* Exhibits A, B, and C.

[10] *See id.*

## III. However Unlikely, the Impact of a Pension Fund Stress Scenario or Failure Would Not be Systemic in Nature

### A. Pension Funds Have a Long-Term Investment Perspective

As noted in the Consultative Document, pension funds are invested in markets for the long term. Pension funds have obligations to millions of pensioners throughout the world that stretch into the unforeseeable future. In order to ensure their ability to meet these obligations, pension funds cannot make short-term bets on cyclical market trends. Rather, as one commenter on the Consultative Document noted,[11] pension fund investments are largely made on a pre-determined periodic basis, without regard to swings in the market one way or the other. As a result, whether in good times or bad, pension funds provide a crucial source of stable liquidity to global markets and their continued participation in these markets is welcome and needed by other market participants. Because they are highly creditworthy and liquid counterparties, with low or practically no leverage, pension plans actually *reduce* systemic risk through their participation in derivatives and other markets. As a Bank of England report noted:

> [Pension funds] have limited short-term liquidity needs [and therefore] may be more inclined to buy and hold assets across the economic cycle. They may also be less subject to pressure to respond to short-term market movements, or they may be more willing and able to take advantage of market movements by buying assets at the bottom of the cycle and selling at the top. As such, they might have the potential to play a stabilising, or even countercyclical role in the financial system.[12]

Furthermore, unlike investors in public funds, pension funds do not offer participation units that are redeemable like the securities of an open- or closed-end investment fund.[13] Pensioners are limited in their ability to withdraw assets or cause a significant shift in the fund's investment strategy during times of market stress. Defined benefit plans are subject to regimented, longer-term redemption schedules keyed off of specific retirement dates and formulas tied to years of service and age that prevent their participants from 'running to the door' during a cascading financial situation. Similarly, early withdrawal tax penalties act as a deterrent for the vast majority of pensioners who might consider cashing out savings from a defined contribution plan prior to the applicable retirement age, even during a market downturn caused

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[11] *See* Letter from Fordham University students (Alemann, Belfanti, Biestek, Godsey, Lauberth, Sarwar) at 7 (April 7, 2014), *available at* http://www.financialstabilityboard.org/wp-content/uploads/r_140423w.pdf.

[12] *See* "Procyclicality and structural trends in investment allocation by insurance companies and pension funds: A Discussion Paper by the Bank of England and the Procyclicality Working Group" at 8 (July 2014), *available at* http://www.bankofengland.co.uk/publications/Documents/news/2014/dp310714.pdf.

[13] *See* Letter from Financial Services Roundtable at 20 (April 7, 2014), *available at* http://www.financialstabilityboard.org/wp-content/uploads/r_140423v.pdf; Letter from Institute of International Finance at 20 (April 7, 2014), *available at* http://www.financialstabilityboard.org/wp-content/uploads/r_140423ae.pdf.

by a systemic shock. As a result, pension funds under a stress or default scenario, however unlikely such a scenario may be, are less likely i) to become under-capitalized and thus unable to meet counterparty obligations; and ii) to exert downward pressure on asset prices through the "market channel" described in the Consultative Document by making a rapid and sizable exit from markets during turbulent times.

Notably, the Consultative Document's definition of a "collective investment vehicle" contemplates open- or closed-end schemes that offer redeemable participation units to investors, which as just explained, is not the nature of pension funds.[14] The Coalition agrees with prior comments that the Consultative Document's own definition establishing the scope of the investment fund sector eligible for G-SIFI designation necessarily forecloses pension funds from being considered under the proposed NBNI methodologies.[15]

### B. Pension Funds Are Not Highly Leveraged

Much of the methodologies' focus for investment funds is on the level of leverage used to transact, which includes the extent to which a fund uses derivatives.[16] The calculations for both the materiality threshold as well as the interconnectedness and complexity factors take into account various measures of leverage. It bears emphasizing that by law, pension funds cannot be highly leveraged investment vehicles due to laws restricting their borrowings.[17] Additionally, pension funds use derivatives almost exclusively for hedging currency and interest rate risks associated with the funds' fixed-income investments, as opposed to gaining speculative exposure to price movements in various asset classes. As a result, a natural curb exists on the overall size of a pension fund's derivatives portfolio such that the ratio of gross notional exposure to net asset value for a pension fund should be, on average, lower than for other funds when assessing the "interconnectedness" factor in the Consultative Document's methodologies.[18] Thus, the global impact of a pension fund default or stress scenario is mitigated by the absence of leverage transmitting a pension fund's financial stress to other trading counterparties and sources of financing through the "counterparty channel" described in the Consultative Document.

### C. Whether or Not Captured by Asset Managers, Pension Funds Should Not Be Designated as NBNI G-SIFIs

Whether or not pension funds are captured by asset managers, a pension fund itself still poses little (if any) systemic risk for the same reasons explained in the foregoing sections. The act of managing pension assets does not exacerbate systemic risk, particularly when existing legal constructs require pension assets to remain separate and impose stringent fiduciary and

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[14] *See* Consultative Document at 31.

[15] *See supra* note 13.

[16] *See* Consultative Document at 32.

