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## Pension Plan for Salaried Employees of Corby Distilleries and Affiliated Companies - December 11, 2008.

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "PBA");

AND IN THE MATTER OF a Proposal of the Superintendent of Financial Services to Refuse to Register an amendment to **Pension Plan for Salaried Employees of Corby Distilleries and Affiliated Companies, Registration Number 0413880;**

### **TO:**

#### **Corby Distilleries Limited**

193 Yonge Street  
Toronto, ON M5B 1M8

#### **Attention:**

Paul Holub  
Vice President, Human Resources

#### **Administrator and Employer**

### **NOTICE OF PROPOSAL**

**I PROPOSE TO** refuse to register Amendment No. 14 to the Pension Plan for Salaried Employees of Corby Distilleries and Affiliated Companies, Registration Number 0413880 (the "Plan") adopted on January 23, 2002.

### **REASONS:**

1. The Plan is a defined-benefit plan that covers present and former salaried employees of Corby Distilleries Limited (ACorby@). Corby is also the administrator of the Plan.
2. The Plan was formed as a result of a merger between the Pension Plan for Salaried Employees of Corby Distilleries Limited (the ACorby Plan@) and the McGuinness Distillers Limited Pension Plan (the AMcGuinness Plan@), a pension plan for the benefit of all active employees of McGuinness Distillers Limited effective January 1, 1989. In anticipation of the merger, the McGuinness Plan was partially wound up (the A1988 Partial Wind-up@) effective August 31, 1988. Approval of the 1988 Partial Wind-Up was granted by the Pension Commission of Ontario (the APCO@) on December 19, 1988. The merged Plan was also partially wound up effective September 30, 1989 (the A1989 Partial Wind-up@) as a result of various terminations which had occurred from February 28, 1989 through September 30, 1989.

3. The members affected by the 1988 Partial Wind-up and the 1989 Partial Wind-up (the A1988 Terminated Members@ and the A1989 Terminated Members@, respectively) received the basic benefits to which they were entitled in accordance with the valuation reports prepared by the actuary for the Plan and approved by the PCO. Surplus allocated to the partial wind ups was segregated and accounted for separately from other Plan assets.
4. An actuarial report dated December 18, 1989 had established, in respect of each partial wind-up, the maximum value of the assets that could be allocated to the terminated members upon partial wind-up and the value of the liabilities with respect to the terminated members on partial wind-up, in both cases revealing a surplus of assets over liabilities.
5. In order to deal with the surplus resulting from the 1988 and the 1989 Partial Wind-ups, Corby decided that it would provide the 1988 Terminated Members and the 1989 Terminated Members with a benefit enhancement equal in value to 50% of surplus resulting in their respective wind-ups. It implemented this benefit enhancement through an amendment to the Plan passed on January 20, 1999 (AAmendment No. 8") with an effective date of January 1, 1999.
6. Amendment No. 8 provides as follows: each terminated member will receive an increase in benefits amounting to the lesser of
  - (a) the individual member=s proportionate share of the surplus in addition to any post wind-up return on assets and reduced by any other benefit enhancements received since wind-up; and
  - (b) an enhancement through favourable adjustments to the calculation of the individual=s pension entitlement up to the maximum benefits permitted under the Income Tax Act, as set out in Amendment No. 8. Should a terminated member fail to elect to receive the benefit enhancement, that member would instead receive the amount as a lump-sum cash payment.
7. The text of Amendment No. 8 refers to an intention by Corby to Aenhance the benefits of the 1988 Terminated Employees and 1989 Terminated Employees" and refers to the effect of the amendment as providing an Aincrease in the value of benefits". While Amendment No. 8 offers the terminated employees the right to elect to receive a Alump-sum cash payment for his entire Individual Surplus", this amount is referred to in the same paragraph as a Abenefits enhancement".
8. In its application for registration (Form 1.1) of Amendment No. 8 dated March 24, 1999, Corby, in selecting the subject matter to which the amendment pertained, did not check the box marked ADistribution of Surplus", but checked the box marked AOther", and inserted the following text: ABenefit enhancements in respect of McGuinness employees affected by the 1988 and 1989 partial wind-ups corresponding to 50% of the share of surplus allocated to them". A Notice of Registration for Amendment No. 8 was issued by FSCO on September 22, 1999.
9. On January 23, 2002, the Board of Directors of Corby passed an amendment (AAmendment No. 14") which was effective from January 1, 1999 rescinding Amendment No. 8 and declaring it Avoid and of null effect".
10. Section 14(1) of the *PBA* states: An amendment to a pension plan is void if the amendment purports to reduce,

