

Roadmap for the new financial consumer protection framework



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More than two years ago, the government tabled Bill C-86 (Bill), introducing a new financial consumer protection framework for banks and authorized foreign banks.

The Bill consolidated existing consumer provisions and regulations and strengthened consumer provisions that apply to banks and authorized foreign banks under the *Bank Act* (Act). This article describes where we currently stand with respect to this framework, and we offer a navigation map to help banks process the new requirements once the corresponding regulations are published and the regime is brought into force.

Where we stand

A few milestones have occurred since the introduction of the Bill:

- The Bill received Royal Assent on December 13, 2018.
- The amendments to the *Financial Consumer Agency of Canada Act* and to the *Bank Act*, introduced to strengthen and increase the powers of the Financial Consumer Agency of Canada (FCAC), came into force on April 30, 2020.

However, the regulations necessary to implement the framework, and to fully understand the impact of the legislation, have not yet been publicly released. Although COVID-19 has most likely delayed the publication of the regulations, we expect that they will be released this fall or in early 2021. Hopefully, banks will be given enough lead time to allow them to understand the new requirements and implement any necessary changes before the framework comes into force.

Roadmap for the new framework

Currently, consumer protection requirements are largely imposed by way of regulations that address specific topics: cost of borrowing, prepaid payment cards, and access to basic banking, to name a few. Although the source of these obligations is found in the Act, the specifics of the requirements are, in large part, self-contained in the regulation (for example, to understand cost of borrowing requirements, a bank will need to refer to sections 449 to 451 of the Act and to the *Cost of Borrowing Regulations*).

Under the new framework, consumer protection requirements (other than corporate governance and whistleblowing) will be housed within a new “Part XII.2” of the Act, and supplemented by the new regulations. Appreciating how the legislation and the regulations are organized is critical to understanding the new requirements and ensuring that all

obligations are identified. It is useful to think of the new framework's obligations as being organized into six key parts:

1. Corporate governance
2. Responsible business conduct
3. Complaints process
4. Disclosure and transparency
5. Redress
6. Whistleblowing

The corporate governance, complaints process, redress and whistleblower provisions are easy to navigate as they are self-contained within a limited number of provisions in the Act. It is expected that regulations will provide additional details regarding these obligations.

A side-by-side review of the various parts of the *Bank Act* along with the regulations will help provide a complete picture of requirements.

However, the bulk of the banks' consumer protection obligations are found in the responsible conduct and disclosure and transparency divisions, each of which can be further categorized in two groups: 1) the general requirements and 2) the specific product or service requirements.

Although this structure may appear logical, it is, in practice, difficult to navigate as it will require a bank to refer to more sections than under the existing framework. For example, to identify the legislative requirements for credit card agreements, a bank will need to consider:

- The **general responsible business conduct requirements**, which provide for the bank's obligations pertaining to the disclosure of charges or penalties, consent, cancellation periods, alerts, etc.;
- The **product-specific responsible business conduct requirements**, which, depending on the product, may include obligations such as default charges, no increase or provision without express consent, liability for unauthorized use, credit card statement, etc.;
- The **general disclosure requirements**, which include requirements such as agreements by telephone, information boxes, promotional or other offers, etc.;
- The **product-specific disclosure requirements**, which include the specific disclosure requirements for credit cards applications and agreements; and
- Any regulations which will supplement the above-mentioned provisions.

Considering this new legislative structure, it is recommended that banks adopt a three-step approach when interpreting the legislation under the new framework:

1. Consider the general requirements for business conduct found under Part XII.2 Division 2 and for disclosure under Part XII.2 Division 3 before proceeding to the specific product requirements, as the general requirements provide insight as to how the product-specific provisions may need to be interpreted.
 - For example, section 627.55(1) of the Act (general requirements for disclosure) provides that a bank shall disclose information in writing, unless provided for otherwise. The bank must then assume that the information has to be in writing unless it can find an exemption or an exception.

2. Consider the product-specific requirements.
 - For example, section 627.89 provides that, before entering into a credit agreement, the institution must disclose: the cost of borrowing, the particulars of the customer’s rights and obligations, any charges or penalties, when an institution is required to send an alert (in the case of a credit card or line of credit) and any additional information prescribed by regulation.
3. Refer to the applicable regulations for further requirements, such as the “prescribed information” referred to above.

Think in layers

Thinking in terms of layers of obligations will help banks identify the new requirements.

The following example of advertising requirements of lending products illustrates the need under this new framework for side-by-side review of the various parts of the Act and the regulations to get a complete picture of the requirements.

The advertising requirements applicable to lending products will be found in the following provisions of the Act:

- **Business conduct general requirements, section 627.14:** an advertisement shall be accurate, clear and not misleading.
- **Disclosure general requirement, section 627.63:** if the institution is required to disclose information in advertisement it shall do so by presenting it prominently—as specified by regulations—within the advertisement.
- **Disclosure requirement specific for lending products, section 627.91:** an institution that makes a prescribed representation in an advertisement for a credit product shall disclose the cost of borrowing as prescribed.
- **Regulations will also need to be reviewed** to identify the information that is to be prescribed for sections 627.63 and 627.91.

Ultimately, as the saying goes, “the devil is in the details”—and the place where those “devilish” details usually reside is in the regulations. Because of the manner in which the new legislative framework is structured, a significant amount of time will be required to delve into those details, once the draft regulations are published, to spot the differences between the current framework and the framework introduced in Bill C-86.