[17] *See* Exhibits A, B, and C.

[18] *See* Consultative Document at 40.

other requirements on pension plan managers. Indeed, managed pension accounts, such as the separately managed accounts noted in the Consultative Document, are governed by investment guidelines that prevent external managers from implementing a strategy or taking any course of action that runs counter to the pension plan's governing documents and applicable prudential law governing such plans. If a pension plan is, for the reasons stated herein, not to be deemed in scope of NBNI G-SIFI methodologies, it follows that such pension plan's board, pension plan sponsor and in-house asset manager should also not be deemed to be within scope, solely as a result of managing or overseeing such pension plan assets. The Coalition considers it important that pension plan boards and pension plan sponsors who manage the assets of their plans in-house (either directly or through an affiliate) should not be considered asset managers subject to the proposed methodologies. In addition, where in-house managers employ external managers, various double-counting issues could arise. In any case, there will be monitoring and compliance costs, ultimately borne by plans or their plans sponsors, if NBNI G-SIFI methodologies are applied.

## IV. Conclusion

For the reasons above, it makes sense to exempt pension funds from the NBNI G-SIFI methodologies by recognizing that pension funds (i) are heavily regulated, minimally (if at all) leveraged, prudently managed entities; (ii) do not pose systemic risk; and (iii) are among the safest counterparty in the global financial system.

On behalf of its membership, the Coalition thanks the FSB and IOSCO for this opportunity to comment on the Consultative Document and hopes that the comments provided herein will further illustrate the many reasons why pension funds should be excluded from the NBNI G-SIFI methodologies. If it would benefit the FSB and IOSCO's understanding, Coalition members would be happy to meet in person to further discuss the Coalition's views.

American Benefits Council
The Committee on Investment of Employee Benefit Assets
The ERISA Industry Committee
European Association of Paritarian Institutions
National Coordinating Committee for Multiemployer Plans
Pensions Europe
Pension Investment Association of Canada

**EXHIBIT A**
U.S. Plans

Below is a summary of some of the key reasons U.S.-regulated ERISA plans present virtually no counterparty risk.

- ERISA plans are required to be prudently diversified. In entering into swaps for plans, ERISA requires that plan fiduciaries act solely in the interest of the plan's participants and beneficiaries and with the care, skill, prudence, and diligence that a prudent person familiar with such matters would use.[19]

- "Investment managers" for ERISA plans are required to be regulated entities (registered investment advisers, banks, or insurance companies) that are (1) subject to the highest standard of care under U.S. law, (2) liable for significant financial penalties for failure to comply with relevant provisions of ERISA, and (3) liable in many instances for the acts of other fiduciaries.[20]

- ERISA plan assets are required to be held in trust for future payment, subject to the oversight of a trustee which is typically a U.S. regulated bank or, in the case of a multiemployer plan, an independent trust jointly managed and subject to specified fiduciary rules.[21]

- Because of the regulatory structure that applies to ERISA plans, ERISA plans typically have minimal (if any) leverage.

- ERISA plans are subject to stringent funding requirements pursuant to the Pension Protection Act of 2006.

- ERISA plans are financially transparent; they typically have third-party custodians report their net asset value to dealers on a monthly basis and are required by law to report their holdings annually to the Department of Labor.[22]

- ERISA plans are not operating entities subject to business-line risks and competitive challenges.

- There is no provision under any law for ERISA plans to file for bankruptcy or reorganization to avoid their financial obligations to counterparties. Even the filing of bankruptcy by an ERISA plan sponsor or the involuntary termination of the plan

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[19] ERISA section 404(a)(1)(B).

[20] ERISA sections 3(38) (investment manager requirements), 404(a) (fiduciary standards), 405 (co-fiduciary liability), 409 (fiduciary liability), 502 (ERISA enforcement).

[21] ERISA section 403(a).

[22] *See* Form 5500.

does not relieve a plan of its financial obligations to counterparties since the plan is transferred to the Pension Benefit Guaranty Corporation.

- ERISA plans are typically (and correctly) not treated the same as unregulated investment entities in CFTC regulations. For example, Rule 4.5 excludes certain ERISA plans from the definition of a "commodity pool" and operators of most ERISA plans from the definition of "commodity pool operator." The CFTC has relied on ERISA's "pervasive" regulation of plans and plan fiduciaries as a reason it does not need to regulate these plans.[23] Similarly, pension trusts are exempt from registration as "investment companies" with the SEC.[24]

- Based on a survey of over a dozen major dealers by one Coalition member, ERISA plans have in all cases met their financial swap obligations to dealers despite the bankruptcy of Fortune 500 plan sponsors, the market crash of 2008, and every other significant financial event since the adoption of ERISA in 1974.

[23] *See* Commodity Pool Operators; Exclusion for Certain Otherwise Regulated Persons From the Definition of the Term "Commodity Pool Operator," Final Rules, 50 Fed. Reg. 15868, 15869 and 15873 (1985); 58 Fed. Reg. 6371, 6373 (1993).

[24] Section 3(c)(11) of the Investment Company Act of 1940 ("Investment Company Act").

