

# DEPARTMENT OF FINANCE PUBLISHES SECOND CONSULTATION PAPER WITH RESPECT TO ITS REVIEW OF THE FEDERAL FINANCIAL SECTOR FRAMEWORK AND OSFI SUSPENDS "BANK WORDS" CRACKDOWN

Posted on August 24, 2017

**Categories:** [Insights](#), [Publications](#)

On August 11, 2017, the Department of Finance (the "Department") released its second consultation paper, entitled [Potential Policy Measures to Support a Strong and Growing Economy: Positioning Canada's Financial Sector for the Future](#) (the "**Second Paper**"), effectively launching the final stage of consultations in connection with the upcoming renewal of the federal financial sector legislative and regulatory framework. On the same date, and in connection with one of the requests for input in the Second Paper, the Office of the Superintendent of Financial Institutions ("**OSFI**") released an unusual [Notice of Suspension](#) that in effect suspended enforcement of its June 30, 2017 [Advisory](#) that took a hard line on how words such as "bank" and "banking" could be used by non-bank financial services providers.

The first consultation paper, released on August 26, 2016 sought input with respect to, among other things, key trends that may influence future directions and related implications, based on three policy objectives: to ensure that the legislation and regulatory landscape governing the federal financial sector supports stability (safe, sound and resilient), efficiency (provides competitively priced products and services and passes such gains on to customers, accommodates innovation and contributes to economic growth) and utility (meets the needs of different types of consumers, including individuals, businesses and families and is committed to protecting the interests of consumers).

The Second Paper takes into account the comments and recommendations previously submitted in connection with the first paper and requests feedback on whether and how to implement certain measures that could lead to the consideration of legislation in Parliament in advance of the statutory sunset date of March 29, 2019, and that may inform policy directions for longer-term future work.

These measures are categorized in the Second Paper under four themes: (i) supporting a competitive and innovative sector; (ii) improving the protection of bank consumers; (iii) modernizing the framework; and (iv)

safeguarding a stable and resilient sector.

### **(i) Supporting a Competitive and Innovative Sector**

The Department has identified several near-term measures that could be included in the 2019 update to the federal financial institutions statutes (namely, *The Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* and the *Trust and Loan Companies Act*, collectively, the “**FFIS**”).

#### *Fintech Business Powers and Collaboration*

Recognizing that collaboration between federally regulated financial institutions (“**FRFIs**”) and fintechs,<sup>[1]</sup> may lead to innovation, accessibility and affordability in the financial sector, and that FRFIs may add scaling to the technology and speed-to-market that fintechs often bring, the Department seeks input on appropriate statutory language that could clarify and modernize the fintech business powers of FRFIs, while maintaining the general prohibition on commercial activities and investments that is designed to keep FRFIs focused on financial services as their core area of expertise. A number of banks had complained that collaboration with fintechs is made difficult by restrictions on the business activities in which banks may engage and entities in which they may invest. The Department is therefore also seeking input on whether to provide FRFIs with added flexibility to make non-controlling investments in fintechs and/or the ability to make referrals to fintechs, subject to the consumer activities prohibition and relevant consumer protection and prudential limitations (such as OSFI’s outsourcing framework). On the topic of advancing fintechs more generally, the Second Paper notes that the Government will work to provide fintechs with more detailed information on the financial sector framework, such as better regulatory contact information.

#### *Entry and Exit Process for Entrepreneurs in Financial Sector*

Another way that competition, innovation and accessibility may be supported is to provide an easy to follow and streamlined entry and exit process for financial sector entrepreneurs, including fintechs, who may target certain underserved niches. The Department has identified two very specific refinements that could be made towards this goal (namely, increasing the number of officers a newly incorporated FRFI can remunerate, and providing the Superintendent the authority to extend the period to issue an Order to Commence and Carry on Business in exceptional circumstances), and is seeking input on whether to implement these or similar measures.

#### *Small and Mid-Sized Banks*

The Department is requesting insights into possible refinements that could better position the Canadian economy for growth and innovation in the future, including how small and mid-sized banks could promote competition and innovation by increasing capital formation and efficient credit allocation.

