

FCAC'S SUBMISSION ON OPEN BANKING: FINDING THE RIGHT BALANCE TO ACHIEVE CONSUMER PROTECTION AND BROAD FINANCIAL SECTOR PARTICIPATION

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On March 1, 2021, the Financial Consumer Agency of Canada (“**FCAC**”) made a [submission](#) to the Advisory Committee on Open Banking (the “**Committee**”) for consideration as part of the Committee’s consultation process on open banking (also called consumer-directed finance). FCAC’s recommendations aim to achieve a balanced approach to open banking in Canada that prioritizes consumer protection and clearly establishes roles for both industry and government participants.

Consumer Protection

FCAC is a federal financial sector regulator responsible for, among other things, overseeing the compliance of federally-regulated financial entities with consumer protection measures. Many of its recommendations for open banking emphasize consumers’ rights to control their financial data, to access a wide range of financial services and products, and to seek remedies for issues that may arise. FCAC asserts that “consumer protection must be embedded in every stage of accreditation, implementation, and in the governance and maintenance of any open banking system”.

In particular, FCAC recommends that open banking participants be required to fulfill certain accreditation criteria, including legally binding consumer protection and financial inclusion requirements. These requirements would help ensure that: (i) consumers have fair and reliable access to financial services and products; (ii) financial entities have appropriate security, data protection, and privacy standards in place; and (iii) financial entities have the ability to compensate consumers for potential losses.

Accountability is another point of emphasis in FCAC’s submission. FCAC recommends applying a user-friendly and efficient liability framework that assigns liability within the system and does not place the onus on the consumer. This includes a single external complaints body with binding authority that would be responsible for adjudicating open banking activities. FCAC points to the Dispute Management System established by the Open Banking Implementation Entity in the United Kingdom as an example that the Committee could draw upon.

Consumer education and consent are two other key components in FCAC's submission. Education will increase consumer awareness of the benefits and risks of open banking. Specifically, FCAC recommends that the Committee establish an investment fund for consumer education along with a trusted authority responsible for overseeing educational programs and materials. Consent, on the other hand, allows consumers to maintain control over their financial information. FCAC reinforces that consent should be express, especially when it comes to moving consumer data among open banking participants, and that it should not be tied to the provision of a product or service.

The above proposals aim to enhance consumer confidence, which the FCAC views as essential for the success of open banking in Canada. FCAC believes that the government, in particular, can play a key role in fostering this confidence.

Government Involvement

The Committee is currently contemplating a "hybrid model for open banking that is neither entirely industry-led nor government-led". FCAC proposes that the Committee leverage the knowledge and experience of existing financial sector regulators. Due to their experience developing market standards and regulating market conduct, regulators are well-placed to mitigate risks and establish best practices.

FCAC suggests that the government fulfill the following duties:

- assist with setting appropriate accreditation criteria to ensure that consumer protection is prioritized;
- provide unbiased information on financial products and services and coordinate with financial entities in order to provide consumers with the information that they need to make well-informed open banking decisions; and
- establish market conduct, complaint standards, and liability standards (which FCAC believes should be determined by relevant federal and provincial regulators and not an industry-led body).

At a minimum, FCAC submits that open banking participants should be required to meet existing federal market conduct standards. However, FCAC acknowledges that a wide range of financial entities will be participating in the system (or at least trying to). In order to encourage broad participation, FCAC recommends that the Committee consider substituted compliance in some cases to help manage the regulatory burden and level the playing field.

Issues Requiring Further Consideration

While FCAC's submission offers several proposals for the Committee to contemplate, it also identifies potential issues that the Committee could explore further during its consultation process.

Jurisdictional boundaries and legislative constraints pose a challenge for establishing a single, unified standard for open banking across Canada. In particular, FCAC recognizes that existing financial sector regulators currently oversee various participants and will likely handle consumer complaints about open banking. Therefore, further consideration will need to be given to clearly defining the role and scope of regulators' authority and the extent of their involvement in the open banking system.

Finding the correct balance with respect to the proposed accreditation and implementation bodies is also important. FCAC acknowledges that an industry-led accreditation body may be in a better position to determine technical standards and governance practices for financial entities, but this body should still be subject to government oversight to reduce the risk that it will become "an industry group, rather than a public purpose entity". Similarly, FCAC urges the Committee to consider how provincial and federal financial sector regulators and government organizations will interact with the implementation organization, especially if the latter is responsible for setting rules for financial entities participating in open banking.

In sum, FCAC supports the proposed hybrid model for open banking in Canada, so long as the right balance between industry and government is attained.

Recognizing that a fulsome framework may still take some time to develop, FCAC recommends that immediate direction be provided, including a sunset date for screen-scraping (which open banking will replace). Screen-scraping requires consumers to share their bank log-in credentials with a third party app who then logs into the consumer's account to obtain financial information. There are of course a whole host of liability and privacy concerns with the use of screen-scraping. Regardless, it is currently being utilized as part of the application process for certain financial services products and the monitoring of financial data as a condition to the continued use of those products.

While there will be challenges and difficult decisions, they are worth overcoming in order to implement a secure open banking system for Canadians that allows participation from a broad range of financial sector entities.

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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.

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