

New Consumer Protection Framework for Banks

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Bill C-86, Budget Implementation Act, 2018, No. 2. (Bill C-86) received second reading in the House of Commons on November 6, 2018. Among other amendments, Bill C-86 proposes amendments to the *Bank Act* (Canada) (the Bank Act). Bill C-86 picks up from the amendments proposed to the Bank Act in 2016 under *Bill C-29, Budget Implementation Act, 2016, No. 2*, of which we previously reported in our e-Lert “*Bank Act Amendments – New Consumer Protection Framework*.” Bill C-86 consolidates provisions of the Bank Act and introduces new measures to strengthen provisions that apply to banks and authorized foreign banks in relation to consumer protection.

The following is an overview of some of the significant amendments proposed to the Bank Act by Bill C-86 in relation to the financial consumer protection framework.

Response to Marcotte and Bank Retail Sales Practices

The proposed amendments respond to the landmark Supreme Court of Canada decision in the trilogy of cases known as *Marcotte*, of which we previously reported in our e-Lert “*Supreme Court of Canada Rules That Consumer Protection Laws Apply To Bank-Issued Credit Cards*.”

Bill C-86 also responds to the findings and conclusions of the Financial Consumer Agency of Canada (FCAC) in its reports “*Domestic Bank Retail Sales Practices Review*” and “*Report on Best Practices in Financial Consumer Protection*.” The FCAC has oversight of federal consumer protection legislation that applies to federally regulated financial entities. The FCAC’s review of the domestic retail sales practices of Canada’s six largest banks stemmed from allegations publicized in Canadian media of mis-selling by bank employees of financial products and services to consumers.

Financial Consumer Protection Framework

Corporate Governance

The Bill C-86 proposed amendments require banks to designate an independent board committee with duties that include requiring management to establish procedures for compliance with consumer provisions, reviewing procedures for appropriateness for compliance, and requiring management to report at least once a year to the committee on the implementation of these procedures and other activities carried out by the bank in relation to consumer protection. The board committee would also have reporting obligations to the directors of the bank and the Commissioner of the FCAC.

Fair and Equitable Dealings

The fair and equitable dealings regime under the proposed amendments establishes, among other things, the following:

- ***Training.*** Banks to ensure that officers and employees in Canada and any person who offers or sells the bank's products or services in Canada to be trained in respect to the bank's policies and procedures established for compliance with the consumer provisions of the Bank Act.
- ***False or misleading information.*** Prohibition on banks communicating false or misleading information to customers, the public or the FCAC Commissioner.
- ***Prohibited conduct.*** A general prohibition on undue pressure or coercion, taking advantage of a person, and engaging in conduct prescribed by regulations under the Bank Act.
- ***Provide appropriate products or services.*** Banks to establish and implement policies and procedures to ensure that products or services in Canada that the bank offers or sells to natural persons (other than for business purposes) are appropriate for the person with regard to their circumstances, including their financial needs.
- ***Remuneration.*** Banks to ensure that the remuneration of its officers and employees in Canada (and any person that offers or sells its products or services in Canada) and any payment or benefit the bank offers to such persons, does not interfere with such person's ability to comply with the above-mentioned policies and procedures relating to appropriate products or services.
- ***Cooling-off period.*** Providing a cooling-off period for persons to cancel agreements providing ongoing products or services within prescribed time periods.
- ***Alert of account balance.*** Banks to send an electronic alert to natural persons if their personal deposit account or credit account is below an amount prescribed by the person, provided that if there is no such prescribed amount, then the alert would be sent where the amount is below \$100.

Retail Deposit Accounts

The proposed amendments include new disclosure provisions in respect of personal deposit accounts, requirements for retail deposit account openings upon provision by a person of specified identification documents, a prohibition on requiring a natural person to make a minimum deposit or maintain a minimum balance, provisions requiring banks to provide customers with a minimum amount of funds upon deposit of a cheque or other instrument, and modified requirements in relation to the cashing of government cheques.

Cost of Credit Disclosure to Business Customers

Currently, banks must disclose prescribed information, including the cost of borrowing, to natural persons other than for business purposes, prior to entering into a credit agreement with such person. The Bill C-86 proposed amendments expand disclosure requirements to business customers, requiring banks to provide information, to be prescribed, to business customers prior to entering into a credit agreement with such

business customers.