### *Examining the Merits of open Banking*

One of the requests that may prove to be controversial is the Department's request for input on the merits of "open banking", described as "a framework under which consumers have the right to share their own banking information with other financial service providers", following the lead of certain European jurisdictions which are in the process of implementing the EU's Second Payment Services Directive "PSD2" that will mandate open banking. As noted in the Second Paper, "Open banking holds the potential to make it easier for consumers to interact with financial service providers and increase competition" (for example by streamlining on-boarding and making comparison shopping more transparent). However, the Department may encounter significant push-back from traditional FRFIs, who may regard customer data as valuable proprietary information.

### **(ii) Improving the Protection of Bank Consumers**

The Second Paper notes that certain improvements were proposed by the Department in 2016 in the areas of access to basic banking services, business practices, information disclosure, complaints handling, and governance and public accountability. It also describes initiatives that are currently underway by OSFI and the Financial Consumer Agency of Canada ("FCAC") to assess whether further improvements are required.

### **(iii) Modernizing the Framework**

In what may perhaps be the most hotly debated section of the Second Paper, the Department describes and seeks input on several measures designed to ensure that the federal financial sector framework remains current and effective in the face of a changing environment.

### *Insurer Investment in Infrastructure*

Traditionally, FRFIs have had limited powers to make commercial investments. Federally regulated life and health insurers, in particular, have relied on fixed income investments to meet their insurance policy obligations, but some have recently gained experience in infrastructure investment, primarily through debt. In considering the long-term growth of such life and health insurers, the Department seeks stakeholder views on whether to provide these types of insurers with greater investment powers to be used for permitted types of investment opportunities that would ensure that they maintain a focus on the business of life and health insurance.

### *Corporate Governance*

In order for FRFIs to ensure a strong and modern corporate governance framework, the Department is considering whether to apply certain changes proposed to be made to the *Canada Business Corporations Act* pursuant to the House of Government Bill C-25<sup>[2]</sup> ("**Bill C-25**") to the FFIS. Given the concern that a blanket

application may affect institutions differently, the Department is particularly interested in learning about the impact these changes may have on smaller institutions. Although there are a whole list of potential changes, the Second Paper describes 4 potential areas ripe for change: diversity on boards, shareholder democracy, meeting material distribution and corporate transparency.

With respect to diversity on boards, the potential change to be adopted from Bill C-25 is the introduction of the “complain or explain” model whereby a company (or FRFI, if adopted) would be required to disclose information on gender diversity policies (pertaining to the proportion of women on boards) among the directors and senior management and, if no such policies exist, explain why not. The goal is to promote the participation of women on boards of directors and in senior management roles of FRFIs.

For shareholder democracy, the Department seeks input on whether to establish annual elections for directors with fixed, one-year terms for FRFIs, modeled on the changes proposed in Bill C-25 for publicly listed companies. It is hoped that the proposed change would increase director accountability and allow shareholders to voice their opinions on a more frequent schedule.

Bill C-25 also proposes to eliminate “slate voting” whereby shareholders, members and policyholders vote for a group of directors that have been nominated by management for election, instead of voting for each director as an individual. The Department wishes to understand any unique hurdles that smaller institutions may face if such action is eliminated, and whether a 2 year grace period would alleviate any such concerns.

The Department is also inviting feedback with respect to how a majority voting standard could work in the case of an uncontested election for directors of FRFIs. Pursuant to Bill C-25, in an uncontested election and where the number of seats equals the number of nominees, candidates would require more votes in favour than against them to be elected or re-elected.

In order to save on costs, the Department is considering allowing FRFIs to choose to adopt the “notice and access” system described in Bill C-25 (instead of having to mail out meeting materials) requiring companies to simply notify shareholders of an upcoming meeting and how to gain access to the materials required.

Bill C-25, if enacted, would explicitly prohibit the use of bearer shares and bearer share warrants, given their untraceable nature and proclivity for use in money laundering and terrorist financing activities. The Second Paper requests feedback with respect to whether this prohibition should also be implemented for FRFIs.

#### *Repeal of Cooperative Credit Associations Act*

The Department has also invited stakeholders views with respect to the potential repeal of the *Cooperative Credit Associations Act*, given that there are no active institutions currently subject to it.

