

Ontario introduces the *Credit Unions and Caisses Populaires Act, 2020*

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As part of its 2020 Budget¹, the Government of Ontario has introduced the *Credit Unions and Caisses Populaires Act, 2020* (Act) which will replace the existing *Credit Unions and Caisses Populaires Act, 1994* (CUCPA). We outline some of the key changes in our latest guidance.

What you need to know

- **Expanded capital raising options:** Ontario credit unions will be permitted to sell securities through the exempt market under National Instrument 45-106-Prospectus Exemption and National Instrument 45-108-Crowdfunding.
- **Increased scope of permitted business:** Ontario credit unions will be able to engage in any trade or business that is not otherwise authorized under the Act with the FSRA CEO's written approval (with some limitations); make loans to non-customers; and sell insurance in branches and on their websites.
- **Updated governance:** Ontario credit unions will be required to implement a code of conduct and file board gender diversity reports, while the governance provisions of the Act have been streamlined to be more principles based.
- **Increased administrative flexibility:** Meeting rules have been updated with more technology neutral language to allow for alternatives to in-person meetings and voting, while record-keeping requirements have been liberalized to allow for storage outside of Ontario.
- **Stakeholder engagement:** The Ontario government intends to work with stakeholders on necessary regulations to the Act and with FSRA to develop Authority rules. With completion of this phase targeted for the end of 2021, the Ontario government's goal is for the Act to come into force in 2022.

The details

The Act is the outcome of a review process that began with a consultation on the development of a new legislative framework for Ontario credit unions in 2019 and a subsequent legislative review which was completed earlier this year.

Overall, a significant proportion of the CUCPA's content has been retained in the Act, but with much of the detailed, prescriptive content removed to be set out in regulations and Authority rules (i.e., the rules of the principal regulator of Ontario credit unions), the Financial Services Regulatory Authority of Ontario (FSRA)². Significant changes have been

made, however, that should provide Ontario credit unions with a more liberalized and modern legislative regime, most notably with respect to capital raising and business powers, governance, and administrative practices.

I. Capital raising and business powers

Ontario credit unions will have readier access to capital as the Act includes provisions to permit Ontario credit unions to sell securities through the exempt market under National Instrument 45-106-Prospectus Exemption and National Instrument 45-108-Crowdfunding. Currently, Ontario credit unions can raise capital by selling securities to their members which requires the filing of an offering statement with FSRA, in accordance with the CUCPA, or filing a prospectus with the Ontario Securities Commission (OSC). While the existing framework was originally intended as a less burdensome alternative to filing a prospectus with the OSC, the new ability to raise capital through the exempt market will offer Ontario credit unions a more streamlined and cost-effective approach.

The Act will also significantly expand the scope of business that an Ontario credit union may undertake, most notably with respect to ancillary businesses, lending, and insurance. The Act has removed the requirement that an Ontario credit union may only engage in businesses "reasonably ancillary to the provision of financial services". Instead, an Ontario credit union will now be permitted to engage in any trade or business that is not otherwise authorized under the Act with the FSRA CEO's written approval (subject to any conditions or limitations which may be prescribed by the Authority rules) (section 139). Furthermore, under the Act, an Ontario credit union will be permitted to make loans to non-members (section 154). In addition, while the existing provision of the CUCPA restricting an Ontario credit union's insurance business will remain unchanged in substance, the Ontario government has stated in "Ontario's Action Plan 2020" that Ontario credit unions will be permitted to sell insurance within branches and on their websites and that the new Act will provide "opportunities for insurance intermediaries and credit unions to seek mutually beneficial business relationships that could reduce costs". The final scope and effect of these new business powers will only become clear with the publication of the applicable regulations and Authority rules, but the indications are that Ontario credit unions will have a wide range of new opportunities to expand their client base, business partnerships, and product offerings.

