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Agenda Item 5(c)
September 14/21 EOC Meeting

The Wait Is Over: Federal Government Releases Regulations For Financial Consumer Protection Framework

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Financial Services Bulletin
AUGUST 25, 2021

On August 17, 2021, the Department of Finance published the *Financial Consumer Protection Framework Regulations* (the "Regulations") in the Canada Gazette. This comes almost three years after the government introduced Bill C-86, *Budget Implementation Act, 2018, No. 2* ("Bill C-86"), which laid the foundation for the government's new financial consumer protection framework (the "Framework").

Background to the Regulations

In 2018, two reports by the Financial Consumer Agency of Canada (the "FCAC") highlighted areas where improvements could be made to better protect consumers and further strengthen regulatory oversight of banks in Canada (see Report on Best Practices in Financial Consumer Protection, which assessed the best practices in provincial and territorial consumer protection regimes, and Domestic Bank Retail Sales Practices Review, which reviewed the sales practices employed by Canada's six largest banks).

In response to the FCAC reports, the government introduced Bill C-86 which, among other things, strengthened the FCAC's mandate and powers and introduced the Framework, which contained some of the most sweeping consumer protection provisions ever proposed for banks and authorized foreign banks ("institutions") operating in Canada (see Fasken Bulletin: Federal Government Introduces Significant New Consumer Protection Framework for Customers of Banks – Bill C-86).

On December 13, 2018, Bill C-86 received royal assent. Since then, industry has been waiting with bated breath for the release of the Regulations in order to understand the full scope of the Framework. The wait is finally over.

Final Piece of the Puzzle

The Regulations largely streamline and consolidate existing requirements for institutions that are found in 23 different existing regulations. That said, the Regulations do contain new obligations for institutions.

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Of the new obligations contained in the Regulations, the five key elements are:

- access to basic banking;
- improving the timeliness of institutions' complaint-handling process;
- clarifying the scope of the Framework;
- updating disclosure requirements with respect to liability for unauthorized credit card transactions; and
- prescribing new disclosure requirements for deposit type instruments at renewal.

Access to Basic Banking Services

The Regulations will raise the maximum amount of a Government of Canada cheque that a member bank (i.e., a bank that is a member of the Canada Deposit Insurance Corporations) must cash, free of charge, for a consumer from $1,500, to $1,750. According to the government, this is being done to reflect rising benefit levels for minimum income programs (e.g. Old Age Security, Canada Pension Plan). Since the maximum amount that must be cashed is increasing, Public Services and Procurement Canada has started to update the indemnification rules to reflect this change.

Complaints Handling Processes

Currently, there are no requirements on institutions to deal with customer complaints in a specific number of days, only FCAC guidance that request institutions resolve such complaints within 90 days from the day a complaint is escalated to an employee designated to deal with complaints. During the consultation process, institutions had expressed a preference for a complaint handling period that was longer than 60 days. However, the Regulations will require institutions to deal with consumer complaints within 56 days following the day a complaint is made. This is intended to improve the timeliness of the complaint-handling process for consumers and, according to the Department of Finance, align Canada with international best practices for bank complaint handling. A 56 day time period is consistent with the standard set by the United Kingdom.

Clarifying the Scope of the Framework

The Framework includes a number of general requirements that apply to all "products and services" offered or sold by an institution. To ensure that this expression does not inadvertently capture derivatives and eligible financial contracts (financial instruments that are not captured by the current legislative framework), the Regulations clarify that for the purposes of Part XII.2 (Dealings with Customers and the Public), a "derivative" as defined in subsection 415.2(2) of the *Bank Act* and an "eligible financial contract" as defined in subsection 415.2(3) of the *Bank Act* are not included in the expression "products or services".

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Liability for Unauthorized Credit Card Transactions

The Framework made changes to the limits on the liability of a customer for unauthorized use of a credit card. To reflect these changes, the Regulations prescribe the following updated information that must be disclosed to consumers:

- an institution cannot hold a consumer liable for more than $50 for unauthorized credit card transactions unless the consumer has demonstrated gross negligence or, in Quebec, gross fault in protecting their card, PIN, or their account; and
- a consumer is not liable for fraudulent transactions that occurred after reporting to their institution that credit card information or personal authentication information has been lost or stolen or is otherwise at risk of being used in an unauthorized mannered risk.

