FINANCIAL SERVICES REGULATORY

Financial services regulation in 2020: Convergence, disruption and acceleration

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An unpredictable and volatile year, 2020 can be divided into three distinct phases: pre-COVID-19 pandemic; the initial COVID-19 phase which was marked by short-term emergency measures; and finally a measured resumption of more traditional regulatory function, activity and policy reform. However, this last phase is by no means a return to normal, as the COVID-19 pandemic continues to influence and disrupt the financial services world and impact its regulation.

Convergence and integration

We expected 2020 to be shaped by the modernization initiatives previously announced across the financial services sector. Both the Financial Services Regulatory Authority of Ontario (FSRA) and the British Columbia Financial Services Authority (BCFSA), two relatively new provincial financial services

regulatory bodies with similar mandates, announced priorities for 2020 that included regulatory effectiveness and regulatory cooperation and harmonization across Canada (see the plans for each of these organizations here: FSRA and BCFSA).

We were also closely following the trend towards regulatory convergence as financial products and the financial ecosystem itself started to meld. This was driven primarily by increased consumer demand for more holistic advice and consistent standards across financial products and services, such as the measures to introduce financial advisor/financial planner title reform in Ontario and Saskatchewan.

Mortgage syndication was an area of expected common regulatory focus for 2020. Prior to the pandemic, the Canadian Securities Administrators (CSA) were preparing to implement regulatory changes to harmonize the regulation of syndicated mortgages across Canada. These changes included amendments to National Instruments 45-106 and 31-103 that would remove the prospectus and registration exemptions for the distribution of syndicated mortgages, introduce additional requirements to the offering memorandum prospectus exemptions and amend the private issuer prospectus exemption to remove its availability for the distribution of syndicated mortgages. At the same time, in Ontario, FSRA announced that oversight of non-qualified syndicated mortgages would be transferred from FSRA to the Ontario Securities Commission (OSC), while FSRA would retain oversight over less complex arrangements that did not necessitate significant investor disclosure and oversight by a body such as the OSC. Other developments included the anticipated transfer of mortgage broker oversight in Québec to the Autorité des marchés financiers (AMF), which occurred on May 1, and in British Columbia, the creation of a single real estate regulator within the BCFSA.

At the federal level, we were following two key consumer-centric technology related initiatives: open banking and payments modernization, as well as watching for additional developments in relation to the federal financial consumer protection framework. We were also expecting increased activity by the Financial Consumer Agency of Canada (FCAC) in light of its new enforcement powers, which came into force on April 30, 2020. In addition, we anticipated the resumption of enforcement action by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) as its 2019 Compliance Framework was implemented.

Finally, the Office of the Superintendent of Financial Institutions (OSFI) had announced pending policy consultations focused on, among other things, proportionality of requirements for small and medium-sized deposit-taking institutions, the transition of anti-money laundering (AML) oversight to FINTRAC, reinsurance practices, changes to the stress test for uninsured mortgages and implementation of a new uninsured mortgage benchmark rate.

Disruption

In March, COVID-19 put these policy reforms on temporary hold as regulators pivoted to focus on short-term, emergency measures. These included temporary relief measures, such as extensions of filing deadlines, accommodation for

remote activities, cessation of routine examinations and the implementation of measures to ensure institutional resiliency.

The original timeline for implementation of many regulatory initiatives was delayed or suspended, including

- the transfer of the non-qualified syndicated mortgages regime from FSRA to the OSC was postponed from July 2020 to January 1, 2021
- open banking consultations were delayed until fall 2020
- on March 13, OSFI suspended consultations on all policy and guidance projects
- the implementation of the Investment Industry Regulatory Organization of Canada's (IIROC) plain language rulebook, which had been scheduled for June 1, 2020, was postponed until December 31, 2021

Refocused acceleration and burden reduction

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At the federal level, OSFI announced the resumption of its policy reforms, noting that its forward plan was different from the plan OSFI would have put forward in the absence of COVID-19. OSFI's new guidance priorities recognize the need to be responsive to the overall risk environment in the new and different "business-as-usual" environment. At the same time, OSFI is aware of the material operational constraints of its regulated institutions.

Technology and cyber risk have become the focus of regulatory consultations at many levels. This is not surprising since financial institutions, most of whom had already been actively engaged in digitization projects, were required to rapidly accelerate such initiatives as the COVID-19 pandemic triggered a record shift to online banking.

In September, OSFI published a discussion paper on technology risks, focusing on cyber security, third-party risks, artificial intelligence, data and more. The BCFSA has also announced that it will be issuing an advisory in the upcoming months that will seek feedback on a set of draft principles to address key risks to data and information systems from unauthorized/illegal access or impaired network systems.

