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Revised Office of the Superintendent of Financial Institutions ("OSFI") Guideline B-10 on Outsourcing of Business Activities, Functions and Processes

Guideline B-10 sets outs OSFI's expectations for federally regulated entities ("FREs") that outsource one or more of their business activities to service providers.

While the Guideline operates on the premise that FREs have the flexibility to configure their operations in the way most suited to achieving their corporate objectives, it provides that:

- FREs retain ultimate accountability for all outsourced activities; and
- OSFI's supervisory powers should not be constrained, irrespective of whether an activity is conducted in-house, outsourced, or otherwise obtained from a third party.

Pursuant to the Guideline, FREs are expected to, amongst other things:

- Evaluate the risks associated with all existing and proposed outsourcing arrangements;
- Develop a process for determining materiality of arrangements;
- Implement a program for managing and monitoring risks, commensurate with the materiality of the arrangements, including documenting material outsourcing arrangements in a written contract that addresses all the elements of the arrangement and developing implementing and overseeing procedures to monitor and control outsourcing risks in accordance with its outsourcing risk-management policies.

Service contracts relating to material outsourcing arrangements are expected to contain, as appropriate, certain provisions, including (but not limited to) the following:

- Nature and Scope of the Service Being Provided
- Performance Measures
- Reporting Requirements
- Resolution of Differences
- Defaults and Termination
- Ownership of Assets and FRE's Right of Access to Such Assets
- Contingency Planning
- Audit Rights
- Subcontracting
- Confidentiality, Security and Separation of Property
- Pricing
- Insurance
- Location of Records
- Business Continuity Planning

Guideline B-10 was revised on March 11, 2009. While OSFI stated that the changes made to Guideline B-10 were not substantive in nature, the revised Guideline, nevertheless, makes the following important substantive revisions:

- It implements the changes resulting from the coming into force of Bill C-37, which, amongst other things, removed the requirement for federally regulated entities to

obtain OSFI's approval to maintain and process outside of Canada information or data relating to the preparation and maintenance of certain corporate, accounting and customer records.

- It clarifies the expectation that FREs need to consider the potential influence of multiple outsourcing arrangements, in the aggregate, with a single service provider as part of the FRE's materiality test.

- It specifies that outsourcing arrangements that an FRE has obtained as a result of an acquisition are expected to comply with the expectations set out in the Guideline at the first opportunity, such as the time the outsourcing contract, agreement or statement of work (where applicable) is substantially amended, renewed or extended.

- It includes a standardized template for a centralized list that FREs can use to summarize all their material outsourcing arrangements.

- It provides that FREs are expected to undertake the Guideline's stipulated due diligence process not only when an outsourcing agreement is entered into or renewed but also when it is substantially amended.

- It requires that outsourcing agreements must state the physical location where a service provider will provide the services.

- The Guideline clarifies OSFI's expectation that the FRE's review of the service provider's ability to continue to deliver the service in the manner expected should be commensurate with the level of risk involved. This review should include, among other matters, an assessment of the use and performance of significant subcontractors.

The revised Guideline does not provide for a transition period for FREs to comply with its requirements nor does it contain any grandfathering clause, despite the fact that some of the changes may require amendments to existing outsourcing arrangements.

Guideline B-10 applies, by its terms, to all outsourcing arrangements of a federally regulated entity *or a FRE Group*. For the purposes of Guideline B-10, a "FRE Group" is defined as the FRE and*, inter alia*, a subsidiary of the FRE. In applying Guideline B-10, the FRE is expected to consider the impact on the FRE and on its consolidated operations of outsourcing arrangements entered into by all of its subsidiaries and business operations.

*Should you need assistance in documenting or updating your outsourcing arrangements with third party or affiliate service providers in order to comply with legal, regulatory, policy and audit requirements****, please contact Libby Gillman at 416.418.7204 or at libbyg@lawgill.com.***

Canadian Payments Association Considers New Rule E-1 to Implement Requirements of CPA's Guidelines for Pre-Funded Debit Products Permissible Under the CPA's Payable-Through Policy

In 2008, the Canadian Payments Association ("CPA") undertook a review – as part of its strategic goal to "ensure the efficiency, safety, and soundness of the CPA's clearing and settlement systems" – of pre-funded debit products to provide clearer guidance to the marketplace with respect to what is permissible under the CPA's Payable-Through Arrangement Policy. The paper which resulted from that review "*Guidelines for Pre-Funded*

Debit Products Permissible under the CPA's Payable-Through ("PT") Policy (the "Pre-Funded Guidelines").provided that pre-funded debit card arrangements are permissible under the PT Policy subject to the Guidelines stated therein. These Guidelines are summarized below:

- Guideline #1: The CPA member must be the Drawee.
- Guideline #2: The CPA member shall be liable for the outstanding aggregate value of all cards (or other access device) issued in the pre-funded program.
- Guideline #3: The CPA member must disclose its pre-funded debit arrangements to their Clearing Agent(s).
- Guideline #4: The CPA member must be responsible for the authorization requirements (e.g., PIN or other secret code) of the card (or other access device).
- Guideline #5: The cardholder (or device holder) must be defined as the end-user customer that possesses and uses the card (or access device).
- Guideline #6: The CPA member must have an agreement with the end-user customer (e.g., cardholder or PIN agreement).
- Guideline #7: The CPA member must disclose to end-users the "risks of usage" of the pre-funded program.

The CPA is now considering the implementation of the requirements of the Pre-Funded Guidelines and has issued a draft revision of Rule E-1 as well as an accompanying Consultation Paper. In addition to reflecting the above-noted Guidelines in the revised Rule E-1, the CPA is proposing to add three new sections to the Rule outlining Acquirer FI and Payor FI responsibilities and introducing registration requirements, as follows:

1. Pursuant to proposed Sections 6 and 14 of the draft Rule, Acquirer FI responsibilities will include:
   - a requirement for the Acquirer FI and the Acquirer to register with a POS Payment Service; (A POS Payment Service is defined as the network that facilitates POS Transactions);
   - Entering into an agreement with each Acquirer for which it holds an account whereby the Acquirer agrees:
     - (i) to comply with CPA By-laws, Rules and standards and to enter into an agreement with each Acceptor (i.e. merchant) for which it acts whereby the Acceptor agrees to comply with all applicable CPA By-laws, Rules and standards; and
     - (ii) to begin an investigation where the Acquirer suspects the Acceptor is involved in suspicious activity;
   - where the Acquirer FI is not the Acceptor's financial institution, holding the funds in a segregated account such that the funds are legally protected for the benefit of the Acceptor; and
   - ensuring that each Acquirer for which it holds an account captures information pertaining to Acceptors consistent with the "know your customer" principles (e.g. legal name and address of Acceptor, type of business being offered by the Acceptor).

2. In addition, pursuant to proposed Paragraphs 8(a) and (b) of the draft Rule, the Payor FI (CPA member that holds and controls the cardholder's account) is responsible for registering with the POS Payment Service and for entering into an agreement with the Service whereby that Service agrees, among other things, to comply with all applicable CPA bylaws, rules and standards.

3. Part C of the draft Rule also outlines the procedures for handling cardholder inquiries/complaints that are based on the Canadian Code of Practice for Consumer Debit Card Services (the "Code") (This requirement applies to members of the CPA who are not currently signatories of this Code).

Comments on the draft Rule were requested to be provided to the CPA by May 4, 2009. The CPA proposes to introduce this revised Rule for consideration by its Board of Directors at its meeting on June 10, 2009.

Litigation Update

Margaret Smith and Ronald Adrian Oriet v. National Money Mart Company, Dollar Financial Group Inc. et al

A class action suit currently being heard in the Ontario Superior Court alleges that National Money Mart Company ("Money Mart") and its parent company, Dollar Financial Group, Inc. ("Dollar Financial") breached section 347 of the *Criminal Code of Canada* by charging and collecting fees and interest between 1997 and 2007 at an effective annual interest rate in excess of 60% on "Fast Cash Advance" loans, also known as "Payday Loans". The class action asserts that all of the interest and fees charged and collected by Money Mart and its franchisees on "Fast Cash Advance" loans repaid by cheque on the borrower's next payday are legally "interest" notwithstanding that Money Mart calls them "fees". If the charges are "interest" for purposes of section 347 of the *Criminal Code*, then, the plaintiffs allege, the effective annual interest rate on these loans substantially exceeds 60%.

Section 347 of the *Criminal Code* was amended in 2007 to allow the provinces and territories to regulate the payday loan industry and place limits on the cost of borrowing in their own jurisdiction if they meet specific requirements and request designation. In particular, new section 347.1(2) was added, which exempts a person who makes a payday loan from criminal prosecution if:

- the loan is for $1,500 or less and the term of the agreement lasts for 62 days or less;
- the person is licensed by the province to enter into the agreement; and
- the province has been designated by the Governor in Council (Cabinet) under new section347.1(3).

New section 347.1(2) does not apply to federally regulated financial institutions, such as banks.

