

TORYS



Proposal to The Canadian Association of Financial Institutions in Insurance (CAFII)

Torys' responses to the issues and
clarifications requested by CAFII

February 28, 2019

Following recent conversations with CAFII representatives, Torys now has a better appreciation of the reasons why CAFII wishes to engage an external consultant or research firm (the Firm). Torys understands that the Firm will manage the project, conduct the research, do the comparative analysis, generate the strategic options and write the final report. This includes business modeling insight, benchmarking and the development of strategic options and recommendations for possible industry and proprietary reforms.

Accordingly, we look forward to working with the Firm to ensure that CAFII receives the best possible advice. Our responses to the questions you raised reflect this new approach.

Question 1: How Torys will adjust its proposal to work with external consultants

Torys has adjusted its proposal with the following value added services, and generally, as follows:

- With respect to the selection of the Firm, Torys will work with CAFII to select the Firm best suited for the project. This includes assisting with the development of the RFP, the review of responses, the interview process and the final selection process. This also includes, with CAFII's input and approval, Torys entering into a contract with the chosen Firm.
- Torys will engage the selected Firm to manage the project. This approach is important from a competition law perspective as it will ensure that the project is clearly framed as legal advice and that solicitor-client privilege is maintained.
- With respect to Engagement #1, the Firm will conduct the research, comparative analysis and write the final report. Torys will then present the Firm's final report to CAFII. This approach will allow for the establishment of the necessary safeguards to ensure compliance with competition law requirements, and to minimize any risks associated with competition law. We will be in constant communication with the selected Firm and CAFII to assist in any way required and to provide input into the research and drafting of the Engagement #1 report, including providing expert knowledge and insights to the external consultant's work on the subject matter.
- Omar Wakil will provide competition law compliance advice and risk management advice at each step.
- With respect to Engagement #2, the Firm will, with Torys' input and expert advice, develop strategic options, which will include:
 - the results of a benchmarking exercise
 - proposed guidelines or guidance documents
 - proposed industry and proprietary reforms
- The Firm will draft the final report which Torys will deliver, in all cases with a view to competition law advice and solicitor client privilege.

Question 2: How Torys will manage adherence to Competition Law, especially with the involvement of external consultants?

Several provisions in the federal *Competition Act* relate to competitor collaborations, the most relevant being section 49, a criminal provision prohibiting certain agreements or arrangements between federal financial institutions. There is no competitive effects requirement, so the legislation can be contravened even if there is no adverse impact on competition. The *Competition Act* does not prohibit information exchanges, although exchanges of competitively sensitive information ought to be controlled as a matter of best practice – to avoid the inference of collusion – and to safeguard CAFII members' commercial interests.

The Firm's involvement will facilitate *Competition Act* compliance as any competitively sensitive information or raw data provided by CAFII members can be sent to the Firm and "scrubbed" (e.g., by being aggregated in an appropriate form) before being shared within the wider group.

Torys will provide guidance as to how discussions should be conducted and recommendations developed, including those involving the Firm. This guidance which ensure compliance with the *Competition Act* will include recommendations along the following lines:

- establishing for participating members a "do's and don'ts" guide setting out what they can and cannot do and the information that that can and should not be shared
- appropriately monitoring and memorializing meetings and communications between working group members to ensure no inappropriate flow of competitively sensitive information amongst members
- establishing guidelines directing the Firm as to what information needs to be "scrubbed" and the manner in which it should be done
- ensuring that the reports produced from Engagements 1 and 2 are structured to address competition risk, for example ensuring that the report cannot be characterized as a prohibited "agreement or arrangement" amongst federal financial institutions

Ultimately, an important part of the process will be to ensure the parties involved in the project take reasonable and well documented precautions so as to enable them to satisfactorily respond to potential enquiries from the Competition Bureau.

Question 3: How does Torys see the process of engaging, managing, coordinating and cooperating with external consultants working especially in the context of ensuring adherence to Competition Law?

Torys will closely collaborate with the external consulting firm to ensure that the final report satisfies CAFII expectations. To achieve this objective Torys will:

- develop with the external consulting firm a sound and comprehensive research plan
- establish regular touchpoint meetings with the external consultants to ensure that the project is on track and progressing as planned
- provide to the external consultants the required level of expertise on the subject matter
- ensure that any communications with members adhere to the guidance provided by Torys to ensure compliance with the *Competition Act* (see answer to question 2 above)

Other key points

The 60 day timeframe proposed by CAFII for the delivery of the final report is dependent on the identification and retention of a consulting firm and the ability of that firm to meet specified deadlines. We look forward to assisting the industry and members companies in addressing these issues.

Our proposed flat fee of \$110,000 CA, not including GST/HST or disbursements, remains the same. While we will not conduct the research, we anticipate devoting a considerable amount of time to various activities with the consultant, including meetings, providing expert advice at all stages of the work, and reviews of the final reports.

