

# THE FEDERAL BUDGET: WHAT FINANCIAL INSTITUTIONS NEED TO KNOW

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On April 21, Finance Minister Joe Oliver tabled the 2015 federal budget (the "**Budget**"). Two of the major changes include an enhanced consumer protection framework applicable to Canadian banks and further information about the government's intention to introduce a "Bail-In" regime for Canada's six largest banks, both designed to protect consumers in their dealings with financial institutions.

## **Consumer Protection Framework**

One of the major initiatives will amend the *Bank Act* (the "**Act**") to implement and/or enhance consumer protection requirements for banks. In addition, a set of overarching principles will be set out in the Act to guide the conduct of banks. Banks will now be obliged as part of their public reporting requirements to report annually on how their business activities meet the spirit of these principles.

Interestingly, the Budget proclaims the federal government's intention that the Act "provide the exclusive set of rules governing consumer protection for banks" in order to achieve one comprehensive, consolidated set of rules to allow banks to efficiently deliver national products and services, and ensure that customers have uniform protection across the country. This change may represent a welcome development for banks that addresses the uncertainty following the September 2014 Supreme Court of Canada ("the **SCC**") decision *Bank of Montreal v Marcotte*, in which the SCC found, in addition to the Act, that the *Consumer Protection Act* (Quebec) could also apply to banks. The SCC held that even though the federal legislature may constitutionally have exclusive power to regulate an area, such as banking, provincial legislation can also apply. If the federal and provincial laws at issue are not found to be in operational conflict, the SCC reinforced the long-followed principle that it could give meaning to both pieces of legislation. While the Budget proposals still lack specifics, it will be important to see which amendments and additions make it into the Act and how these will interact with provincial consumer protection laws.

Some of the consumer protection proposals of note in the Budget include:

*Clear and simple disclosure of information:* The government proposes additional disclosure requirements for banking services and products, including increased use of summary information boxes. Specific products that

will require summary information boxes have not been identified, but banks may have to amend their current documents to comply with the new requirements.

*Broader corporate governance requirements:* Board of directors' duties will be expanded under the Budget proposals to cover all consumer protection measures. Currently, boards of directors' are limited under the Act to (1) ensuring there are appropriate procedures in place to provide required disclosure to customers and (2) general oversight of regulatory compliance management, including oversight of procedures to resolve conflicts of interest.

*Prohibition of high pressure sales tactics:* Business practices such as high pressure sales tactics will face increased scrutiny if the Budget proposals are implemented. The government did not, however, provide details by way of specific scenarios or business practices that would be prohibited. The Budget also proposed the addition of mandatory cooling-off periods for additional products, though again details regarding which products will be affected were not given.

*Access to banking:* Under the Budget proposals, a broader range of personal identification can be used to open a bank account, allowing greater access to banks by consumers. No particulars are provided, but the example of a customer presenting both a birth certificate and an electricity bill together was deemed sufficient identification to open an account.

*Improved transparency and accountability:* Under the proposed amendments to the Act, banks will be required to take measures to be more transparent with customers. For example, banks may be required to make additional public reporting on complaints, which includes the issuance of annual reports on how they have adhered to the guiding principles on consumer protection that will be set out in the Act.

*Clear and accurate advertising:* The Budget proposes a requirement that advertising be clear and accurate. As there are already regulations set out under both the Act and the Competition Act that deal with misleading and false advertising, it remains to be seen how such new regulations will co-exist with existing ones.

## **The "Bail-In" Regime**

The federal government also confirmed its intention to implement the Taxpayer Protection and Bank Recapitalization Regime, or the "Bail-In" regime. Bail-In regimes have been considered in a number of jurisdictions since the 2008 financial crisis. The goal of a Bail-In regime is to limit taxpayer exposure in the event of a bank failure, and to instead shift the burden to the creditors and shareholders of the bank. Under the Canadian regime, failing financial institutions that are considered "systematically important" may be restructured by the government. For the most part, this will affect the six largest banks in Canada.

The proposed regime includes a statutory conversion power. This power allows for the permanent conversion

of eligible liabilities of a non-viable bank into common shares. Under the regime, eligible liabilities include only unsecured debt that:

1. is tradable and transferable;
2. has an original term to maturity of 400 days or more; and
3. is used or renegotiated after the implementation date set out by the government.

Under the proposed regime, a minimum loss absorbency requirement will be instituted. As well, a comprehensive set of disclosure and reporting requirements will be developed.

The Bail-In regime was first proposed in the 2013 federal budget, and is primarily based on the Taxpayer Protection and Bank Recapitalization Regime consultation paper issued by the Department of Finance in August 2014 (the "**2014 Paper**").

One major difference between the Canadian Bail-In regime and the regime implemented in the United States is that the adoption of a holding company structure will not be mandatory. In Canada, an operating bank is the top-tier entity in the corporate group, as opposed to a holding company, unlike in other jurisdictions. The 2014 Paper noted that the government was considering whether the holding company structure should be required for Canadian banks; it has now been confirmed that no holding company requirement would be applicable to Canadian banks.

### **Other Noteworthy Proposals**

Other budget proposals that will be of interest to financial services clients include:

- the expansion of the voluntary mortgage prepayment disclosure commitment for non-bank mortgage lenders to bring disclosure more in line with federally regulated financial institutions' current commitments;
- legislative amendments to enhance the protection of information gathered by financial sector oversight bodies;
- continued work with stakeholders on the implementation of the federal credit union framework to encourage growth and competitiveness in the credit union sector;
- the potential introduction of additional regulations to ensure the safety of retail payment systems for consumers while simultaneously fostering innovation; and
- amendments to the *Canada Business Corporations Act* that deal with director elections, shareholder communications, gender diversity and corporate transparency.

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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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