



The Financial Services Regulatory Report

FCAC Sets December 31, 2007 as the Deadline for Complying with New Disclosure Requirements for Credit Agreements with Multiple Borrowers

The Commissioner of the Financial Consumer Agency of Canada (the "FCAC"), in a letter to the financial services industry dated September 15, 2006 restated his position on required disclosure practices in cases involving multiple borrowers.

The FCAC is the federal agency established in 2001 by the federal government to enforce many of the federal laws that protect consumers in their dealings with financial institutions.

In that letter, the Commissioner deemed that:

"the disclosure of the cost of borrowing and other prescribed information is to be provided to **all** borrowing parties, in accordance with the Regulations and should not be construed as a "best practice".

The *Cost of Borrowing Regulations* do not differentiate between different types of "borrower". Therefore, the industry should not make a judgment about which borrowers do or do not have the right to disclosure with respect to their loans. FCAC has advised all federally regulated financial institutions subject to the *Cost of Borrowing Regulations* to review their practices and to ensure that they provide proper disclosure to all borrowers whose loans fall within the scope of the *Cost of Borrowing Regulations*."

The Commissioner indicated that it is possible that there may be situations where joint borrowers do not wish to receive separate copies of the same disclosure statements. While a borrower cannot waive the institution's legislative obligation to provide disclosure, the Commissioner was of the view that, after being informed of their right to receive separate disclosure documents, joint borrowers may give their consent, in writing, to receive their documents as a single disclosure document that is addressed jointly to the co-borrowers.

For example, two family members who share the same credit card account may wish to receive only one monthly statement, as opposed to two separate statements. In this case, the family members would provide written consent so they can receive one monthly statement that would be addressed to both cardholders. Such consent must clearly describe the consequences of this decision, and should include a statement indicating that the consent is revocable if separate statements are required at some point in the future.

The *Cost of Borrowing Regulations* made under the respective financial institution statutes set out the manner, timing of initial and subsequent disclosures and content of the disclosure that must be made to borrowers under various kinds of loan arrangements e.g. fixed, variable, (including mortgages), credit card and line of credit. In the case of credit cards, for example, the *Regulations* require that a supplementary disclosure statement be provided to borrowers *monthly* containing certain information together with the itemized statement of account.

The FCAC has set December 31, 2007 as the date by which enhanced disclosure practices are to be in place for all new borrowers, or for borrowers who are renewing their credit

agreements. At that time, institutions are required to advise existing borrowers of this change in practice, and inform them that a borrower can contact the bank and make arrangements to receive individual disclosure statements.

2006 Financial Institutions Legislation Review

On June 14, 2006, the federal government released its White Paper on the proposed revision of the federal financial institutions legislation. By the terms of the provisions of the respective federal financial institutions legislation (i.e. the *Bank Act*, the *Insurance Act*, the *Loan and Trust Companies Act*), these statutes will expire and must be re-enacted together with any amendments by no later than April 24, 2007.

Some of the changes being proposed by the Government in its White Paper include:

Ownership

- ✓ Under the current legislative regime, banks with equity of \$5 billion or more must be widely held. Banks with equity of between \$1 billion and \$5 billion are subject to a 35% public float requirement and small banks (those with equity under \$1 billion) can be wholly owned by a single shareholder.
The White Paper proposes to raise the large bank equity threshold to \$8 billion and to increase the small bank equity threshold (i.e. the threshold below which banks may be closely held) to \$2 billion.

Disclosure

- ✓ The Government proposes to develop a new disclosure regime for deposit-type investment products such as chequing and savings accounts, GICs and term deposits. Current disclosure requirements either do not address the differences between these deposit vehicles or render the disclosure requirements irrelevant or inappropriate.
The White Paper suggests that the proposed disclosure regime will ensure disclosure appropriate for the type of deposit product being purchased and will include disclosure of the term, rate of return and penalties for early withdrawal.
- ✓ The White Paper noted that federal financial institutions take different approaches to providing disclosure to co-borrowers. Some financial institutions provide disclosure documents to all borrowers who sign the loan agreement while others provide disclosure only to the person deemed to be the primary borrower. In a situation where only the primary borrower receives disclosure, the White Paper stated that there is concern that co-borrowers might not be aware of their rights and obligations under the loan agreement.
The Government is proposing, therefore, to enact amendments to the federal financial institutions statutes to clarify that all borrowers must receive the required disclosure documentation but that express consent may be given by co-borrowers for a single set of documents to be sent in the name of all signatories to a loan agreement to a single address. These amendments will provide legislative force to the FCAC's letter (referred to above) to the industry.
- ✓ The Government proposes to harmonize online and in-branch disclosure requirements.
- ✓ Where disclosure statements are made part of a credit agreement (as opposed to a separate disclosure statement), institutions must do so in a format whereby pertinent information can be easily identified by the borrower, either by presenting it in a consolidated manner or by providing an accurate summary of the required information.

