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Financial services regulation in 2022: Bridging the gaps

JANUARY 11, 2023 9 MIN READ

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Following key legislative and regulatory developments in the Canadian financial services space over the past several years, regulators focused in 2022 on bridging regulatory gaps, fleshing out details and working towards operationalizing new systems and frameworks. Payments were the subject of particular attention, with the objective of more effectively modernizing and regulating the ecosystem in Canada. Key areas of interest included payments modernization initiatives, such as Payments Canada's Real-Time Rail and the *Retail Payments Activities Act.* New anti-money laundering (AML) measures aimed at certain businesses were imposed in the payments industry. The long-awaited introduction of open banking in Canada moved forward. Finally, we saw increased inter-regulatory cooperation on cryptoassets. Work is underway, and change is certainly ahead.

Anti-money laundering

On February 14, 2022, the federal government took dramatic measures in response to ongoing blockades and protests in Ottawa by invoking the *Emergencies Act* for the first time since that legislation was enacted in the 1980s. Specific emergency measures announced on February 15 took aim at perceived payments gaps in the AML regime. Included were additional obligations for certain reporting entities already subject to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the PCMLTFA) in order to surveil payments flowing to fund the blockades. Additionally, new obligations were imposed on entities that had not previously been subject to the PCMLTFA, such as crowdfunding platforms and payment service providers. For further information about the government's invocation of the *Emergencies Act*, please see our Osler Update.

The emergency measures were ultimately short-lived: the declaration of a public order emergency under the *Emergencies Act* was revoked on February 23, 2022. However, the February emergency measures paved the way for more permanent changes that took further shape over the course of 2022. The 2022 federal Budget committed to expanding the scope of the PCMLTFA to apply to crowdfunding service providers, payment service providers and all businesses conducting mortgage lending. For further information about the financial services regulatory implications of the 2022 federal Budget, please see our Osler Update.

On April 5, 2022, the first suite of regulatory changes under the PCMLTFA came into force. These changes required crowdfunding platforms to register with Financial Transactions and Reports Analysis Centre (FINTRAC) as money services businesses (MSBs) or foreign MSBs. The changes also required these platforms to implement a full AML compliance program that satisfies the requirements under the PCMLTFA. Further, these regulatory changes broadened the definition of "electronic funds transfer" for MSBs and foreign MSBs. This set the stage for FINTRAC to retract its prior position that merchant settlement providers and payment processors were exempt from the MSB obligations under the PCMLTFA.

In a Notice published on July 21, 2022, FINTRAC clarified that invoice payment service providers and certain payment service providers previously exempted from the PCMLTFA must register with FINTRAC and implement compliance programs. Persons providing invoice payment services are those persons who act "as an intermediary between a payer and a payee to make payments to invoices, such as those pertaining to utilities, payroll and commission, mortgage and rent, or tuition." A person or entity is providing payment services when three criteria are satisfied:

- The entity must receive payment instructions and act as an intermediary between a payer purchasing goods or services and a payee supplying goods or services.
- The payer must consent to make the payments for goods or services through the entity.
- The payee must have an agreement with the entity to have access to the transfers carried out as payment for the goods or services.

There are several exceptions to the registration requirement that could apply. One such exception is available for a person or entity that solely accepts a payment for goods or services that they supplied to their own customer. A further exception applies to a person or entity that solely provides hardware (for example, a physical payment terminal) and does not offer any other associated payment services.

Although more payment service providers are now captured under the PCMLTFA's MSB regime, the definition of "MSB" in the PCMLTFA does not fully match the definition of "payment service provider" under the *Retail Payment Activities Act* (RPAA), discussed in further detail below. Accordingly, there will be a number of businesses that may fall under the RPAA, but not the PCMLTFA's MSB regime, and vice versa. These gaps may be bridged once both regimes are more settled.

For further information about FINTRAC's treatment of merchant servicing and payment processing activities, please see our Osler Update.

Payments modernization

In the summer of 2021, Payments Canada launched the first phase of Lynx, its replacement for the former Large Value Transfer System. Release One of Lynx introduced a new payments infrastructure for large value settlements and featured an updated risk model.

A second release of the Lynx system is still expected to launch in late 2022. This second release will implement the ISO 20022 messaging standard, which will eventually replace existing message type messages. This will enable Canadian financial institutions to meet the ISO 20022 global requirements that are due to be implemented by SWIFT in November 2022 – and will allow for more efficient and data-rich settlements of large transactions. As financial institutions prepare for the second Lynx release, Payments Canada has released ISO 20022 message specifications.

