LIBRARY of PARLIAMENT
BIBLIOTHÈQUE du PARLEMENT

Bill S-5:
An Act to amend the law governing financial institutions and to provide for related and consequential matters

Publication No. 41-1-S5-E
12 December 2011

Mark Mahabir
Adriane Yong

International Affairs, Trade and Finance Division
Parliamentary Information and Research Service

Legislative Summary of Bill S-5

HTML and PDF versions of this publication are available on IntraParl (the parliamentary intranet) and on the Parliament of Canada website.

In the electronic versions, a number of the endnote entries contain hyperlinks to referenced resources.

Ce document est également publié en français.

Library of Parliament ***Legislative Summaries*** summarize government bills currently before Parliament and provide background about them in an objective and impartial manner. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations. Legislative Summaries are revised as needed to reflect amendments made to bills as they move through the legislative process.

Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Publication No. 41-1-S5-E
Ottawa, Canada, Library of Parliament (2011)

CONTENTS

1 BACKGROUND 1

1.1 Sunset Provision 2

1.2 The 2007 Financial Institutions Legislation Review 2

2 DESCRIPTION AND ANALYSIS 3

2.1 Parts 1 to 4: Amendments to the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* and the *Trust and Loan Companies Act* 3

2.1.1 Amendments that Apply to More than One Statute (Clauses 2 to 182) 3

2.1.2 Amendments to the *Bank Act* (Clauses 2 to 103) 4

2.1.3 Amendments to the *Cooperative Credit Associations Act* (Clauses 104 to 121) 5

2.1.4 Amendments to the *Insurance Companies Act* (Clauses 122 to 161) 5

2.2 Part 5: Amendments to the *Bank of Canada Act*, the *Canada Deposit Insurance Corporation Act*, the *Canadian Payments Act*, the *Winding-up and Restructuring Act*, the *Office of the Superintendent of Financial Institutions Act*, the *Payment Clearing and Settlement Act* and the *Financial Consumer Agency of Canada Act* 5

2.2.1 Liability of the Canada Deposit Insurance Corporation and Bridge Institutions During Receivership and the Application of Certain Acts (Clauses 196 to 202) 5

2.2.2 Returned Payments, the Canada Deposit Insurance Corporation and the Bank of Canada (Clauses 183, 185, 188 and 189) 6

2.2.3 Other Issues Regarding the Canada Deposit Insurance Corporation (Clauses 186 to 188, 190 to 192, 194, 195 and 203) 7

2.2.4 By-Laws and Compliance Panel Orders of the *Canadian Payments Act* (Clauses 208 and 209) 7

2.2.5 Restructuring of Insurance Companies under the *Winding-up and Restructuring Act* (Clauses 210 and 211) 8

2.2.6 Amendments to the *Office of the Superintendent of Financial Institutions Act* and the *Financial Consumer Agency of Canada Act* (Clauses 212, 219 and 220) 8

2.2.7 Amendments to the *Payment Clearing and Settlement Act* (Clauses 213 to 215) 8

2.3 Part 6: Coordinating Amendments and Coming into Force (Clauses 222 to 225) 9

LEGISLATIVE SUMMARY OF BILL S-5: AN ACT TO AMEND THE LAW GOVERNING FINANCIAL INSTITUTIONS AND TO PROVIDE FOR RELATED AND CONSEQUENTIAL MATTERS

1 BACKGROUND

Bill S-5, An Act to amend the law governing financial institutions and to provide for related and consequential matters (short title: Financial System Review Act), was introduced in the Senate on 23 November 2011 by the Leader of the Government in the Senate, the Honourable Marjory LeBreton. The bill received second reading and was referred to the Standing Senate Committee on Banking, Trade and Commerce on 6 December 2011. After hearings on 7, 8, 14 and 15 December 2011, the committee reported the bill to the Senate on 15 December 2011 without amendment but with observations, and Bill S-5 received third reading in the Senate on 16 December 2011.

The bill amends the four primary statutes under which federally regulated financial institutions are governed:

- the *Bank Act*;
- the *Cooperative Credit Associations Act*;
- the *Insurance Companies Act*; and
- the *Trust and Loan Companies Act*.

Amendments to the *Bank of Canada Act*, the *Canada Deposit Insurance Corporation Act*, the *Canadian Payments Act*, the *Winding-up and Restructuring Act*, the *Office of the Superintendent of Financial Institutions Act*, the *Payment Clearing and Settlement Act*, the *Financial Consumer Agency of Canada Act*, the *Jobs and Economic Growth Act* and the *Sustaining Canada's Economic Recovery Act* are also included in the bill.

