BCFSA: Changing BC's regulatory framework for financial institutions

February 21, 2020

On November 20, 2019, the Legislative Assembly of British Columbia passed the third reading of the newly introduced Bill 37, the *Financial Institutions Amendment Act, 2019* (Bill 37), which received royal assent on November 28, 2019. The purpose of Bill 37 is to modernize the legislative framework, enhance consumer protections and help maintain public confidence in BC's financial institutions. Bill 37 makes significant changes in the operations of credit unions, insurance companies and intermediaries and trust companies.

On November 1, 2019, certain *Financial Services Authority Act* provisions came into force, which gave the BC Financial Services Authority (the BCFSA) powers over the *Financial Institutions Act*, *Credit Union Incorporation Act*, *Insurance Act*, *Insurance (Captive Company) Act*, *Mortgage Brokers Act*, and *Pension Benefits Standards Act*. Essentially, the BCFSA has replaced the Financial Institutions Commission (FICOM) as the province's financial institution regulator. The changes in Bill 37 are a part of this shift to the new regulator in British Columbia.

The BC financial services authority

A key aspect of the new legislation is that Bill 37 grants the BCFSA rule-making powers and establishes procedures for making those rules. This new rule-making power is important as offenses and penalties under the *Financial Institutions Act* have been extended to apply to contraventions of the rules established by the BCFSA, as well as an increase in fines.

Bill 37 grants rule-making powers to the BCFSA in many different areas. Some of the key changes that Bill 37 makes to the *Financial Institutions Act* allow the BCFSA to make additional rules surrounding those alterations. For example, financial institutions must comply with capital and liquidity requirements prescribed by regulation, but must also comply with capital and liquidity requirements set out in rules made by the BCFSA. The BCFSA can make rules respecting the adequacy of liquid assets and the capital base of financial institutions, which types of assets and liabilities constitute the capital base, how those assets and liabilities are valued, as well as other rules respecting capital and liquidity. In addition, a credit union needs the BCFSA's written consent

before engaging in certain activities if the amount of its capital base fails to meet prescribed requirements.

Bill 37 requires insurance companies and credit unions to adopt and comply with a code of market conduct. The BCFSA can make rules respecting these codes' form and content, as well as the manner and time in which they need to be filed. Insurance companies must adopt a code of market conduct, created by the BCFSA. Credit unions have the opportunity to establish their own code of market conduct by having their board of directors file it with the BCFSA. However, the BCFSA can require that amendments be made to the codes at any time, or even force a code of market conduct on a credit union who does not adopt its own.

Financial institutions' committees who are appointed under section 135 of the *Financial Institutions Act* are now responsible for monitoring and evaluating risks to the financial institution in addition to their existing duties. This includes monitoring and evaluating risks that may be imposed by regulations or under the new rule-making power of the BCFSA, and reporting those risks to the directors of the financial institution.

After consulting a financial institution, the BCFSA may designate it as a domestic systemically important financial institution if the BCFSA believes that the failure of the financial institution could cause significant disruption to the financial system. The BCFSA may base its decision on one or more factors, which include the financial institution's interconnectedness with other financial institutions, its substitutability by other financial institution, its size, and its complexity in relation to its business, structure, and operations. The BCFSA may establish requirements through its rule-making powers for these financial institutions and extraprovincial corporations that are designated as such.

Some additional areas where the BCFSA may make rules respecting financial institutions and extraprovincial corporations include corporate governance, market conduct, operational oversight and risk management. The BCFSA may make rules regarding insurance issued through electronic agents and respecting oversight by restricted insurance agent licensees of their employees and agents. In addition, the BCFSA can adopt, in whole or in part, rules or guidelines of other financial services regulatory authorities along with any changes it considers appropriate. It can also make rules regarding the methodology for deposit insurance assessments, funding requirements and corporate governance of reciprocal exchanges, and methods of determining certain amounts under the *Credit Union Incorporation Act*.

The good news for financial institutions is the BCFSA must publish any proposed rules or rule changes for public comment before they can be made, amended or repealed. This provides financial institutions with the ability to comment on any proposed rules or rule changes prior to their enactment. In addition, the minister must consent to any rules or changes, providing another layer of checks and balances for stakeholders. If any of the rules that are implemented conflict with regulations, then the regulations will take precedence over the conflicting rule.