Redress

Where a bank has imposed a charge or penalty in relation to a product or service, the bank will be required to credit or refund the amount of the charge or penalty, if it was collected but not otherwise provided for in the respective agreement, or credit or refund any excess amount that is greater than the amount of the charge or penalty provided for in the agreement. Banks will also be required to credit or refund a charge or penalty where the bank has not obtained the express consent of a person before providing the person with a product or service.

Public Accountability

Banks with equity of \$1 billion or more will be required to file a written statement with the FCAC Commissioner, within 135 days of financial year end, setting out the following information:

- the names of voluntary codes of conduct adopted by the bank, which are designed to protect the interests of its customers and are publicly available, as well as any public commitments it has made which are designed to protect the interests of its customers and the means the codes and commitments are available to the bank's customers and the public;
- measures taken by the bank to provide products and services to low-income persons, seniors, persons with disabilities and persons who face accessibility, linguistic or literacy challenges; and
- consultations undertaken by the bank with its customers and the public in relation to existing products and services (including how they are provided), the development of new products and services, identifications trends and emerging issues that may impact the bank's customers or the public, and matters in respect of complaints received by the bank.

Complaints Process

Bill C-86 proposes an enhanced complaints regime under the Bank Act, significantly expanding existing obligations of banks and authorized foreign banks. Under the complaints regime, banks will be required to:

- establish procedures satisfactory to the FCAC Commissioner for dealing with complaints, within a period to be prescribed, and designate one of the bank's officers or employees in Canada to be responsible for receiving and dealing with complaints and implementing such procedures;
- annually make available on the bank's website, in addition to any other information that may be prescribed by regulation, information relating to the number and nature of complaints the bank is dealing with, the average length of time taken to address the complaints, and the number of complaints that have been resolved to the satisfaction of the persons who made the complaints;
- within 60 days of the end of each quarter, submit a form to the FCAC Commissioner, with respect to

each complaint received by the designated officer or employee during that quarter, a copy of the record (the record must be retained for at least seven years) of the complaint containing prescribed information; and

- not use misleading terms with respect to complaints procedures, including the use of the term “ombudsman.”
- The definition of complaint is broad and means dissatisfaction, whether justified or not, expressed to an institution with respect to a product or service in Canada that is offered, sold or provided by the institution or the manner in which a product or service in Canada is offered, sold, or provided by the institution.

Whistleblowing Regime

A new whistleblowing regime is proposed for banks and authorized foreign banks under Bill C-86 with respect to any “wrongdoing.” Wrongdoing is defined as including a contravention of any provision of the Bank Act or the regulations made thereunder, a voluntary code adopted by the bank or a public commitment, and a policy or procedure established by the bank. Any employee of the bank who has reasonable grounds to believe the bank or any person has committed or intends to commit a wrongdoing may report the matter to the bank or the FCAC Commissioner, the Superintendent of Financial Institutions, any government or body that regulates or supervises financial institutions or a law enforcement agency. Policies and procedures will be required to be implemented for dealing with wrongdoing matters reported to the bank and prohibiting the bank from taking action against such employees (such as disciplining, harassing, suspending or demoting the employee).

Financial Consumer Agency of Canada Act Amendments

Bill C-86 also amends the *Financial Consumer Agency of Canada Act* (the FCAC Act). The FCAC Act delineates the FCAC's functions, administration and enforcement powers, and the provisions of federal law under the FCAC's supervision. Proposed amendments to the FCAC Act include a requirement of the FCAC Commissioner to publicly disclose the nature of a violation, including the name of the person who committed it and the amount of the penalty. This power is subject to any regulations that may be published. The proposed amendments of the FCAC Act will increase the maximum penalty for violations of the consumer protection provisions of the Bank Act from \$50,000 to \$1,000,000 for natural persons and from \$500,000 to \$10,000,000 for financial institutions or payment card networks.

For further information regarding this matter, please contact Suhuyini Abudulai or any other member of the Banking, Lending & Specialty Finance Group.