### *Use of Bank Words*

On June 30, 2017, almost two months before the Second Paper was released, OSFI issued its Advisory 2017-01, *Restrictions on the use of the words “bank”, “banker” and “banking”* (the “**Advisory**”), which adopted a very restrictive interpretation of how the statutory prohibitions in the *Bank Act* on the use of those “bank words” by non-banks should be interpreted and administered, and an accompanying cover letter setting out an aggressive timetable for complying with what many players regarded as new and unwarranted restrictions.[3]

The Advisory caused considerable consternation among provincially regulated non-bank financial institutions such as credit unions (which often use such phrases as “do your banking with us” in advertising) as they counted up the potentially huge costs of revising reams of marketing materials that offended OSFI’s interpretation of the *Bank Act* restrictions by the deadlines of December 31, 2017 for information contained on websites of other electronic media, by June 30, 2018 for information contained in print materials, and by June 30, 2019 for information contained on physical signage.

Possibly in response to this controversy, the Department is asking for input with respect to whether prudentially regulated non-bank deposit-taking institutions (such as credit unions) should be granted flexibility to use the “bank words” in describing their activities and services in a way that avoids market confusion and ensures the appropriate protection of consumers.

It is probably no coincidence that on the same day as the Second Paper was released, OSFI issued a virtually unprecedented notice suspending the compliance expectations set out in the cover letter to the Advisory. In the suspension notice, OSFI indicates that it will communicate its revised compliance expectations once the Department has announced the outcome of its consultation with respect to these restrictions.

### **(iv) Safeguarding a Stable and Resilient Sector**

The Department, through its consultations to date, identifies several areas in the Second Paper whereby further work is required or for which additional insights from stakeholders is requested.

#### *Earthquake Exposure Risk*

Based on data showing a lack of earthquake insurance uptake in certain areas in Canada, and the low level of predictive validity for damages caused by extreme earthquakes, the Second Paper notes that stakeholders in the property and casualty insurance sector have expressed concerns with their ability to cope in the event of a high-impact earthquake. The Department is considering how to best limit the risks of an extreme earthquake through consultations with provinces, territories and stakeholders. The Second Paper describes the work of FCAC in this area who is planning to improve consumer education products to enhance consumer awareness of insurance products, along with awareness of the rights and responsibilities of consumers. No timeline for

this awareness campaign is provided.

#### *Life Insurance Resolution Framework*

With respect to life insurers, the Department requests input with respect to possible enhancements to the life insurance resolution framework which would be utilized in the event of failure of a major life insurer in order to limit costs to the economy (instead of a conventional bankruptcy or liquidation). The Second Paper notes that reforms in this area have so far focused on the banking sector, but that a plan to establish a resolution framework for financial market infrastructures was announced in the 2017 budget.

#### *Cyber Security Strategy*

The consultation to date confirms that cyber security and cyber risk is a complicated area in which three issues are often dealt with: privacy, collaboration, and personnel. An additional complicating factor is that responsibility for the inherent challenges faced in this area is shared amongst governments, the private sector, law enforcement and the public. Nonetheless, the Second Paper champions the creation of a cyber security strategy that is forward-looking, enduring and responsive to a continually changing cyber security environment, and making Canada a global leader in the provision of cutting-edge cyber security technology and the use of such technologies to promote safe and secure services to the global marketplace. To this end, the Second Paper notes that the Government has recently endorsed the [G7 Fundamental Elements of Cybersecurity in the Financial Sector](#) to assist financial sector entities to design and implement cyber security strategies and frameworks. Going forward, the Department will work with Public Safety Canada and also pursue international efforts in order to gain international co-operation and adequately assess potential changes to the FFIS.

#### *Disclosure of Climate-Related Risks*

One additional item identified by stakeholders that may enhance stability and resiliency is improved disclosure by firms of climate-related risks related to green finance. The Second Paper describes recommendations from the Financial Stability Board and a project currently underway by the Canadian Securities Administrators to review the disclosure of risks and financial impacts of climate change. However, there is no indication of whether or not the Department intends to incorporate any of these recommendations into the FFIS, once finalized. The Second Paper does note that the Department continues to contribute to ongoing work on green finance in international forums such as the G7 and G20.

