

Financial services regulation: Toward integrated consumer protection initiatives

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In the decade that immediately followed the financial crisis, financial services regulatory reform largely focused on solvency and capital adequacy. Over the past few years, there has been a notable shift in focus as market conduct and consumer protection has become a point of regulatory convergence across the financial services sector. At the same time, policy makers have been actively promoting not just changes in law, but significant reform in the regulatory framework and approach to regulation. Regulators (perhaps at long last) seem to be becoming more modern, nimble, responsive and collaborative. Consequently, we are seeing a trend towards regulatory harmonization among jurisdictions, financial service providers and financial services and products. This means that best practices in market conduct and consumer protection compliance are not necessarily industry-specific but can and should be derived from a broad range of sources on an enterprise-wide basis across the sector.

Below we highlight in more detail notable recent developments in the market conduct and consumer protection space that reflect these themes of regulatory harmonization and collaboration. These developments highlight the need for integrated compliance measures.

New regulatory authorities in Ontario and British Columbia

In 2019, two new regulators, the Financial Services Regulatory Authority of Ontario (FSRA)^[1] and the British Columbia Financial Services Authority (BCFSA), commenced operations and assumed the regulatory duties of their provincial predecessors. The mandates of the two new regulators are similar and include fostering effective and consistent regulation across Canada, promoting the adoption of industry codes of market conduct and enhancing regulation of insurance intermediaries and mortgage brokers.

FSRA launches its business plan

FSRA assumed the regulatory responsibilities of the Financial Services Commission of Ontario (FSCO) and the Deposit Insurance Corporation of Ontario on June 8, 2019 (see our [blog post](#) on this topic). These bodies formerly oversaw insurance products and provincially regulated insurers, credit unions, loan and trust corporations, pension plans, mortgage brokers and certain auto insurance service providers. Based on FSRA's published statements and remarks to the industry, as well as our experience with FSRA to date, stakeholders can expect a more collaborative, flexible, principles-based approach to regulation than was the norm under FSCO. FSRA's mandate includes fostering effective and consistent regulation across Canada. With this in mind, FSRA has stated that it may press upon other regulatory authorities to act, if the entity or individual in question is under the jurisdiction of more than

one regulator. This could occur across provincial boundaries (e.g., a mortgage broker may be registered in both Ontario and British Columbia) or across industries (e.g., an individual who deals in more than one regulated product).

FSRA's 2019-2022 business plan, as approved by the Ontario Ministry of Finance, has two over-arching priorities:

- **Burden reduction:** FSRA will review all 1,100 pieces of regulation and guidance inherited from its predecessors and streamline or remove unnecessary material where possible. This is consistent with the Ontario government's 2018 plan to cut regulatory red tape by 25% by 2020.
- **Regulatory effectiveness:** FSRA will aim to achieve legislative objectives and protect the public interest through enhanced consumer, industry and regulatory expertise; through collaboration, transparency and efficient processes; and by using technology and enabling innovation.

In addition to its general mandate, FSRA's business plan sets out regulatory initiatives with respect to specific sectors.

- **Credit unions:** FSRA intends to integrate prudential conduct supervision, modernize the regulatory framework and adopt an industry code of conduct, which could be identical to or based on the Market Conduct Code recently released by the Canadian Credit Union Association. FSRA further intends to ensure an appropriate resolution and deposit insurance reserve fund (DIRF) framework for credit unions.
- **Insurance:** FSRA's goal in this sector is to adopt effective conduct standards and improve licensing effectiveness and efficiency. A further goal is to harmonize the *Treating Financial Services Consumers Fairly Guideline* with national direction such as the guidance document from the Canadian Council of Insurance Regulators and the Canadian Insurance Services Regulatory Organizations, *Conduct of Insurance Business and Fair Treatment of Customers*.
- **Mortgage brokering:** In this sector, FSRA intends to provide oversight of syndicated mortgage investments, but will transfer oversight responsibility for non-qualified syndicated mortgages to the Ontario Securities Commission (OSC). FSRA will also work to improve licensing effectiveness and efficiency, and to adopt an industry code of conduct.

Further to these goals, the Ontario government noted in its *fall economic statement*, released November 6, 2019, that it will conduct a legislative review of the *Credit Unions and Caisses Populaires Act, 1994*, the *Mortgage Brokerages, Lenders and Administrators Act, 2006* and the *Co-operative Corporations Act*.

Review of the credit union legislative framework is already underway, as comments on the consultation document, *A Modern Framework for Credit Unions in Ontario: Reducing Red Tape and Increasing Investment*, were due by August 16, 2019. Among other things, the consultation asked for input on: how to make it easier for credit unions to do business and compete in Ontario; dispute resolution processes and the need for an ombudsperson; regulatory treatment for centrals and leagues, noting that most Ontario credit unions are members of Central 1, a British Columbia central; a securitization and funding framework; business and investment powers, particularly in respect of investments in FinTechs; access to capital; improving the consumer experience and consumer protection; unclaimed deposit framework; corporate governance; and enabling innovation.

Review of the mortgage broker legislation is also underway. The *Report on Legislative Review of the Mortgage Brokerages, Lenders and Administrators Act, 2006* (Report), which is the outcome of the five-year statutory review of the Act, was released on September 30, 2019. The Report notes that the creation of FSRA represents an opportunity to “right-size” regulation for the sectors it oversees. The Report included a recommendation to require specialized licensing education for brokers who deal and trade in areas of practice that demand added knowledge and skills.

We expect to see themes emerge across the credit union, insurance and mortgage broker industries as FSRA works to modernize legislation, harmonize and consolidate its guidance, and develop or adopt industry codes that reflect the common issues that arise in regulating all of these sectors.