Fair treatment of consumers continues to be in the spotlight. On September 15, 2020, FSRA announced two key areas of assessment in the life and health insurance sector for 2020-2021: the implementation of Fair Treatment of Customers principles across distribution channels, in collaboration with the Canadian Council of Insurance regulators and its member regulators, and a review of the relationship between insurance companies and managing general agencies. Interestingly, FSRA did not indicate any specific focus on the electronic sales channel, but distribution channels more generally are a key area of review.

Regulators continue to focus on burden reduction and recognize the need for regulatory collaboration to advance that objective. This theme was emerging

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prior to COVID-19. Heightened operational constraints resulting from the pandemic have now put this into greater focus as institutions have less capacity to respond to regulatory requests. There are several examples of such burden reduction:

- June 2020: The CSA released a consultation paper that reviewed the current regulatory framework for IIROC and the Mutual Fund Dealers Association of Canada (MFDA). The consultation paper conveyed a willingness to re-examine the self-regulatory organization (SRO) framework, an objective consistent with the CSA's focus on client-focused reforms and the reduction of regulatory burden. This continues the push for convergence in this sector, first articulated in an October 2019 report from the C.D. Howe Institute, and subsequent commentary from both the MFDA (February 2020) and IIROC (June 2020). Both call for changes and echo the concern that the multi-regulatory model has failed to keep pace with the technology-driven transformation of the financial services industry. These themes were picked up by the Task Force for the Modernization of Capital Markets in its July 2020 report.
- October 2020: OSFI and FSRA announced plans to establish a committee to collaborate on defined contribution pension plans. The committee will review the approaches of both regulators to supervising defined contribution plans and, where possible, identify opportunities for regulatory harmonization.
- October 2020: OSFI launched a consultation relating to amendments to OSFI Guideline E-13 (Regulatory Compliance Management) and Guideline B-8 (Deterring & Detecting Money Laundering and Terrorist Financing). This consultation is in connection with the new OSFI/FINTRAC collaboration which will separate the AML/ATF regulatory oversight function among the two regulators in an effort to reduce regulatory burden.
- October 2020: FSRA published its proposed 2021-2022 Statement of Priorities and Budget for public consultation. Among other things, the draft focuses on improving regulatory efficiency and effectiveness to better serve the public interest.

What to expect in 2021

As we navigate through the second phase of the pandemic, we anticipate that the COVID-19 crisis will continue to shape and disrupt the financial services sector and its regulation. Among other things, we are watching for

- further regulatory collaboration among regulators such as OSFI, FSRA and BSFSA
- advances in e-commerce, such as temporary measures facilitating remote registration, signing and witnessing of documents becoming permanent; increased adoption of non-face-to-face identity verification methods by traditional financial institutions in accordance with the FINTRAC requirements; other provinces adopting amendments to their personal property security statutes to facilitate the use of electronic chattel paper, following the lead of Ontario and Saskatchewan

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- continued regulatory focus on non-financial risk management, including technology and cybersecurity risk
- further developments towards open banking. Consultations are expected to resume virtually at the end of November and continue through December 2020. In addition, the industry is forging ahead, including with initiatives such as the Financial Data Exchange
- the increased enforcement action that we have been expecting from the FCAC and FINTRAC. Although this heightened activity has not yet occurred, we expect it will as we head into 2021. The FCAC has perhaps been unwilling to exercise its new enforcement powers during the pandemic, but such forbearance is unlikely to last. Meanwhile, FINTRAC has announced that it is resuming its regular desk examinations and published notice of two administrative monetary penalties that were imposed earlier in the year
- more focus on payments modernization initiatives, given that cashless payment use is on the rise. Payments Canada is in the process of implementing a new real-time payments infrastructure (referred to as a Real-Time-Rail or RTR) that will create a system capable of delivering funds in less than 60 seconds, through real-time exchange of payment messages and real-time clearing and settlement. Implementation of the RTR is currently scheduled for 2022, but there may be industry pressure to meet or exceed this timeline, given the digitization acceleration resulting from the pandemic
- credit union reform. Coming out of FSRA's modernization initiatives, the *Credit Unions and Caisses Populaires Act, 2020* was introduced on November 5, 2020
- further significant developments in the crypto-asset space, following the regulatory advances made in 2020, including oversight of dealers in virtual currency by FINTRAC as of June 1, 2020, and the launch of Canada's first regulated crypto trading platform under the CSA's regulatory sandbox. We expect more in 2021
- implementation of Ontario's *Financial Professionals Title Protection Act, 2019* that prohibits the use of the "financial planner" and "financial advisor" titles by individuals unless they have obtained the required credentials, following the outcome of the recent consultation that closed in November 2020. Saskatchewan is likely to follow suit

This is by no means an exhaustive list. While change has been the new normal for several years in the financial services regulatory space, COVID-19 has accelerated the pace. The year ahead promises to be interesting and we will continue to monitor these and other developments.

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