- (a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;
- (b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or
- (c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.
11. Subsection 14(1) prevents the sponsor of a pension plan from reducing the accrued benefits of plan members through amendment to the plan. Subsection 14(1) states that once plan members have become entitled to certain benefits under a pension plan, no amendment can be made by the administrator to retract or reduce those benefits, and such an amendment will be considered void.
12. Although funded out of the surplus attributable to the 1988 and 1989 Partial Wind Ups, Amendment No. 8 contains enhancements to the pension benefit of the 1988 and 1989 Terminated Employees. The benefit enhancements contained in Amendment No. 8 are, therefore, protected by section 14 and Amendment No. 14 s, therefore, void under section 14 of the *PBA*.
13. The conclusion that Amendment No. 8 constitutes a benefit enhancement rather than a mere distribution of surplus is supported by the following facts: a. The text of Amendment No. 8 refers to Corby=s intention to Aenhance the benefits of the 1988 Terminated Employees and 1989 Terminated Employees" and that the effect of the amendment is to provide an Aincrease in the value of benefits". While Amendment No. 8 offers the terminated employees the right to elect to receive a Alump-sum cash payment for his entire Individual Surplus", this amount is referred to in the same paragraph as a Abenefits enhancement"; b. As noted above, the application for registration of Amendment No. 8 with FSCO, in esponse number 6 that specifies the subject matter of the amendment, does not have a check in the box marked ADistribution of Surplus", but instead the box marked AOther" is checked, followed by the text: ABenefit enhancements in respect of McGuinness employees affected by the 1988 and 1989 partial wind-ups corresponding to 50% of the share of surplus allocated to them".
14. In addition, Amendment No. 8 is clearly binding on Corby because it is validly adopted by the Corby Board of Directors and was registered by the Superintendent.
15. Section 18(1)(d) states that the Superintendent may "refuse to register an amendment to a pension plan if the amendment is void...". For the reasons stated bove, Amendment No. 14 is void and the Superintendent, therefore, proposes to refuse to register it.
16. Such further and other reasons as may come to my attention.

**YOU ARE ENTITLED TO A HEARING** by the Financial Services Tribunal (the "Tribunal") pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Proposal is served on you.\***

**YOUR WRITTEN NOTICE** must be delivered to:

Financial Services Tribunal  
5160 Yonge Street  
14th Floor  
Toronto, Ontario  
M2N 6L9

**Attention:** The Registrar

**FOR FURTHER INFORMATION** on a Form for the written notice, please see the Tribunal website at [www.fstontario.ca](http://www.fstontario.ca) or contact the Registrar of the Tribunal by phone at 416- 590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

**IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE PROPOSAL AS DESCRIBED IN THIS NOTICE.**

**DATED** at Toronto, Ontario, this 11th day of December, 2008.

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K. David Gordon  
Deputy Superintendent, Pensions

**COPY TO:**

Osler, Hoskin & Harcourt LLP  
Box 50, First Canadian Place  
Toronto, ON M5X 1B8

**Attention:**

Evan Howard  
(416) 862-4894 (Phone)  
(416) 862-6666 (Fax)

**Solicitors for Corby**

\* **NOTE** - Pursuant to section 112 of the PBA any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the seventh day after the date of mailing.