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Agenda Item 5 (b) (4)  
April 04/20 Board Meeting

## Memorandum

<b>From</b>	Marc Duquette Dominic Dupoy Pier-Olivier Poisson	<b>Date</b>	March 6, 2020
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<b>To</b>	Keith Martin	<b>Your ref</b>	
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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 the AMF has asked CAFII to submit practical solutions by March 27, 2020. We also understand that CAFII has asked for that delay to be extended, but that it has not yet received any response in that regard.

#### 1. OPINION BY NRF

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In our view, CAFII should delay the sending of the draft letter it prepared. Although this letter articulates CAFII's position in a very convincing manner, it appears legitimate for CAFII to seek legal advice from external counsel before expressing its position in such a formal way.

Ideally, CAFII would let the AMF know of its intention to consult with Norton Rose Fulbright (**NRF**) in order to evaluate its legal options as soon as possible. The need to obtain NRF's view may also serve as a justification for the extension of the March 27 delay.

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 matter to be examined by NRF. 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 NRF and be the subject of a strong consensus among CAFII members.

Assuming that the AMF will allow CAFII to obtain the view of NRF, we propose to examine the following two issues: (i) whether the RADM applies to credit card-embedded insurance benefits, and (ii) assuming that it does, how can its provisions practically apply to credit card-embedded insurance benefits.

Subject to your comments and instructions, we propose to examine the following issues 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.

We should be in a position to deliver an opinion in April or May 2020. We estimate that the preparation of the opinion should not amount to more than 50,000 \$ CDN.

Should CAFII wish to share the final opinion with the AMF, we would recommend sending it not only to Mario Beaudoin, but also to his superiors Ms. Louise Gauthier (Directrice principale des politiques d'encadrement

de la distribution) and Frédéric Pérodeau (Surintendant de l'assistance aux clientèles et de l'encadrement), and to Mtre Philippe Lebel (Secrétaire et directeur général des affaires juridiques). In our view, it would be important at that stage to bring members of the AMF's legal department such as Mr. Lebel into the discussion to help the AMF have a better understanding of the issues discussed in the opinion and of their consequences.

## **2. CHALLENGE BEFORE THE COURT**

To the extent that our opinion concludes that it is possible for CAFII members to substantially comply with the RADM and that the AMF is in agreement with the practical solutions proposed, it might not be necessary to challenge the interpretation of the AMF before the Court.

However, if our opinion concludes that it is simply not possible to logically comply with the RADM and that CAFII would have strong arguments to challenge its application to credit card-embedded insurance benefits, the matter might end up before the courts.

From a procedural standpoint, the position of the AMF may be challenged before the Court in at least two ways.

Firstly, we may wait for the AMF to issue a statement of offence and challenge it before the Court of Quebec. In our view, this approach is, however, not optimal. For one, the statement of offence will not be issued to CAFII but to one of more of its members. It is unclear whether CAFII will then be allowed to intervene before the Court in such penal matter. Furthermore, the issuance of the statement of offence may draw unwanted negative publicity.

In our view, the second approach is more appropriate in the circumstances. This second approach would consist in the filing by CAFII of a motion to obtain a declaratory judgement before the Quebec Superior Court.

The relevant case law provides for numerous examples of a motion to obtain a declaratory judgement being filed to obtain a judgment deciding whether a specific regulatory regime applies to certain persons.

At that stage, we assume that CAFII would have the proper standing to bring such a motion before the Court. In the worst case scenario, a joint motion may be brought by CAFII members.

Although we did not conduct any specific research in that regard, we are confident that the dispute between CAFII and the AMF would be considered as a "genuine problem" within the meaning of article 142 of the *Code of civil procedure* :

142. Even in the absence of a dispute, a judicial application may be instituted to seek, in order to resolve a genuine problem, a declaratory judgment determining the status of the plaintiff, or a right, power or obligation conferred on the plaintiff by a juridical act.

The declaratory judgement approach would allow CAFII to be "in the driver's seat". Obviously, we will be in a better position to assess the chances of success of such a motion once the opinion contemplated above is completed.

It is difficult to evaluate the costs of presenting a motion for a declaratory judgement with great precision. The costs will indeed depend on the approach taken by the AMF. If the AMF does not collaborate and decides to present various preliminary motions (issuance of a statement of offence and challenge of the jurisdiction of the Superior Court, challenge of CAFII's standing, motion to dismiss, motion for examination on discovery, objections to questions and request for communication of documents, appeal from decisions rendered on such preliminary motions, etc.), the costs will obviously increase.

The costs will also be a function of the evidence that CAFII may decide to present before the Court. For example, the costs will increase if an expert report is filed or if multiple witnesses are to testify before the Court regarding the credit card business and the practical impact of an application of the RADM to credit card-embedded insurance benefits.

In light of the above, we may estimate that the costs relating to the filing of a motion for a declaratory judgement will vary between 75,000 and 100,000 \$ (before taxes and excluding any appeal).