Complaints Handling

- ✓ Currently, complaints handling procedures are disclosed only at the time an account is opened. In addition, consumers of financial products and services (e.g. mortgages) who do not open an account do not receive information about the institution's complaint handling procedures. The Government proposes that complaints handling procedures be available to all consumers and small and medium size enterprises on an ongoing basis.

Electronic Transactions

- ✓ The Government has indicated that it will encourage the adoption of a voluntary consumer protection regime to deal with new and emerging forms of electronic transactions (such as internet and telephone banking, as well as stored value cards and new online payment options such as email money transfers and online debit transactions). The FCAC will be responsible for monitoring adherence to the code by federally regulated financial institutions.

Cheque Hold Periods

- ✓ The Government proposes to amend the *Bank Act* to provide authority to make regulations to limit cheque hold periods. However, the Government has indicated that it is willing to consider a voluntary commitment (without using its regulation making power) if the financial services industry reduces maximum cheque hold periods from the current 10 days to 7 days. A further reduction to 4 days will apply when the Canadian Payment Association's (CPA) cheque imaging project is fully implemented. This commitment would be monitored and reported on by the FCAC to ensure that it is respected.

Amendment to the Bills of Exchange Act

- ✓ The Government proposes to amend the *Bills of Exchange Act* to provide an enabling framework to allow for the use of electronic cheque images in the cheque clearing and settlement system.

Foreign Bank Entry

- ✓ The Government proposes to remove near banks (those foreign entities that are not regulated as banks in their home jurisdiction but provide banking-type services such as consumer loans) from the foreign bank entry framework.

Improvements in the Regulatory Approval Regime

- ✓ Currently, ministerial or the Superintendent's approval is required for a broad range of financial sector transactions. Changes to streamline the approval regime are being proposed. For example, where transactions do not raise policy issues, it is proposed to transfer the approval from the Minister of Finance to the Superintendent of Financial Institutions. Certain requirements for Superintendent's approval are also being eliminated. For example, the requirement to obtain the Superintendent's approval for processing information outside of Canada will be eliminated.

Further details of the proposals for streamlining the regulatory approval regime are contained in the Technical Annex to the White Paper.

Credit Union and Caisses Populaires

- ✓ Currently, a minimum of 10 credit unions are necessary to establish a federally incorporated cooperative credit association (these institutions can provide products and services across provincial boundaries). The Government proposes to reduce to 2 the minimum number of credit unions required for incorporation of a credit association. In addition, a deposit insurance opt-out regime for cooperative credit associations which do not accept retail deposits is being proposed.

Residential Mortgages Exceeding 75% of Property Value

- ✓ The Government proposes to raise the loan to value ratio on residential mortgages requiring insurance from 75% to 80%. Accordingly, there will no longer be a *statutory* requirement for residential mortgages with a loan to value ratio below 80% to be insured.

The Government is now in the process of drafting legislation to give effect to these proposals.

CPA Membership Policy To Take Effect December 31, 2006

Institutions eligible for Canadian Payments Association membership (i.e. life insurance companies, securities dealers and money market mutual funds) that offer payment services (e.g. cheque or debit cards) to clients with their financial products, and clear these payment items through the CPA's clearing and settlement system must become members of the CPA by December 31, 2006. Applicants are encouraged to apply for membership as soon as possible to allow sufficient time for review of their application and submission to the Board of the CPA.

Legislation to Regulate Gift Cards Proposed in Ontario

Expiry dates on retail gift cards could soon be a thing of the past in Ontario as the Liberal government moves to make the province the first jurisdiction in Canada to ban the practice and regulate such cards.

Government Services Minister Gerry Phillips announced recently that legislation to regulate the cards will be introduced in the weeks after the Ontario Legislature resumes sitting.

If passed, amendments to the Ontario *Consumer Protection Act* will allow the government to create regulations banning expiry dates and ensuring the cards are not discounted depending when consumers choose to redeem them.



If you require assistance on how any of the above-noted matters will affect your organization please call Libby Gillman at 416.418.7204 or contact her at libbyg@lawgill.com

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