Bill S-5 contains various measures that update the law governing financial institutions; in particular, the bill includes amendments in relation to:

- the shares of a Canadian financial institution being held by foreign financial institutions controlled by foreign governments;
- acquisitions of foreign entities by Canadian financial institutions;
- the widely held ownership threshold for banks;
- the authority of the Superintendent of Financial Institutions over certain types of transactions;

- the administration of unclaimed insured deposit accounts by the Canada Deposit Insurance Corporation (CDIC) and the Bank of Canada;
- the insolvency of financial institutions and the liability of the CDIC when acting as a receiver during receivership of an insolvent financial institution;
- compliance panel orders of the Canadian Payments Association;
- restructuring of insurance companies; and
- the liability of officials and employees of the Office of the Superintendent of Financial Institutions (OSFI) and the Financial Consumer Agency of Canada (FCAC).

1.1 Sunset Provision

The *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* and the *Trust and Loan Companies Act* contain a statutory sunset date.[1] Consequently, the federal government typically reviews the legislation governing federally regulated financial institutions every five years, prior to the date set out in each statute's sunset provision. Currently, the statutory sunset date for these statutes is 20 April 2012.

1.2 The 2007 Financial Institutions Legislation Review

The most recent review of the legislation governing financial institutions was conducted in 2007 through the examination of Bill C-37, An Act to amend the law governing financial institutions and to provide for related and consequential matters,[2] which was introduced in the House of Commons on 27 November 2006. In order to have sufficient time to review and amend the relevant legislation, the 2006 federal budget had extended the statutory sunset date by six months, from 24 October 2006 to 24 April 2007.

The amendments contained in Bill C-37 were based on a June 2006 federal policy paper entitled *2006 Financial Institutions Legislation Review: Proposals for an Effective and Efficient Financial Services Framework*.[3] The legislative changes included greater disclosure for consumers in relation to investment products and complaint procedures, the introduction of electronic cheque imaging and clearing, and an increase in the widely held threshold for large banks from $5 billion to $8 billion in equity.[4]

2 DESCRIPTION AND ANALYSIS

Bill S-5 has 225 clauses and six parts. The following description highlights selected amendments; it does not review every clause.

2.1 Parts 1 to 4: Amendments to the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* and the *Trust and Loan Companies Act*

2.1.1 Amendments that Apply to More than One Statute (Clauses 2 to 182)

Bill S-5 has several clauses that contain identical amendments to the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* and the *Trust and Loan Companies Act*. This section of this document discusses these amendments in the context of the *Bank Act*, recognizing that similar amendments are made to the other three statutes.

Clause 2 amends the definition for "consumer provision" in the *Bank Act*, so as to be consistent with amendments to the *Financial Consumer Agency of Canada Act*.[5]

Clauses 32 and 99 allow a foreign financial institution that is controlled by a foreign government to hold a minority interest in a Canadian bank or bank holding company through the purchase of shares. These foreign financial institutions are allowed to exercise voting rights with respect to the shares that they own. Currently, Canadian banks and bank holding companies are not allowed to transfer shares to foreign financial institutions that are controlled by a foreign government.[6]

Clauses 53(2) and 53(3) require a Canadian bank to obtain approval from the Minister of Finance prior to acquiring control of a foreign entity if:

- the bank has equity of $2 billion or more; and
- the value of the foreign entity's consolidated assets, in combination with the value of the consolidated assets of the bank's other "foreign control acquisitions" in the past 12 months, exceed 10% of the value of the bank's consolidated assets prior to the preceding 12-month period.

The Minister, in contemplating the acquisition, can take into account all matters considered relevant in the circumstances, including the stability and best interests of Canada's financial system. Applications for approval are to be filed with the Superintendent of Financial Institutions. These types of transactions were subject to ministerial approval until 2001, when the approval process was shifted to the Superintendent.[7]

Clauses 75 and 153 indicate that, when an application has been filed with the Superintendent of Financial Institutions, the Superintendent can issue a certificate of incorporation to banks and insurance companies that have been incorporated by a special Act of Parliament. Currently, the Superintendent maintains a register for each financial institution but does not issue documents to the financial institution.

