

**memorandum**

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Dear Mr. Martin:

**Application of RADM to Credit Card-Embedded Insurance Benefits**

You have asked for our input regarding the position adopted by the Autorité des Marchés Financiers (**AMF**) that the *Regulation respecting Alternative Distribution Methods* (**RADM**) applies to credit card-embedded insurance benefits and the strategy to be developed by the Canadian Association of Financial Institutions in Insurance (**CAFII**) in that regard.

We understand that meetings and discussions have been held between representatives of CAFII and the AMF in order to discuss the above issue, and that CAFII has written to the AMF on July 7, 2020 to propose certain practical solutions on behalf of its members. You have informed us that the AMF, in a response dated March 30, 2021, has replied that it expects insurers to prepare product summaries that fully comply with section 20 of the RADM to be given to consumers when they choose their credit card and complete an initial disclosure. More specifically, the AMF expects that the insurers will fulfill the following before September 17, 2021:

- Disclose each product embedded in the credit cards under the distribution without representative (DWR) regime (one file per product);
- Make each product summary and a specimen of the policy or the insurance certificate accessible on their own website; and

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- Provide the AMF with an action plan to implement the delivery of the summary by their distributors to the clients, to train their distributors and to implement the necessary adjustments to their processes to comply with the Quebec laws and regulations.

We also understand that CAFII is considering asking for this September 17 delay to be extended, but that it has not yet applied for the extension at this time.

### **NRFC OPINION**

In the above context, you have sought assistance to develop legal arguments in order to convince the AMF that the RADM should not apply to credit card-embedded insurance benefits or, at the very least, to obtain some leverage in that regard.. A summary of the principal legal considerations to be examined by us in a written opinion follows below.

CAFII intends to let the AMF know of its intention to consult with Norton Rose Fulbright Canada (**NRFC**) in order to evaluate its legal options as soon as possible. The need to obtain NRFC's view may also be presented as a justification for an extension of the AMF's delay as your members may decide to wait for the advice before implementing changes, if any.

Given CAFII's fundamental right to obtain legal advice, the apparent complexity of the issues, the practical impact of those issues on the business model of CAFII's members and the admission by the AMF that the application of the RADM to credit card-embedded insurance benefits is an "emerging issue", we are of the view that the AMF will most probably agree that it is appropriate for CAFII to seek legal guidance from external counsel in the present circumstances.

CAFII does not need to disclose to the AMF the specific subject matters to be examined by NRFC. Nor does it need to commit to communicate the contemplated opinion to the AMF. In our view, CAFII should merely explain that the potential application of the RADM to credit card-embedded insurance benefits raises important and complex legal issues and that those issues need to be examined in details by NRFC and be the subject of a strong consensus among CAFII members.

Regarding the opinion sought, we propose to examine whether the RADM applies to credit card-embedded insurance benefits. To this end, subject to your comments and instructions, we propose to consider the following elements in our opinion :

- Review of the RADM and of its preceding regulatory regime;
- Review of the doctrine and case law dealing with the application of the RADM and its preceding regulatory regime;
- Review of the various documents issued by the AMF and interested stakeholders during the consultation process led by the AMF before the adoption of the RADM;
- Review of the applicable statutory interpretation principles;
- Preliminary analysis of the legislative framework governing other benefits generally offered with credit cards e.g. reward programs, fraud protection, etc.;
- Preliminary analysis of the situation in the other Canadian provinces;

- Practical issues flowing from a potential application of the RADM to credit card-embedded insurance benefits and creative ways that may ease the AMF's concerns regarding the protection of Quebec consumers;
- Analysis of certain provincial and federal statutory provisions relating to the distribution of insurance products; and
- Jurisdiction of the AMF to impose the RADM on federally-regulated entities and issues relating to the *Bank Act*;

We should be in a position to deliver an opinion in late May or early June 2021. We estimate that fees for the preparation of the opinion should not amount to more than \$50,000 CDN. The estimate also covers participation in one or two calls with a committee of your members to discuss our draft opinion and a limited number of revisions to the draft opinion.

Should you wish us to participate in a meeting with AMF representatives to present and discuss our conclusions, we would estimate an additional budget of \$3,000 to \$5,000 for the preparation and participation in the meeting, assuming it is held by electronic means, in view of the current pandemic restrictions.

Should a change in the circumstances of our work materially affect our above estimate, or should our mandate be expanded to include representations to parties other than CAFII, its members or the AMF, such as the Quebec Department of Finance Department, we will seek from you further instructions regarding our estimate.

The same would also apply if we were to conclude that it is simply not possible to adequately comply with the RADM and that CAFII would like to retain our services regarding a possible challenge before the Courts.

We trust that the above accurately describes the proposed mandate. Should you have any question or comment, however, please do not hesitate to ask.