

# National Banking Law Review

General Editor: Robert E. Elliott, Fasken Martineau DuMoulin LLP

VOLUME 30, NUMBER 3

Cited as 30 Nat. B.L. Rev.

JUNE 2011

## • BASEL III — IMPLICATIONS AND OSFI GUIDANCE •

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*The Basel Committee on Banking Supervision on December 16, 2010 released the final text of the Basel III Rules. On January 13, 2011, the Basel Committee issued final elements of proposed reforms to raise the quality of regulatory capital. Certain aspects of the Basel framework and in particular the timing of its implementation are subject to national discretion. On February 1, 2011, the regulator responsible for the solvency of Canadian banks and other deposit-taking institutions ("DTIs"), the Office of the Superintendent of Financial Institutions ("OSFI"), issued its action plan for the implementation of the Basel III Capital Adequacy and Liquidity Requirements in Canada. Subsequently on February 4, 2011, OSFI issued a draft Advisory concerning contingent capital and a release relating to non-qualifying capital instruments. This article summarizes both the Basel III Rules and OSFI's indication as to how these rules will be interpreted and enforced in Canada.*

### **The Basel III Rules**

The Basel Committee on Banking Supervision has stated that Basel III attempts to: (i) improve

## • FINANCIAL INSTITUTIONS ABLE TO DELIVER DOCUMENTS BY ELECTRONIC MEANS •

Stephanie Robinson, McMillan LLP

On June 1, 2011, banks and other federally regulated financial institutions under the *Bank Act*, S.C. 1991, c. 46, will be able to provide notices, documents and other information to customers by electronic means. The long anticipated *Electronic Documents (Banks and Bank Holding Companies) Regulations* under the *Bank Act* [the *Regulations*] provide clarity and certainty in respect of the requirements for electronic communications. The *Regulations* fix the manner in which consent to electronic documents may be given and revoked, specify conditions regarding the provision and receipt of electronic notices, documents and other information, and expand the permitted use of electronic signatures.

The *Regulations* are part of a larger package of amendments that were introduced in 2005 by the Minister of Finance to modify several statutes that affect financial institutions, including the *Bank Act*. Among other changes, the amendments specified the conditions under which notices, documents and other information could be provided electronically. They were intended to provide greater legal recognition of the use of electronic documents, and to modernize and harmonize the governance standards in the financial institutions statutes with those standards adopted in 2001 for business corporations under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and general cooperatives under the *Canada Cooperatives Act*, S.C. 1998, c. 1. As a result of the 2001 amendments to the *Canada Business Corporations Act*, corporations are permitted to use electronic means to communicate with their shareholders.

In order for the amendments to be implemented, regulations that specify the conditions regarding the provision and receipt of documents by electronic means had to be settled. The Government adopted a phased approach to bring the amendments into force in order to give financial institutions time to adjust their internal policies and procedures and prepare for the changes contemplated by the *Regulations*. After five years of deliberation the *Regulations* have been published in final form and the Government set June 1, 2011, as the date that both the amendments to the *Bank Act* and the *Regulations* will come into force.

The following is a summary of the electronic document regime that has been introduced under *Electronic Documents (Banks and Bank Holding Companies) Regulations*:

- A financial institution must receive express consent from an addressee before the institution can satisfy a notice requirement by providing an electronic document to the addressee. Consent to receive an electronic document may be obtained in writing (paper or electronic form) or orally. The consent is only valid if prior to granting consent, the financial institution notifies the addressee:
  - (i) when the consent will take effect;
  - (ii) that the consent may be revoked at any time;
  - (iii) that the addressee is responsible for updating the address to which electronic documents are delivered; and
  - (iv) that the electronic documents will be retained for a specified period and that the addressee is responsible

for retaining a copy of the document (the “Consent Notice”).

- If the consent or the Consent Notice are provided in an electronic document, the electronic document must be accessible to the addressee and must be capable of being retained and referred to by them.
- A consent given by an addressee in writing must include the name of the information system designated by the addressee for the receipt of the electronic documents and it must include a list of the notices, documents or other information that is covered by the consent and which may be delivered by electronic means.
- A consent given by an addressee orally must be followed by a notice from the institution in writing (in paper or electronic form) that confirms the name of the information system designated by the addressee for the receipt of the electronic documents and provides the Consent Notice.
- If the addressee provides consent on a one-time basis, then no Consent Notice is required.
- An addressee may revoke their consent to receive electronic documents at any time, either in writing (paper or electronic form) or orally, and in response the institution must, without delay, confirm the revocation to the addressee in writing and indicate when the revocation will take effect.
- An electronic document can be posted on a website, provided that the addressee receives written notice (in paper or electronic form) about the location and availability of the document. Documents

under the *Bank Act* that are required to be sent to a specific place cannot be posted on a website; however, they may be sent electronically to an information system designated by the addressee.

Electronic documents must be made in a language and presented in a manner that is clear, simple and not misleading. When a document must be sent to several addresses, the document must be sent to the addresses concurrently.

For the purposes of the *Regulations*, an electronic document is considered to have been “provided” to an addressee when: (a) it leaves an information system in the control of the sender; or (b) it is posted on or is available through the secure website of the sender. If the financial institution has a reason to believe that the intended recipient has not received the electronic document, then a paper copy must be mailed.

For the purposes of the *Regulations*, an electronic document is considered to have been “received” when: (a) it enters the information system designated by the addressee; (b) it is posted on or is available through the secure website of the institution; or (c) the recipient receives notice of the availability and location of the electronic document.

Finally, the *Regulations* specify that an electronic signature must consist of one or more letters, characters, numbers or symbols in digital form incorporated, attached or associated with an electronic document.

Certain notices, documents and information cannot be provided to customers by electronic means, such as security certificates and transfers, and the transmission of any notice, document or other information that is sent to the Minister of Finance, the Superintendent of Financial Institutions, the Commissioner of the

Financial Consumer Agency of Canada or the Bank of Canada.

Both the Office of the Superintendent of Financial Institutions and the Financial Consumer Agency of Canada will monitor compliance with these new requirements.

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The *National Banking Law Review* is published six times per year by LexisNexis Canada Inc.  
This issue is cited as 30 Nat. B.L. Rev.

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Price: \$385 for six issues and annual index. Binder available at \$20 upon request.  
\$455 for Print & PDF

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ISBN 0-409-91076-7  
ISBN 0-433-44389-8 (Print & PDF)  
ISBN 0-433-44684-6 (PDF)

ISSN 0822-1081

The Journal is indexed in the *Index of Canadian Periodical Literature*  
and in the *Index to Canadian Legal Literature*.  
Publications Mail Registration No. 180858