New section 347.1(3) states that the provisions outlined above will apply in provinces that are designated by the Governor in Council, at the request of the province. The designation is dependent on the province enacting legislative measures that "protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements." New section 347.1(4) allows the Governor in Council to revoke the designation if requested to do so by the province, or if the legislative measures referred to above are no longer in force.

Last year, the Ontario legislature passed the *Payday Loans Act, 2008*. The legislation comes into force in stages, on April 1, 2009 and July 1, 2009. The legislation:

- Requires payday lenders and loan brokers to be licensed, effective April 1, 2009.
- Prohibits certain industry practices, including "rollover" loans, effective July 1, 2009.
- Gives payday loan borrowers a two-day "cooling off" period to cancel a loan with no reason without incurring a penalty, effective July 1, 2009.
- Establishes an Ontario Payday Lending Education Fund, paid for by licensees.
- Sets a maximum total cost of borrowing cap for payday loan agreements in Ontario of $21 per $100 borrowed, as recommended by Ontario's Maximum Total Cost of Borrowing Advisory Board. The maximum total cost of borrowing cap for payday loan agreements in Ontario will come into force upon designation of Ontario under the *Criminal Code* (as amended).

The legislation also provides for enforcement and prosecution of violations and the ability to revoke, subject to appeal, the licenses of payday lenders and loan brokers.

British Columbia, Manitoba, Saskatchewan, New Brunswick, Nova Scotia and Prince Edward Island are also in the process of or have enacted payday lending legislation that is consistent with requirements for designation under the *Criminal Code*. Manitoba, Nova Scotia and Ontario are in various stages of obtaining designation under section 347.1 of the *Criminal Code*. Other provinces whose legislation complies with the above-noted requirements for designation may also apply to obtain a designation order.

Jurisdictional Comparisons

Maximum total cost of borrowing for payday loan agreements under provincial legislation (proposed and enacted)

Manitoba	Saskatchewan	Ontario	British Columbia	Nova Scotia
Maximum total cost of borrowing to be set by Regulation. The *Consumer Protection Amendment Act (Payday Loans)* was enacted in December, 2006. (Proclaimed in force). Manitoba was designated for purposes of section 347.1 of the *Criminal Code*. However, Bill 14, introduced on April 8, 2009, proposed changes to the payday loan provisions of the *Consumer Protection Amendment Act* which will likely require corresponding changes to the federal designation in order for the payday loans in that province to be exempt from the criminal interest rate provisions.	Maximum total cost of borrowing to be prescribed by Regulations made pursuant to Bill 43, *An Act Respecting Payday Loan Agreements, Payday Lenders and Borrowers*, enacted May, 2007. (Not yet proclaimed in force)	Ontario proposes a maximum total cost of borrowing of $21 per $100 borrowed. The maximum total cost of borrowing cap for payday loan agreements in Ontario will come into force upon designation of Ontario under the *Criminal Code* of Canada (as amended).	B.C. proposes a maximum total cost of borrowing of $23 per $100 borrowed. Bill 27, *Business Practices and Consumer Protection (Payday Loans) Amendment Act*, enacted November 22, 2007. New Regulations under the Act were proposed on March 2, 2009 and will come into effect on November 1, 2009. Pursuant to the Regulations, payday loan companies will need to be licensed by the Business Practices and Consumer Protection Authority (BPCPA) as of November 1, 2009.	Maximum total cost of borrowing of $31 per $100 borrowed. Bill 87, *An Act to Amend the Consumer Protection Act*, enacted November 2006. A notice was published in the Canada Gazette on February 26, 2009 proposing to issue an Order designating Nova Scotia for purposes of section 347.1 of the *Criminal Code* provided the legislative measures which Nova Scotia has enacted (which provide the basis for the Order) are proclaimed in force

New Brunswick	Quebec	Prince Edward Island	Newfoundland and Labrador	Alberta	Northwest Territories, Yukon and Nunavit
Bill 4, *An Act Respecting Payday Loans,* enacted April, 2008 (Not proclaimed as of April 29, 2009)	For many years, the Office de la protection du consommateur has refused to issue permits under the Quebec *Consumer Protection Act* to businesses that charge interest rates greater than 35% p.a.	*Payday Loans Act* introduced in the PEI legislature on April 21, 2009	General Consumer Protection legislation.	General Consumer Protection legislation. Initial consultation process complete.	General Consumer Protection legislation.

The Financial Services Regulatory Report is published periodically to keep you informed of developments in financial services legal and regulatory matters. This Report is a general discussion of certain legal developments and should not be relied upon as legal advice. If you require legal advice or financial regulatory consulting services, we would be pleased to discuss with you the issues raised in this Report in the context of your particular circumstances.