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ARTICLE

Update on Changes to the Canadian Payments Act

Payments Canada (formally known as the Canadian Payments Association) owns and operates Canada's core payment clearing and settlement systems. The legislation governing Payments Canada is the *Canadian Payments Act* (the Act). Borden Ladner Gervais LLP (BLG) participated in the consultation process with the Department of Finance this past summer regarding proposed changes to the Act. The consultation process and its purpose had a number of components. The key components for entities engaged in payments services are the development of the new real time rail (RTR) and the participation of non-traditional payment service providers (PSPs) in Payments Canada.

On February 27, 2019, the Department of Finance released its *Report on the Review of the Canadian Payments Act* (the Report). Below is a brief summary of the Report.

Overview: *Canadian Payments Act* Review

The Act was last amended in 2015 and included a requirement to undertake a review three years after the legislation took effect. In May 2018, the [Department of Finance released a consultation paper](#) in this connection and sought views on two targeted themes under the amended Act:

1. The impact of the governance changes introduced by the 2015 amendments, which aimed to enable Payments Canada to better achieve its public policy mandate (i.e., safety and soundness, efficiency, and user interests). The key components of these changes were the creation of a board comprised of mostly independent directors, an additional advisory council, and a shift to a "one-member, one-vote" system for board elections.
2. The merits of creating an associate member class in Payments Canada's membership structure, which would enable non-traditional PSPs to participate in Canada's national core payments systems. Associate members would be separate and distinct from members, with a separate set of rights and obligations, but subject to Payments Canada's compliance and enforcement standards.

Summary of Responses

The Department of Finance received written submissions from a variety of organizations representing most of Payments Canada's members, international financial market infrastructures, representatives of the co-operative sector, FinTech organizations, and consumer groups, as well as feedback from meetings with stakeholders, including BLG, across Canada.

On the governance changes, respondents broadly view the 2015 amendments as beneficial to the achievement of Payments Canada's mandate and the payments ecosystem in general. However, there is broad consensus that it is too early to provide a comprehensive assessment of the 2015 legislative amendments on the ability of Payments Canada to fulfill its public policy objectives.

On creating an associate member class, respondents support broadening membership in Payments Canada to include non-traditional PSPs and financial market infrastructures, so long as any risks are appropriately mitigated. At a minimum, respondents agree that regulation under the proposed *Retail Payments Oversight Framework* would be a necessary condition for becoming an associate member. The details of the models to support such memberships being incorporated into the *Canadian Payments Act* differ widely. With respect to the proposed associate member class, the government will develop specific proposals in response to the feedback received during this consultation.

1. Board Governance Changes

In brief, although many respondents thought it is too early to assess comprehensively the success of the 2015 governance changes, many see the modernization efforts as a litmus test for assessing the success of these changes. For instance, most respondents see the creation of the majority independent board of directors, and a shift to a "one-member, one-vote" system for board elections as benefiting Payments Canada's capacity for independent decision-making. Most respondents were also of the view that Payments Canada's board considered a broader range of inputs in making decisions after these changes were made in 2015.

2. Associate Member Class

The proposed associate membership class would create a separate and distinct class of members in Payments Canada. This would permit non-traditional PSPs, regulated under the proposed *Retail Payments Oversight Framework*, to participate directly in the RTR. There is widespread support to broaden access to core payment clearing and settlement infrastructure.

Broader Access

Respondents generally agreed that there are barriers to entry for PSPs, and that there is room to improve competition and innovation. Nearly every respondent who discussed membership agreed with expanding risk-based access to the RTR to non-traditional PSPs, with a large majority of respondents supporting the proposed associate member class.

System Access

There is high interest in a limited form of participation to the Automated Clearing Settlement System (the ACSS). The ACSS is one of the two core payment clearing and settlement systems in Canada, operated by Payments Canada. The ACSS is used primarily for clearing retail payments (e.g. cheques, online debits and pre-authorized debits). We note that the ACSS, launched in 1984, will be gradually replaced with a more efficient retail system. Currently, most respondents support exchange-only access to the ACSS for proposed associate members, provided associate members meet the same operational and technical standards as full members. However, in permitting expansion to allow exchange-only access, clearing and settlement of the actual payments would continue to be undertaken by the direct clearers.

Associate Membership Requirements

Many respondents agree that requiring associate members to be regulated under the proposed *Retail Payments Oversight Framework* ensures sufficient oversight. Direct participation in core payment infrastructure would still require meeting relevant Payments Canada by-laws to which all Payments Canada's members are subject.

Advisory Councils

Although there is a wide range of suggestions on how to incorporate associate members' views and expertise into Payments Canada's decision-making process, almost all respondents agreed with the need to ensure representation on one of Payments Canada's advisory councils.

Board Representation

Although there is interest in ensuring associate members are able to participate in the nomination and election process, there is a divergence of views about reserving associate members seats on the board or equal voting rights for associates.

Financial Market Infrastructures

There is strong support among respondents (who responded on this topic) on allowing financial market infrastructures designated for oversight by the Bank of Canada to participate in Lynx. Lynx is a safer, more flexible and resilient high value payment system, meant to replace the current Large Value Transfer System (LVTS). LVTS, in addition to the ACSS, is currently the other core payment clearing and settling system in Canada operated by Payments Canada.

Next Steps

As Payments Canada continues to develop the RTR, the government will consider views around associate membership and has stated that it will develop specific proposals for further consultation. In addition, the government has stated that any potential legislative amendments to the *Canadian Payments Act* to incorporate associate membership will only come after the proposed *Retail Payments Oversight Framework* is implemented. We at BLG will be watching for these new proposals. For further information regarding the Report or any new proposals, please feel free to contact either of the authors listed below.

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