Clause 102 provides that the Superintendent can specify temporary changes to amounts, calculations or valuations required under the *Bank Act*, if there are changes to the accounting principles normally followed when preparing financial documents. This exception to the generally accepted accounting principles allows financial institutions to comply with changes in the International Financial Reporting Standards.[8]

2.1.2 Amendments to the *Bank Act* (Clauses 2 to 103)

Clauses 9 to 11 indicate that the securities of a federal credit union – an institution that was introduced in the 2010 federal budget – can be distributed only in accordance with regulations set out by the Governor in Council; this provision is consistent with similar provisions regarding the distribution of bank securities.

Clause 12(1) changes from $8 billion to $12 billion the equity threshold beyond which a bank or bank holding company may not have a major shareholder. The same adjustment is made in the exceptions to this rule provided in clauses 12(2) to 12(6). For consistency, the change in the limit is mentioned in more than 40 clauses in Bill S-5

Clauses 36 to 38 provide that security interests taken by a bank on private property have a higher priority status than unregistered security interests on the same property. These changes are in response to recent court judgments that have allowed a security interest that was not registered under a provincial private property security statute to have priority over the registered security interest provided for in the *Bank Act*.

Clause 46 confirms that any individual can cash a cheque issued by the federal government worth less than $1,500 at any bank branch. The amendment removes the regulatory stipulation that required banks to determine whether an individual was a customer of the bank prior to cashing such a cheque.

Clause 54 provides that a foreign bank or any entity associated with a foreign bank will be considered to have a financial establishment in Canada if it is a subsidiary of a “federal financial institution.” Foreign banks with a financial establishment in Canada are permitted to engage in a wider range of investment and business activities when compared to those without a financial establishment in Canada.

Lastly, clause 73 prohibits authorized foreign banks from arranging, with their affiliates, representatives, agents or other intermediaries, the sale of a good or service unless the affiliates, representatives, agents or other intermediaries comply with consumer protection provisions and complaint procedures that apply to the authorized foreign banks.

2.1.3 Amendments to the *Cooperative Credit Associations Act* (Clauses 104 to 121)

Clause 106 amends the *Cooperative Credit Associations Act* to allow cooperative credit associations to provide services related to information transmission, information management systems and the development of marketing software to the members of the Canadian Payments Association. Currently, these services are not available to Canadian Payments Association members.

2.1.4 Amendments to the *Insurance Companies Act* (Clauses 122 to 161)

Clause 125 introduces a new provision that allows an insurance company's segregated fund to invest in itself through mutual funds or closed-end funds, provided that the shares of the insurance company are market-indexed shares.

Clause 129 replaces the formula that calculates the maximum amount that can be paid to holders of participating policies – policies that entitle policyholders to participate in the profits of the insurance company – with a calculation to be described in regulations.

Clause 130 stipulates that, if an insurance company makes changes to its adjustable policies – policies in which risk is difficult to calculate accurately and so the premiums can be adjusted – the information that outlines these changes will not have to be sent to the policyholder unless the policy was issued in Canada or it confers voting rights.

According to clause 142, fraternal benefit societies are required to maintain their corporate records in a manner similar to that of insurance companies.

Lastly, under the current law, in order for a foreign entity to receive approval from the Superintendent of Financial Institutions to insure risks in Canada, it must have trust assets of a prescribed value. Clause 144 states that these trust assets have to be worth at least $5 million or any greater amount that the Superintendent specifies. The regulation that outlined the prescribed values was repealed effective January 2010.

2.2 Part 5: Amendments to the *Bank of Canada Act*, the *Canada Deposit Insurance Corporation Act*, the *Canadian Payments Act*, the *Winding-up and Restructuring Act*, the *Office of the Superintendent of Financial Institutions Act*, the *Payment Clearing and Settlement Act* and the *Financial Consumer Agency of Canada Act*

2.2.1 Liability of the Canada Deposit Insurance Corporation and Bridge Institutions During Receivership and the Application of Certain Acts (Clauses 196 to 202)

Clause 196 amends the *Canada Deposit Insurance Corporation Act* (CDICA) to provide immunity to the CDIC, under limited circumstances, for any environmental condition that arose or environmental damage that occurred prior to the CDIC'S

appointment as receiver, during the period that the CDIC is receiver or after issuance of an order by the Governor in Council.

Clause 198 prevents the initiation or continuation of legal proceedings against a CDIC member institution, or in respect of its assets, other than proceedings commenced by the CDIC under the *Winding-up and Restructuring Act*.

Clauses 199 and 200 amend certain provisions that apply to bridge institutions, which are temporary financial institutions created by an order under the CDICA to preserve critical functions of a CDIC member institution facing insolvency. In particular, legal proceedings involving assets or liabilities acquired by a bridge institution are to be postponed for a period of 90 days from the date of acquisition, unless they are waived by the bridge institution, or a superior court of a province/territory says otherwise.