Additional powers of the BCFSA and others

In addition to granting the BCFSA rule-making powers, Bill 37 grants additional powers to the BCFSA and others under the *Financial Institutions Act*. For example, when

performing an inspection to determine compliance with the *Financial Institutions Act*, the regulations, or the rules made by the BCFSA, the BCFSA, the superintendent, a special examiner, or an investigator may enter certain places of the financial institution or its affiliates at any reasonable time. These places include the financial institution's or its affiliates' principal place of business, their offices and any place where records are kept relating to them, among others. If an investigation or hearing is held under the *Financial Institutions Act*, the BCFSA, the superintendent, or the council may order their costs, in full or in part, be paid by the financial institution even if no order is made pertaining to such investigation or hearing.

In addition, the BCFSA can enter into agreements with other financial services regulatory authorities in Canada and the administrator of a national database of market conduct. This would allow for the provision and exchange of information respecting the market conduct practices of insurers.

The BCFSA can also prohibit the use of any document provided by a financial institution if, in the BCFSA's opinion, it is unfair, misleading or deceptive. FICOM was previously limited to exercising this power only in relation to certain forms of contract, but this expands the BCFSA's powers to apply to any document.

There are also restrictions on entering into certain types of transactions. Under Bill 37, credit unions must not enter into certain transactions without first receiving consent from the BCFSA. Where consent is required, the BCFSA must consider prescribed criteria when making its decision.

In the interest of public disclosure, Bill 37 allows the BCFSA to collect and publish certain information from financial institutions, which includes prescribed financial information, risk-related information, and information related to complaints.

Other important changes under Bill 37

Although the most significant changes in Bill 37 relate to the new powers of the BCFSA, there are other changes to the *Financial Institutions Act* and *Credit Union Incorporation Act* that should be considered:

- A person cannot use a name that includes the words "trust", "trustee", "trustco", "deposit", "loan", "assurance", "insurer" or any other words in connection with the business of a person in a way likely to give the false impression that the person is a trust or insurance company, or deceive or mislead people about the ability of the person to perform trust, deposit or insurance business;
- Credit unions can carry on business or identify themselves by a name other than their corporate names, subject to the Act and certain regulations;
- Unincorporated associations are eligible to be members of a credit union only if their application is approved by the directors, a committee of the directors, or a nominee of the directors, and if the unincorporated association subscribes and pays for the minimum number of membership shares required under the rules of the credit union;
- A new process allows for redeeming shares in a credit union held by the holder of an inactive deposit and treating those shares as part of the inactive deposit;
- Financial institutions are required to post their financial statements, auditor's report and other prescribed documents on their websites, as well as make paper

copies of those documents available at their branches and offices. At this time, it is not evident what other documents will be prescribed;

- Deposit insurance coverage is eliminated for certain deposits in a credit union. The insurance no longer applies to deposits made by or on behalf of a savings institution or a subsidiary of a savings institution, or in which a savings institution or subsidiary has a beneficial interest;
- Credit unions are required to establish procedures for dealing with complaints. These procedures must be published on the credit union's website and they must be provided in writing to any person who requests them;
- Extraprovincial corporations must file a report outlining its financial affairs, market conduct and risk management practices and corporate governance with the Superintendent of Financial Institutions. The Superintendent may specify the intervals in which these filings need to be made, which may be different for extraprovincial credit unions, extraprovincial corporations and extraprovincial trust corporations.
- Supervisory information and self-evaluative compliance audit documents are privileged information. Some of the privileged information includes:
    - Ratings assigned to the financial institution to assess its financial condition or other similar ratings
    - Information about any stage of intervention made by the BCFSA or superintendent;
    - Reports made by or at the request of the BCFSA or Superintendent as a result of an examination, audit, inspection or investigation of a financial institution made under this Act, including any related correspondence;and
    - A document or component of a document that contains recommendations, evaluative or analytical information prepared by or on behalf of a financial institution, the BCFSA, or the Superintendent as a result of or in connection with a self-evaluative compliance audit. This is not an exhaustive list and there are certain limitations attached to the privileged information that is not discussed here.
- The Lieutenant Governor in Council (Cabinet) has had its regulation-making powers expanded. Now, the Cabinet can make regulations prohibiting denial of insurance claims based on innocent misrepresentation and omission.

Regulations and rules to come

There remains some uncertainty as to the extent many of these changes under Bill 37 will impact financial institutions, because much of the detail is left to regulations and rules that have yet to be drafted or released. As regulations are passed and the BCFSA publishes its proposed rules, additional clarity will be provided to financial institutions on the extent that these changes will affect how they are regulated in British Columbia.

The changes under Bill 37 come into force by regulation of the Cabinet.

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