

National Banking Law Review

General Editor: Robert E. Elliott, Fasken Martineau DuMoulin LLP

VOLUME 26, NUMBER 1

Cited as 26 Nat. B.L. Rev.

FEBRUARY 2007

• FIVE-YEAR REVIEW OF FEDERAL FINANCIAL INSTITUTIONS LEGISLATION: AMENDMENTS SET OUT IN BILL C-37 •

Blair Keefe and Sunny Sodhi
Torys LLP, Toronto

On November 27, 2006, the federal government tabled Bill C-37, which sets out proposed revisions to federal financial institutions legislation (*i.e.*, *Bank Act*, *Insurance Companies Act*, *Trust and Loan Companies Act* and *Cooperative Credit Associations Act* and certain other related statutes) arising from the regular five-year review of the financial sector framework. A sunset provision in the current financial institutions legislation requires new legislation to be brought into force by April 24, 2007. The bill contains no major changes from the proposals in the June 2006 white paper, other than to reduce from two-thirds to a ma-

jority the number of resident Canadian directors required for domestic financial institutions.

We summarize here some of the more important amendments that will affect both domestic and foreign financial institutions carrying on business in Canada once the bill comes into force. For convenience, we have grouped the changes into three categories that generally reflect the three key objectives of the new legislation as outlined in the government's white paper:

- Interests of Consumers Enhanced;
- Legislative and Regulatory Efficiency Increased; and
- Framework Adapted to New Developments.


In addition, we have summarized the main technical amendments, mainly relating to legislative streamlining, in an attached appendix.

INTERESTS OF CONSUMERS ENHANCED

ADDITIONAL DISCLOSURE REQUIREMENTS

The bill contains statutory-enabling amendments regarding disclosures for deposit-type investment products (such as GICs and term deposits) and deposit-type registered plans, to provide information such as the term of the product, information on return, related charges and penalties for early withdrawal. The purpose of these disclosures is to assist consum-

• In This Issue •	
FIVE-YEAR REVIEW OF FEDERAL FINANCIAL INSTITUTIONS LEGISLATION: AMENDMENTS SET OUT IN BILL C-37 <i>Blair Keefe and Sunny Sodhi</i>	1
CASE COMMENT ACCOUNT AUTHORIZATION AND VERIFICATION: THE REASONABLE ALBERTA BANKER <i>C.J. Shaw, Q.C.</i>	4

 LexisNexis®
Butterworths

ers in distinguishing and comparing financial products so that they may make informed decisions. The bill proposes to harmonize online and in-branch disclosure requirements to allow consumers to compare financial products more easily and to ensure that customers receive adequate disclosure when conducting transactions online. Finally, the bill amends the financial institutions statutes to require financial institutions to make their complaint handling procedures publicly available in branches and online.

Details of certain specific requirements, such as the definitions of “registered products” and “prescribed products”, will be set out in the regulations, which are expected to be released in 2007. We understand the government will also move forward with the proposed changes to the cost of borrowing disclosure regulations; however, no amendments were necessary to the Act for those changes.

LEGISLATIVE AND REGULATORY EFFICIENCY INCREASED

FOREIGN BANK ENTRY

“Near banks” (*i.e.*, foreign entities that are not regulated as banks in their home jurisdiction but provide banking-type services or have banks in their international groups) are removed from the foreign bank entry framework. The entry approval for near banks that undertake unregulated financial services is eliminated.

IMPROVING AND STREAMLINING THE REGULATORY APPROVAL REGIME

The approval regime is streamlined for liquidations, discontinuances, amalgamations, investments, name changes, transfers of business within corporate groups, reinsurance agreements and large dividends. The bill permits the Minister to approve multiple fundamental changes in a transaction, removes the requirement for the Superintendent to approve the processing of information or data outside Canada and removes the requirement for the Minister to approve “out of the ordinary course of business” indemnity reinsurance transactions. For assumption reinsurance transactions, the bill: (i) removes the ministerial approval requirement for companies assuming policies; and (ii) shifts the approval from the Minister to the Superintendent for all transactions, except in the case of a Canadian company ceding all or substantially all of its policies.

CREDIT UNIONS AND CAISSES POPULAIRES

The bill reduces (from 10 to 2) the number of credit unions required for the incorporation of an association under the *Cooperative Credit Associations Act*.

RESIDENTIAL MORTGAGES EXCEEDING 75 PER CENT OF THE PROPERTY VALUE

The loan-to-value ratio requiring mortgage insurance is raised from 75 per cent to 80 per cent. The federal government has indicated that it will consider further increases in future five-year legislative reviews.

FRAMEWORK ADAPTED TO NEW DEVELOPMENTS

CANADIAN PAYMENTS SYSTEMS AND ELECTRONIC CHEQUE IMAGING

An amendment to the *Bills of Exchange Act* provides an enabling framework to permit financial institutions to use electronic cheque imaging in the cheque clearing system.

OWNERSHIP REGIME THRESHOLDS

The bill increases (i) the large bank equity threshold from \$5 billion to \$8 billion; and (ii) the equity threshold for small banks, trust and loan companies, and insurance companies from \$1 billion to \$2 billion. The re-categorization guidelines will be revised to reflect the new higher equity thresholds.

[*Editor's note:* Blair Keefe is head of the Torys' Financial Institutions Group. His practice focuses on corporate and regulatory issues relating to financial institutions, including mergers and acquisitions and corporate finance.

Sunny Sodhi practises in Torys' Corporate Department and is a member of the firm's Financial Institutions Group. His practice encompasses a broad range of corporate and commercial law, including mergers and acquisitions for both public and private companies, corporate finance, corporate governance and restructurings.