**EXHIBIT B**

Canadian Plans

Below is a summary of some of the key reasons Canadian plans present virtually no counterparty risk. Note that Canadian pension funds may be regulated by provincial or federal laws and regulations so certain of the factors below may not apply to all Canadian pension plans.

- Pension plans are subject to a prudent portfolio investment standard. For example, the administrators of pension plans subject to the laws of Ontario are required to "exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person."[25] In doing so, the administrator must use all relevant knowledge and skill that it possesses, or ought to possess, in the administration and investment of the pension fund.[26]

- Pension plans are subject to investment restrictions, concentration limits and other restrictions mandated by law.

- Pension plans must establish and file with the appropriate regulators a detailed statement of investment policies and procedures, including with respect to the use of derivatives, options and futures.[27] Such document outlines the plans expectations with respect to diversification, asset mix, expected returns and other factors.

- Administrators of pension funds are subject to strict prohibitions concerning conflicts of interest. Similar prohibitions are also imposed on employees and agents of the administrator.[28]

- Pension plans are generally prohibited from borrowing.[29]

- The assets of pension plans are held in trust by licensed trust companies or other financial institutions and are separate from the assets of their sponsors.

- Funding shortfalls may be funded by the pension plan's corporate or government sponsor, by increasing contributions of pensioners or by lowering benefit payments, depending on the nature of the plan.

- Pension plans must regularly file an actuarial valuation with the appropriate regulators.

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[25] *E.g.*, Pension Benefits Act, RSO 1990, c P.8 ("PBA"), s 22(1).

[26] *E.g.*, PBA s 22(2).

[27] Pension Benefits Standards Regulations, 1985, SOR/87-19, s 7.1.

[28] *E.g.*, PBA ss22(4) and 22(8).

[29] Income Tax Regulations, CRC c 945, s 8502(i).

- Pension plans are transparent to members and regulators. Provincial legislation requires that pension plans file a detailed annual financial statement accompanied by an auditor's report.[30]

- Pension plans are not operating entities subject to business-line risks and competitive challenges.

- The governance of Canadian pension plans is subject to statutory requirements and guided by best practices.

- There is no provision under any Canadian law for pension plans to file for bankruptcy or reorganization to avoid their financial obligations to counterparties or other creditors. Additionally, the voluntary termination of a plan does not relieve the plan of its financial obligations.

[30] *E.g.*, Pension Benefits Act, RRO 1990, Reg 909, s 76. In addition, an auditor's report is required for pension plans with $3 million or more in assets.

**EXHIBIT C**

EU Plans

Below is a summary of some of the key reasons pension plans established in a European Union member state present virtually no counterparty risk.

- European pension funds are users of long dated interest rate and currency and inflation swaps for purposes of limiting investment risk. Their liabilities (i.e., the pension cash flows) are hedged against inflation and interest rate risks to offer protection ultimately for their pension beneficiaries.

- European pension funds are subject to regulation and extensive regulatory oversight, including the IORP Directive[31] and the national Pension acts of their home countries. Article 18 of the IORP Directive imposes broad investment regulations on pension plans that are intended to assure the security and affordability of occupational pensions. These regulations are designed to enable pension plans to meet their obligations to beneficiaries and creditors.

- European pension funds are also subject to an extensive set of rules regarding their solvency and liability coverage ratio. The regulatory framework ensures that pension funds' coverage ratios do not fall below certain minimum levels. European pension plans are therefore conservatively managed and very creditworthy. European pension funds are constrained by regulation to use swaps solely for risk management purposes. Article 18(d) of the European IORP Directive 3(2003/41/EC) restricts pension funds from using OTC derivatives for any purpose other than to manage risks associated with their long-term liabilities. Accordingly, pension funds do not speculate with derivatives.

- The policy of pension funds is usually determined by a board of trustees, consisting of an equal representation of employers and employees. Pension funds are structured as foundations or similar entities, with key characteristics being that these are not-for-profit and independent entities, without shareholders. Mandatory participation typically is an inherent feature of many pension funds in EU countries. This implies that an employer, or a group of employers, has the requirement to offer a pension scheme to its employees. For employees, participation in such a pension scheme is compulsory. This compulsory system for pension funds works on the basis of solidarity and risk sharing among participants. Any return on investment will be to the sole benefit of the future pensioners.

- Due to the compulsory nature of pension funds in combination with their conservative long-term investment strategy, the theoretical risk of a bankruptcy of a pension funds is very remote. The pension fund can mitigate such risk, for instance, by (i) increasing the premiums (ii) no indexation and/or (iii) decreasing payments to the pensioners.

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[31] Directive 2003/41/EC, Jun. 3, 2003, on the activities and supervision of the institutions for occupational retirement provision, OJL 235, 23/9/2003, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:235:0010:0021:EN:PDF.

- In addition, national rules and regulations will often provide for an extensive set of rules in relation to pension funds investments to avoid that the coverage ratio of pension funds will fall below certain minimum levels. Pension funds are stable long term investors with a high degree of solidarity offering a low-priced product for the pensioners, which are:

    - highly creditworthy;
    - highly regulated;
    - low leveraged; and
    - very prudently managed.