As well, clause 199 prevents parties to contracts and agreements transferred to a bridge institution from claiming that the transfer, and the events that led to the transfer, will affect their monetary interests, unless the contract is an "eligible financial contract" as defined by the CDICA. The clause also prevents a financial institution organization, such as the Canadian Payments Association, from terminating the membership of a bridge institution.

Regarding the liability, as an employer, of the CDIC during receivership or of a bridge institution, clauses 196 and 201 provide immunity to the CDIC or the bridge institution for any employer liability in relation to employees, former employees or a pension plan of those employees that existed before the CDIC's appointment as receiver or the bridge institution's becoming the employer.

Clauses 197 and 202 allow the Governor in Council, by order, to exempt a person affiliated with a CDIC member institution or a bridge institution from the application of the CDICA and its regulations or the following Acts or regulations made under them: the *Bank Act*, the *Canadian Payments Act*, the *Cooperative Credit Associations Act*, the *Financial Consumer Agency of Canada Act*, the *Insurance Companies Act*, the *Office of the Superintendent of Financial Institutions Act*, the *Trust and Loan Companies Act* and the *Winding-up and Restructuring Act*. These clauses also allow the Governor in Council, by order, to modify the application of any provision of those Acts or regulations.

2.2.2 Returned Payments, the Canada Deposit Insurance Corporation and the Bank of Canada (Clauses 183, 185, 188 and 189)

Clauses 183, 185, 188 and 189 amend the *Canada Deposit Insurance Corporation Act* and the *Bank of Canada Act* to create a regime for the administration of funds in an unclaimed deposit account of a wound-up financial institution that was insured by the CDIC. These funds are known as "returned payments," and under these clauses, their treatment may be harmonized with the treatment of identified deposit accounts during the winding-up of a CDIC member institution.

In particular, pursuant to clause 189, supervision of the returned payment and the obligation to determine the identity of the deposit account holder are transferred from

the CDIC to the Bank of Canada if, after a 10-year period, the funds in the deposit account have not been claimed by the legitimate account holder. An account holder is able to initiate legal proceedings against the Bank of Canada for payment of the unclaimed funds if ownership is under dispute.

According to clause 183, the Bank of Canada is not held liable for unclaimed deposit accounts in certain circumstances: accounts with less than $1,000 and unclaimed for at least 40 years from the date of winding-up of a financial institution; or accounts with at least $1,000 if the account has been unclaimed for 100 years from the date of winding up. After the 40-year period, unclaimed deposit accounts with less than $1,000 are paid to the Receiver General.

2.2.3 Other Issues Regarding the Canada Deposit Insurance Corporation (Clauses 186 to 188, 190 to 192, 194, 195 and 203)

Clause 186 amends the *Canada Deposit Insurance Corporation Act* to change the maximum amount that can be borrowed by the CDIC without parliamentary approval to $15 billion plus an amount based on the increase in the total amount of deposits insured by the CDIC on 30 April of the current year when compared to the amount reported on 30 April 2008.

Clauses 191 and 192 change the calculation of the amount of annual premiums required to be paid by CDIC member institutions. In particular, the minimum annual premium is specified in a by-law adopted by the CDIC's board of directors.

Clauses 190, 194 and 195 give the CDIC the power, upon approval of the Minister of Finance, to cancel the deposit insurance policy of a CDIC member institution if the member has not accepted deposits within two years of becoming a member.

Finally, clause 203 provides for the transfer of information obtained by the CDIC from the Superintendent of Financial Institutions to a government or other agency that regulates financial institutions or any deposit insurer if the CDIC is satisfied that the information will be treated as confidential by the recipient.

2.2.4 By-Laws and Compliance Panel Orders of the *Canadian Payments Act* (Clauses 208 and 209)

Clauses 208 and 209 amend the *Canadian Payments Act* (CPA), which sets out the mandate of the Canadian Payments Association, to allow by-laws establishing penalties proposed by members of the Canadian Payments Association to be submitted to the Minister of Finance for approval. The CPA will also be amended to provide the option to convert an order of the compliance panel of the Canadian Payments Association to an order of a federal court or superior court of a province/territory for enforcement in that particular jurisdiction.