Disclosure of the Interest Rate for Deposit Type Instruments on Renewal

The Framework imposed a new requirement on institutions to disclose the interest rate for a deposit type instrument (e.g., GICs) 21 days and five days before renewal. The Regulations clarify that institutions can disclose this rate by directing the consumer to a website or telephone number where they can obtain the current rate.

Other Changes

The Regulations do not contain the requirements under the existing *Cost of Borrowing Regulations* that prescribed certain font sizes and formatting that must be used in the information boxes. The Regulations also contain new exceptions for what will be considered prescribed information in the case of a prescribed affiliate that is an insurance company for the purposes of a Canadian bank's public accountability statement.

Looking Ahead

The Regulations are scheduled to come into force June 30, 2022, giving institutions just over 10 months to implement these new requirements.

While these Regulations have been eagerly awaited for several years, the bulk of the changes do not result in any substantive policy change to the financial consumer protection regulations to which institutions are currently subject. Institutions will continue to be required to comply with federal and/or provincial consumer protection laws as they apply to their operations.

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New regulations complete overhaul of *Bank Act* consumer provisions

August 19, 2021

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On August 18, more than two years after amendments to the *Bank Act* consumer provisions introduced in Bill C-86 as the Financial Consumer Protection Framework (the Framework) received Royal Assent, the government published the Financial Consumer Protection Framework Regulations (the Regulations). Together, the *Bank Act* amendments and the Regulations consolidate and replace existing *Bank Act* consumer provisions and 13 sets of regulations that apply to banks and authorized foreign banks with a view to enhancing consumer protection.

What you need to know

- The *Bank Act* amendments and regulations establish a new financial consumer protection framework and will come into force on June 30, 2022.
- The Regulations will apply to banks, but not trust and loan companies. The existing regulations will continue to apply to trust and loan companies.
- There are few substantive policy changes. The more important changes are identified in this bulletin.
- More consumer protections are extended to large businesses, despite provisions to limit this.
- Banks will be required to deal with customer complaints within 56 days of receipt of the complaint.

Previous Torys bulletins reported on the key features of the Framework[1], including the introduction of responsible business conduct obligations and cooling-off periods for certain consumer agreements, as well as onerous complaint management and whistleblowing requirements.

Although many of the obligations that were previously found in existing regulations can now be found in the *Bank Act* provisions, several details were revealed in the Regulations. This bulletin sets forth, at a high level, some of the more impactful aspects of the Regulations.

1) Application to businesses

Historically, the *Bank Act*'s "consumer protection" requirements have only applied to natural persons and not corporate entities such as businesses or non-profits. This will no longer be the case as many of the Framework's provisions will now apply to businesses customers. These include the "prohibited conduct" provision[2], the express conduct provision[3], and the requirement to list charges or penalties[4], amongst others, will now apply to businesses.

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There have been attempts to limit the Framework's application to businesses. A legislative amendment was tabled in spring 2021 to ensure that only natural persons and eligible enterprises (small- to medium-sized enterprises) would benefit from the "cooling off" cancellation right in section 627.1 of the Framework, thereby exempting large businesses from the right.

Concerns had also been raised that the generic term "borrower" could result in the application of the new, more onerous credit card liability provisions to commercial credit cards. Although the regulations do specifically address this concern, the Regulatory Impact Analysis Statement (RIAS) to the Regulations does clarify that the intent was not to change the scope of the term "borrower" to include corporate borrowers, and as such, the new liability provision will continue to apply only to non-commercial credit cards. Although concerns had been raised regarding the application of other provisions to businesses, the regulations nor the RIAS provide any other exemptions or clarifications.

2) Optional products or services

One of the more important, and confusing, changes in the Framework is the new definition of "optional product or service". To qualify as an "optional product or service" under the new definition, the product or service must be "provided" by the institution whereas under the existing framework, the optional product or service can be "offered or provided". Based on comments made by the Department of Finance, we understand this change has been interpreted to mean that a third-party optional insurance product (such as creditor insurance) no longer qualifies as an "optional product or service" as such products are not "provided" by the institution or an affiliated insurer.

The expectation, and hope, has been that the publication of the Regulations would answer many of the questions that this new definition raised. Unfortunately, section 35 of the Regulations—which identifies the information that must be disclosed for optional services—has further muddied the waters, providing that the prescribed information must be disclosed "in relation to optional services, including insurance services, that are offered on an ongoing basis". This raises the question as to when insurance services are or are not to be considered "optional services". Further analysis will be required to understand the extent to which this reference impacts the interpretation that the definition of optional services does not include third-party insurance services not provided by the bank.