The authors thank Simone Cleworth for her valuable contribution to this article.]

APPENDIX OF TECHNICAL AMENDMENTS

Use of Bank Name. The bill transfers from the Minister to the Superintendent the authority to approve the use of bank names. New rules clarify the permitted uses of “bank”, bank names and logos.

Rollover Between Categories of Investment. To provide greater flexibility under the investment framework, the bill clarifies that an investment initially acquired in a particular category of investment can be rolled over to another category of investment, if the approval requirements and other conditions in the new category, if any, are met.

Investment in Mutual Fund Management Entities. The bill allows a financial institution to own a mutual fund management entity that conducts both management and trustee activities if the financial institution is permitted to do so by a province and an appropriate governance framework is in place. The latter includes measures to ensure the independence of the trustee activities.

Investment in Closed-end Funds. Financial institutions are allowed to invest in closed-end funds.

Loan Workouts. Financial institutions are permitted to acquire ownership interests in an unincorporated entity that holds the ownership interests of another entity that has defaulted, in the context of loan workouts.

Filing Deadline of Annual Returns. The Superintendent is authorized to specify deadlines for the filing of annual returns with Office of the Superintendent of Financial Institutions (OSFI).

Temporary Investments. Foreign banks, like Canadian banks, are allowed to hold temporary investments in non-permitted entities for two years without ministerial approval.

Access to Automated Banking Machines (ABMs). Foreign banks (and entities associated with a foreign bank) are permitted to make arrangements with privately run ABM networks in Canada, to provide access by non-resident customers to their foreign accounts.

In-house Specialized Financing. Foreign banks are permitted to directly engage in specialized financing activities without establishing a separate Canadian entity to hold the investments.

Funding Restrictions on Foreign Banks. The bill clarifies that unregulated branches cannot offer financial services or engage in funding in Canada (*i.e.*, only commercial branches of foreign banks can use the exceptions from the funding restrictions in the foreign bank entry framework).

Change of Name of Financial Institutions. The authority to amend letters patent regarding the name of a financial institution, the place in Canada where its head office is situated and the date of its incorporation is transferred from the Minister to the Superintendent.

Investment Counselling and Portfolio Management. The bill clarifies that a foreign bank can establish a regulated securities branch in Canada that engages only in the busi-

ness of investment counselling and portfolio management (thereby ensuring similar treatment for foreign and Canadian banks).

Investment in Foreign Entities. The bill clarifies that a foreign bank can have a holding company that owns both domestic and foreign entities, and can also have a separate holding company to own limited commercial entities (thereby ensuring similar treatment for foreign and Canadian banks).

Information Returns. Foreign banks do not have to provide financial statements for their affiliates doing business in Canada. Instead, there is a streamlined information return.

Asset Transfers. The bill aims to streamline asset transfer approvals by: (i) providing flexibility to the Superintendent to approve a series of similar transactions subject to terms and conditions; and (ii) removing duplicate Superintendent asset transfer approvals if a related party approval is already required.

Large Dividends and Notice to Superintendent. The bill eliminates the requirement for Superintendent approvals for large dividends, and lengthens to 15 days from ten the notice of proposed dividend payments that must be given to the Superintendent.

Use of Name of Affiliated Entities. The bill eliminates the requirement for Superintendent approval for financial institutions to use the name of an affiliated entity, if the affiliated entity consents to the use of its name.

Return of Seed Money for Segregated Funds. Transfers from segregated funds are exempt from the requirement for Superintendent approval if the withdrawal relates to the removal of seed money.

Related Party Transactions Involving Derivatives. The bill specifies that related party transactions include transactions involving derivatives if the underlying security is of a related party.

Restrictions on Subsidiaries of Holding Companies Transacting with Affiliates. The bill removes immaterial transactions from the calculation of the five per cent limit for asset transaction approvals with non-federally regulated related parties.

Unclaimed Balances. The bill removes the requirement for banks to send information to OSFI about unclaimed

deposits and bills of exchange after nine years of inactivity, and OSFI's requirement to publish this data in the *Canada Gazette*.

Time Limits on Unclaimed Balances. The bill (i) increases (to 40 years from 20) the expiry period of the Bank of Canada's liability on smaller value unclaimed balances, (ii) raises the threshold for these unclaimed balances from \$500 to \$1,000, and (iii) establishes a 100-year expiry period of the Bank's liability for unclaimed balances above \$1,000.

Foreign Insurance Companies Insuring in Canada Risks. The bill clarifies that Part XIII of the *Insurance Companies Act* governs only foreign insurers that "in Canada insure a risk". Thus, while this statute will apply to risks insured by a foreign insurer in carrying on its insurance business in Canada, it will not apply to risks in Canada insured by a foreign insurer from its operations outside Canada.

Cheque Hold Periods. The bill includes amendments to the *Bank Act* to authorize the federal Cabinet to make regulations to limit cheque hold periods. The government is in

the process of finalizing an agreement with the banking industry to reduce the maximum hold period to four days once electronic cheque imaging is fully implemented. In light of this agreement, the federal government does not intend to act on this new authority.

Special Security Regime. The bill attempts to improve the efficiency of administration of the Bank Act Special Security Regime (BASS), by: (i) updating the BASS provisions referring to provincial agencies/offices; and (ii) amending the *Bank Act's* special security provisions to move operational and certain technical aspects of the registry from legislation to regulations.

Participating Accounts under the *Insurance Companies Act*. Amendments to the *Insurance Companies Act* are intended to streamline payments to shareholders and transfers from participating accounts.

* This article is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss with you the issues raised by this article in the context of your particular circumstances.