Payments Canada's hallmark real-time payments system, Real-Time Rail (RTR), was initially expected in 2022. However, the launch was pushed back to mid-2023, and has now been pushed back again, with no announced date. When RTR launches, it will provide the first national real-time payment system. It is expected to support access by both member financial institutions and non-bank payment service providers regulated under the RPAA once supporting legislation is in force.

Retail Payment Activities Act

Work also continues on the forthcoming RPAA, which was approved by Parliament in the summer of 2021. An in-force date has not yet been announced, but draft regulations to support the RPAA are expected to be released for stakeholder consultation in the coming months. While many details will remain unclear until the final regulations are published and any additional guidance is released, the RPAA will require payment service providers to register with the Bank of Canada, address and mitigate operational risks and protect user funds. Providers will also have to implement a notification system for any incidents with material impacts on end users, other payment service providers or clearing houses.

The Bank of Canada has indicated that regulated payment service providers will be eligible to submit an application to join the RTR directly if they meet certain requirements, which may radically change the payments landscape in Canada.

Additional information about the RPAA can be found in our Osler Update.

Open banking

Development of a Canadian open banking regime likewise remains a significant and ongoing project for the Government of Canada. In the summer of 2021, the Advisory Committee on Open Banking released its final report, recommending consumer protection rules, an accreditation system for third-party service providers and technical requirements to enable safe and efficient data transmission. The report recommended a phased approach to open banking governance, with the first two phases focusing on system design and implementation, as well as ongoing administration.

Phase 3, which focuses on implementation of an open banking framework, followed the release of the final report. As part of Phase 3, on March 22, 2022, the government appointed Abraham Tachjian to spearhead developing a comprehensive “made in Canada” open banking framework. Four working groups were also formed, focusing on accreditation, liability, privacy and security, along with a steering committee. The working groups have met over the past three months, and the outcomes of their meetings have been made available.

The first phase of open banking is intended to be “read only,” meaning data can be shared but no action taken. However, the parallel developments of payments modernization and retail payments supervision under the RPAA should provide more compelling use cases for open banking and move it into a “write access” phase. “Write access” would allow entities to initiate an action, such as a payment, on behalf of a customer.

Cryptoassets

Regulators at both the federal and provincial levels in Canada are seeking to fill gaps in crypto regulation. This is a large endeavour that will require significant regulatory cooperation in order to achieve effective oversight without stifling innovation. The need for cooperation is evidenced by the joint statement from the Office of the Superintendent of Financial Institutions, the Financial Consumer Agency of Canada and the Canadian Deposit Insurance Corporation released on November 16, 2022. While this type of joint statement is currently rare, we would not be surprised to see more of the same in the future.

More information about the joint statement can be found in our Osler Update. More information on developments in crypto in 2022 can be found here.

Financial title regulation

Ontario's Minister of Finance approved the Financial Services Regulatory Authority of Ontario's (FSRA) new Financial Professionals Title Protection Rule (FPTP Rule) as part of the framework under the related *Financial Professionals Title Protection Act, 2019*. It came into effect on March 28, 2022. Now that it is in force, the FPTP Rule establishes minimum standards regarding education, conduct and oversight for financial planners and advisors in Ontario.

A transition period will apply for any financial planner or financial advisor who was using the title on or before January 1, 2020. This transition period is four years for financial planners, and two years for financial advisors.

The new regime relies on the direct oversight of financial planners and financial advisors by credentialing bodies approved by FSRA. Accordingly, many members of the financial planning and financial advising professions have watched closely as credentialing bodies have become approved. To date, approved credentialing bodies include FP Canada, the Institute for Advanced Financial Education (IAFE), the Canadian Securities Institute (CSI) and the Canadian Institute of Financial Planning (CIFP).

Saskatchewan's Financial and Consumer Affairs Authority (FCAA) is continuing to work toward the implementation of its own financial titling regime, with the most recent consultation period regarding proposed regulations [PDF] having closed on September 20, 2022. Initially designed to closely mirror Ontario's financial titling regime, the FCAA introduced several key features that depart from the Ontario framework over the course of multiple rounds of public consultation. These include different transition periods, additional baseline competency profiles for financial title users and additional conflicts and suitability requirements.

New Brunswick also recently consulted on its own financial title protection regime, and may join Ontario, Saskatchewan and Québec in imposing greater requirements on financial professional title users in the near future.

Additional information regarding changes to requirements for financial title users can be found in our Osler Update.

What to watch for in 2023

As regulators work to flesh out the details of new mandates and transformative frameworks in the financial services regulatory space, industry participants and stakeholders can expect to see long-awaited modernization and gap bridging developments begin to take shape in 2023.

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