2.2.5 Restructuring of Insurance Companies under the *Winding-up and Restructuring Act* (Clauses 210 and 211)

Clauses 210 and 211 amend the *Winding-up and Restructuring Act* (WRA), which governs the insolvency of federally regulated financial institutions, to change the priority of certain creditors during restructuring of an insurance company. In particular, the payment of certain mortgage insurance and special insurance expenses will no longer have first priority during the restructuring of domestic and foreign insurance companies. The priority in the WRA for the payment of claims during restructuring of a foreign insurance company now apply to companies providing credit protection insurance and other approved products insurance in Canada, and the type of security held with the liquidator for the protection of the policyholders is expanded to include all assets of the insurance company.

2.2.6 Amendments to the *Office of the Superintendent of Financial Institutions Act* and the *Financial Consumer Agency of Canada Act* (Clauses 212, 219 and 220)

Clauses 212 and 220 amend the *Office of the Superintendent of Financial Institutions Act* and the *Financial Consumer Agency of Canada Act* to preclude, respectively, the Superintendent of Financial Institutions or the Commissioner of the Financial Consumer Agency of Canada from testifying in a civil proceeding in respect of his or her duties. This prohibition applies to any of the officials or employees of the Office or of the Agency as well.

Finally, clause 219 amends the *Financial Consumer Agency of Canada Act* to increase the maximum penalty to $500,000 for violations of the Act by a financial institution or by a payment card network operator.

2.2.7 Amendments to the *Payment Clearing and Settlement Act* (Clauses 213 to 215)

Clause 213 amends the definition of “clearing and settlement system” under the *Payment Clearing and Settlement Act*. This Act gives the Bank of Canada responsibility for overseeing the systems that ensure that payment obligations, such as cheques and debit or credit card payments, are met between Canadian financial institutions; these systems are referred to as clearing and settlement systems and the entity that provides the clearing and settlement services is called a “clearing house.”

The current definition of “clearing and settlement system” states that a system must include three participants, one of which must be a bank. The bill removes the requirement that one of the participants be a bank and instead requires the system to include at least one Canadian participant and one participant located in a jurisdiction other than that of the head office of the clearing house.[9] These changes ensure that the definition of “clearing and settlement system” still falls within federal jurisdiction. The bill also amends the definition so that it includes systems that clear or settle derivative contracts.

Clause 214 provides for court enforcement of agreements between the Bank of Canada and a clearing house or clearing house participant.

Finally, clause 215 allows the Bank of Canada to disclose information and documents to entities providing clearing or settlement services for the regulation of securities transactions or eligible financial contracts and to a government agency or regulatory body charged with the regulation of clearing or settlement systems.

2.3 PART 6: COORDINATING AMENDMENTS AND COMING INTO FORCE (CLAUSES 222 TO 225)

Part 6 contains amendments to various Acts, as well as special conditions for the coming into force of Bill S-5, all meant to ensure that inconsistencies are resolved when certain provisions of Bill S-5 and/or the *Jobs and Economic Growth Act* come into force.

NOTES

1. *Bank Act*, S.C. 1991, c. 46, s. 21; *Cooperative Credit Associations Act*, S.C. 1991, c. 48, s. 22; *Insurance Companies Act*, S.C. 1991, c. 47, s. 21; and *Trust and Loan Companies Act*, S.C. 1991, c. 45, s. 20.
2. Bill C-37: An Act to amend the law governing financial institutions and to provide for related and consequential matters, 1st Session, 39th Parliament.
3. Department of Finance Canada, *2006 Financial Institutions Legislation Review: Proposals for an Effective and Efficient Financial Services Framework*, June 2006.
4. "Widely held" means that the shares in the financial institution are publicly traded and the financial institution does not have a major shareholder.
5. Clauses 217 (*Bank Act*), 104 (*Cooperative Credit Associations Act*), 122 (*Insurance Companies Act*) and 162 (*Trust and Loan Companies Act*).
6. See also clauses 127, 128, 156 and 157 (*Insurance Companies Act*); and 165 and 166 (*Trust and Loan Companies Act*).
7. Clauses 101(2) and 101(3) (*Bank Act*); 118 (*Cooperative Credit Associations Act*); 140(3), 140(4), 158(2) and 158(3) (*Insurance Companies Act*); and 179(2) and 179(3) (*Trust and Loan Companies Act*).
8. Clauses 120 (*Cooperative Credit Associations Act*), 159 (*Insurance Companies Act*), and 181 (*Trust and Loan Companies Act*).
9. "Jurisdiction" includes another province or country. See Senate, Standing Committee on Banking, Trade and Commerce, *Evidence*, 1st Session, 41st Parliament, 15 December 2011 (Leah Anderson, Director, Financial Sector Division, Department of Finance Canada).