The Annex lists several other targeted policy measures that the Department is seeking feedback on, including whether to:

- reflect OSFI's practice to publish basic information on its website about FRFIs in the FFIS;

- broaden the list of approvals that require advance publication in the *Canada Gazette*, providing an opportunity for Canadians to object;
- modernize the administration of unclaimed balances, including revising the unclaimed balances that should be transferred to the Bank of Canada, as custodian, the information that should be provided to the custodian to claim unclaimed balances, the period of time for holding such unclaimed balances, whether the timelines should vary depending on the size or instrument, what should be done with unclaimed balances after this time, and whether there should be an administration fee payable;
- repeal the nuclear insurance exception pursuant to Part XIII of the *Insurance Companies Act* and subject nuclear insurance to the general foreign companies regime thereto;
- allow foreign insurers to hold records in Canada at a location other than the chief agency location of the foreign company;
- allow property and casualty and marine insurers to assume periodic payment obligations pursuant to three-party structured settlement agreements;
- exempt persons who already control a FRFI from the requirement to obtain Ministerial approval for indirect increases in their share ownership;
- allow increased electronic participation in meetings (and under what conditions);
- clarify rules pertaining to advance voting for decisions such as members of the board or proposals, especially for members of credit unions;
- implement a threshold that would apply before members of a federal credit union can bring forward a proposal (and what that threshold should be);
- continue to allow members of Federal Credit Union Membership Lists automatic access to such lists or whether access should only be provided upon request;
- expand the scope of the definition of “related party” and the application of the related party regime under the *Insurance Companies Act* to increase the transactions that are subject to OSFI approval;
- reduce the limit of 50% of regulatory capital to 25% with respect to transactions between FRFIs and directors, officers and their interests;
- establish a materiality threshold for Superintendent approval of the acquisition of an unregulated entity of up to 2% of the consolidated assets of the acquirer;
- eliminate the requirement for Superintendent approval where a FRFI acquires control of a limited partnership investment only because it controls the general partner of such partnership;
- introduce Superintendent approval for the acquisition of control of a factoring or financial leasing entity, subject to the determined materiality threshold;
- remove the “principal and primary tests” (which allows mutual fund distribution entities and real property brokerage entities to engage in unauthorized activities so long as their principal or primary

- activities meet the statutory definition of such entities) and introduce a requirement for such entities to exclusively engage in authorized activities, consistent with the rules for other unregulated entities;
- clarify that when a financial institution reclassifies an investment, it would be deemed to be acquiring the investment at the time it originally made the acquisition;
  - eliminate the ability for the Minister or Superintendent to authorize indeterminate extensions for temporary investments, loan workouts and realization of a security interest;
  - narrow the scope of exemptions related to undertaking a large asset transaction to ensure that the Superintendent reviews transactions involving significant financial risks; and
  - revise the *Canada Deposit Insurance Corporation Act* to clarify that the liquidator of a Canada Deposit Insurance Corporation (“**CDIC**”) member institution has no right to apply set-off
  - against a claim related to insurance deposits, allowing CDIC to recoup the full payment of insured deposits made to depositors.

Stakeholders are invited to make written submissions to the Department by September 29, 2017. Given the breadth of topics covered in the Second Paper, it is likely that the Department will again receive submissions from a broad range of stakeholders that will take some time to dissect. However, the consultation regime has proven to be a dynamic process capable of responding to many of the concerns raised. It will be interesting to see which of these policy measures end up in draft legislation and whether this consultative process will eventually lead to changes to the FFIS driven by those working and breathing in the industry.

by Darcy Ammerman, Robert M. Scavone and Bob Bell, Student-at-Law

[1] Defined as “companies that commercialize emerging financial technologies”[ps2id id='1' target='']

[2] An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act.[ps2id id='2' target='']

[3] To provide some further context, section 983 of the Bank Act contains restrictions on the use of the “bank words” by financial service providers that are not banks governed by the Bank Act (i.e., listed on Schedules I or II), the violation of which is a criminal offence potentially punishable by fines or imprisonment. However, there has been confusion in the past (or, in some cases, a sheer “blindness” approach) with respect to how far these restrictions go.[ps2id id='3' target='']

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2017



The logo for mcmillan, featuring the word in a lowercase, sans-serif font. The 'm' and 'c' are in a dark red color, while the 'm', 'i', 'l', 'l', 'a', and 'n' are in a light blue color. The logo is positioned in the upper left corner of the page.

mcmillan