The Act will also resolve the long-standing lack of clarity in connection with the handling of unclaimed balances. The CUCPA directs Ontario credit unions to pay unclaimed balances to the Ontario Minister of Finance, in accordance with the Minister's directions, beginning on a day specified by the Minister. No directions have ever been made and the date for payments has never been specified. Section 147 of the Act will address this gap, although the new provision will require implementation through an Authority rule that has not yet been drafted. The Act will make it clear, however, that once payment of an unclaimed balance is made to FSRA in accordance with the Act, an Ontario credit union will be discharged of liability with respect to the amounts paid.

II. Governance

The governance provisions of CUCPA have also been significantly revised to remove much of the prescriptive detail in favor of broader statements of principle which will be subject to the provisions of regulations, Authority rules, or credit union by-laws. While the implementing regulations and Authority rules may yet result in a governance regime fundamentally similar to the existing one, the Act will introduce a number of new requirements that align with the direction of financial services and corporate legal reform in other jurisdictions. For example, section 102 of the Act will require the board to adopt and comply with a code of market conduct (or the FSRA CEO may direct the board to adopt one if it does not do so on its own) while section 103 will require boards to file a gender diversity report annually. Also of note is the expanded power of the Auditor under the new section 134 to call meetings of the board, audit committee, or the internal auditor of the credit union. Attendance at these meetings will be mandatory. Of these new provisions, the requirement to adopt and comply with a market code of conduct is likely to have the greatest impact on institutions, especially those that have not already aligned their business with the existing Market Conduct Code for Credit Unions of the Canadian Credit Union Association (CCUA).

III. Administrative practices

The Act has also been updated to take account of technological change, most notably with respect to meetings of members and directors and with respect to record keeping (sections 185-186). The Act will require policies to be put in place on the rights of members and of directors to participate in and vote at meetings remotely. The wording of the

new provisions is more technologically neutral than the former provisions which addressed telephone and electronic meetings, and should help to avoid uncertainty arising from changes in technology and circumstances such as those created by the COVID-19 pandemic.

With respect to records, the new section 204 respecting record-keeping requirements has also adopted more technologically neutral wording, as it simply requires that a record be prepared and kept in any form capable of being reproduced in intelligible written form within a reasonable time. Similarly, the requirements with respect to the location of records have been updated (presumably to address the realities of digital storage and cloud computing). Ontario credit unions will now be able to keep any or all of their records outside of Ontario so long as the records are available for inspection, by means of any technology, during regular office hours at the credit union's head office, and so long as the credit union provides technical assistance to facilitate an inspection of the records. Ontario credit unions will still be required to comply with applicable limitations under other statutes with respect to the location of records (e.g., federal and Ontario tax statutes) so any steps to take advantage of this new provision will require care to ensure compliance with those other statutes. It is also worthwhile to note in this context that Ontario's possible creation of a private sector privacy law may further limit the extent to which Ontario credit unions could take advantage of this provision, especially with respect to the transfer of customer and employee data outside of Canada.

IV. Next steps

As noted, the Act will require implementation through regulations and Authority Rules. This process will involve the Ontario government working with stakeholders on necessary regulations and with FSRA to develop the many Authority rules necessary to give effect to the Act's newly streamlined, principles-based provisions. With completion of this phase targeted for the end of 2021, the Ontario government's goal is for the Act to come into force in 2022. The Act will remain in force for five years under the new sunset provision (section 275), by which time it should be possible to assess how effectively the Act has fulfilled the goals of modernizing the legislative framework for Ontario credit unions. Similar to the federal financial institution statutes, the inclusion of the sunset provision will ensure that the Act continues to be reviewed and updated every five years.

¹ Formally "Bill 229, An Act to implement Budget measures and to enact, amend and repeal various statutes".

² The rationale for this delegation of authority to FSRA appears to be that as an expert body, FSRA is best positioned to develop appropriate rules, and that as the primary regulator, this rule making authority will enable it to respond more effectively to market or product changes.

To discuss these issues, please contact the author(s).

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