BCFSA assumes responsibilities

On November 1, 2019, the BCFSA started operations and assumed the responsibilities of the Financial Institutions Commission of British Columbia (FICOM), including overseeing credit unions, trust companies, insurance providers and intermediaries, and mortgage brokers, and administering the Credit Union Deposit Insurance Corporation.

Like FSRA, the BCFSA is also tasked with taking a more modern approach to regulation and ensuring consistency with other regulators. The creation of the BCFSA resulted from a 2017 independent review which followed the B.C. auditor general's report of deficiencies at FICOM, including a failure to keep up with international industry standards. As a result, we expect to see the BCFSA undertake similar modernization and harmonization initiatives to those announced by FSRA.

Also on the horizon are changes proposed by *The Financial Institutions Amendment Act, 2019* (Bill 37), which received Royal Assent on November 28, 2019. These include

- new rules for the online sale of insurance in B.C. that will be set out in the regulations (not yet released), as well as in additional rules adopted by the BCFSA
- a requirement for insurance companies to adopt and comply with a code of market conduct that will be established by the BCFSA
- a requirement for credit unions to adopt a code of market conduct, which, as in Ontario, may be derived from the Canadian Credit Union Association's Market Conduct Code, that must be filed with the BCFSA
- a requirement for credit unions to establish complaints resolution procedures, which must be published on the credit union's website and made available upon request
- the introduction of a regime for restricted insurance agent licensing for parties such as lenders that sell specific types of insurance that are incidental to their business activities (e.g. credit insurance). This regime may be similar to the restricted agent licensing regimes in Alberta, Manitoba and Saskatchewan. The rules and requirements of this regime will be established by the Insurance Council of British Columbia

A new FCAC Commissioner

Ms. Lucie Tedesco stepped down as Commissioner on June 3, 2019 after 11 years with the Financial Consumer Agency of Canada (FCAC). After a brief interim period, Ms. Judith Robertson was appointed Commissioner effective August 19, 2019 for a five-year term. At the

time of her appointment, Ms. Robertson sat on the FSRA Board as one of its founding Board members and was previously a Commissioner of the OSC from 2011 to 2017. Prior to that, she had extensive experience as an executive in the capital markets and financial services industry.

As of November 2019, the FCAC had not posted any new decisions for the period following former Commissioner Tedesco's final Decision #134, posted on June 4, 2019. Consequently, we do not have any published evidence as to how the FCAC may approach decisions differently under Ms. Robertson. Given the breadth of the new Commissioner's experience, and in particular her experience with the OSC, it will be interesting to see how the FCAC evolves under her tenure.

Notable developments in consumer protection laws

Customer suitability – which has traditionally been the focus of insurance intermediary and securities advisor regulation – has been more broadly adopted within the financial services sector. A particular focus has been on enhanced regulation to protect vulnerable consumers such as seniors and high cost of credit borrowers. We discuss four developments on trend below.

Code of Conduct for the Delivery of Banking Services to Seniors

After numerous consultations, the Canadian Bankers Association released the Code of Conduct for the Delivery of Banking Services to Seniors. This voluntary code of conduct applies to banks when delivering banking products and services to Canada's seniors and is overseen by the FCAC. The term "seniors" is defined in the code as an individual in Canada who is 60 years of age or older and who is transacting for a non-business purpose. While some aspects of the code will not come into effect until January 1, 2020 or January 1, 2021, as of July 25, 2019, banks should: take into account market demographics and the needs of seniors when proceeding with branch closures (Principle 6); and endeavor to mitigate potential financial harm to seniors (Principle 5). Principle 5 may be challenging, as it requires front line staff to balance security with autonomy and many providers report difficulties in convincing seniors of the reality of romance scams and other types of financial scams and abuse aimed at seniors.

New high-cost credit regimes

Alberta followed Manitoba's lead and implemented a high-cost credit regime on January 1, 2019, while Québec's regime came into force on August 1, 2019. We are still waiting for regulations to be published that will implement the proposed high-cost credit regime in British Columbia (set out in Bill 7 – 2019: Business Practices and Consumer Protection Amendment Act, 2019). This regime will impact lenders and lessors in British Columbia who charge rates that meet or exceed the "high-cost" threshold. If British Columbia follows Alberta and Manitoba's lead, this threshold will be an effective rate of 32% or above per year.

Implementation of Bill 134 in Québec

Financial services providers operating in Québec were extremely busy in the first half of 2019 as they worked to implement the numerous changes set out in Bill 134, An Act mainly to modernize rules relating to consumer credit and to regulate debt settlement service contracts, high-cost credit and loyalty programs and the accompanying regulations. The most significant changes set out in Bill 134 came into force on August 1, 2019. Among the most challenging

to implement were the new requirements regarding credit cards. Controversial changes include higher mandatory minimum payments, a subject which was widely covered by the Québec media. Credit grantors and lessors are also required to assess the consumer's capacity to repay a loan or make their lease payments, which is not required under any other provincial lending legislation.

Bill C-86

Industry consultations regarding the regulations under the new federal consumer protection framework introduced in October 2018 (*Budget Implementation Act, 2018, No. 2*) took place over the course of 2019. Federally regulated financial institutions continue to grapple with the wide-ranging implications of the Bill, including the enhanced sales practices provisions.

Final thoughts

With so many developments in progress, 2020 will be a busy year. In addition to following these developments closely, we are also interested to see if and how governance and compensation frameworks will converge across the sector to align with these market conduct objectives and themes.