3) Telephone agreements

Banks welcomed the introduction of section 627.55(2) of the amended *Bank Act*, which allows a bank to enter into a product or service agreement over the telephone on the condition that the prescribed information be disclosed orally by telephone and then subsequently be sent in writing. However, the usefulness of this provision has been somewhat dampened by the amount of information that the Regulations require to be disclosed over the telephone.

Upcoming webinar: *Register for our upcoming webinar and join our lawyers as they examine the important aspects of the regulations, what they mean for banks and how they can best prepare for when the new requirements come into force*.

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Although section 627.55(2)(a)(i) of the Act would have allowed for only a "prescribed portion of the information" to be disclosed, the Regulations have not taken advantage of this drafting and require the disclosure of a significant amount of information, and in the case of certain products such as deposit-type instruments, the disclosure of more information than is required under the existing framework.

Banks will need to closely analyze the required disclosures should they wish to enter into agreements over the telephone.

4) Principal Protected Notes and Deposit Type Instruments

Section 627.78 of the *Bank Act*, as amended, combines the previous disclosure requirements for the issuance of principal protected notes (PPNs) and deposit type instruments DTIs currently found under *Principal Protected Notes Regulations* and the *Deposit Type Instruments Regulations* (DTI Regulations).

This approach led to several issues, including the fact that it did not appear that all existing disclosure requirements had been transferred to section 627.78. It had been expected that these omissions would be addressed in the Regulations. Although section 27 of the Regulations does add the disclosure requirement for PPNs that were missing in section 627.78 (when compared to existing requirements), it did not resolve issues with respect to the required disclosures when issuing DTIs. For example, two of the disclosure requirements under the existing DTI Regulations (paragraphs 3(1)(f) and (h)) are no longer required for the issuance of DTIs but are required when DTIs are sold by telephone (section 25 of the Regulations) or when a bank issues a new DTI following the DTI's maturity (section 29).

The requirements pertaining to PPNs and DTIs and are convoluted and will require special attention from the banks.

5) Other key regulations

- Information boxes: Information boxes are still required and their content is prescribed, but information box presentation requirements currently found in the *Cost of Borrowing Regulations* (subsection 6(2.4) and the schedules thereto) have been eliminated. The elimination of specified font size and the prescribed form of information boxes should alleviate some of the challenges associated with disclosing in a digital format.
- Credit card solicitations: The *Cost of Borrowing Regulations* require the same information to be disclosed by the bank in making credit card solicitations, whether they are done in person, by phone, by mail or by any electronic means. Under the new Framework[5], credit card solicitations by telephone are subject to additional disclosure requirements to those made in person by mail, or by electronic means.
- Complaints process: Section 14 of the Regulations states that the prescribed period for dealing with a complaint is 56 days after the day on which it is received.

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Also noteworthy are the Framework's provisions that remain inoperative as the Regulations did not prescribe the necessary details. Some of these may serve as "placeholders" for future requirements

- Section 627.16, which imposes requirements (to be prescribed by regulations) if the institution acts in the capacity of a representative, agent or other intermediary for another entity in respect of a product or service provided by that entity.
- Section 627.17(3), which requires an institution to open a retail deposit account for any natural person who requests it in a prescribed manner and who meets prescribed conditions.
- Section 627.62, which requires the disclosure of prescribed information to prescribed amendments.
- Section 627.89(2), which imposes requirements (to be prescribed by regulations) when an institution is entering into a credit agreement with a person for business purposes.
- Section 627.88, which requires the institution to disclose information (to be prescribed by regulations) with respect to credit agreement by making it available at branches and websites.

The RIAS indicates that "the majority of the regulatory requirements result in no substantive policy change to the financial consumer protection regulations that banks and authorized foreign banks must currently follow." However, banks should be wary of taking too much comfort from this statement as a small change in a requirement that would not qualify as "substantive policy change" may still have a significant impact on a bank's operations, and in particular, its information systems.

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[1] *See our other related commentary:*

- *Roadmap for the new financial consumer protection framework, available here.*
- *Mandatory naming, greater penalties and clarified objectives: the new FCAC provisions, available here.*
- *Bill C-86 Set to Strengthen Financial Consumer Protection, available here.*

[2] *Section 627.04 of the* Bank Act.

[3] *Section 627.08 of the* Bank Act.

[4] *Section 627.12 of the* Bank Act.

[5] *As a result of the application of section 627.57 of the Act, and sections 59, 61 and 65(1) of the Regulations.*