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Best Practice for the Uniform Treatment of Wire Payments

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Since the conversions of the NVCC instruments and the bail-in debt instruments would occur simultaneously, it would likely be desirable for them to occur in a coordinated manner. However, with the rigidity of the preset formula in the contractual NVCC instruments, it is difficult to envisage how that could occur. Moreover, since it is impossible to predict in advance the circumstances that might cause a bank to become non-viable, it is difficult to know what type of resolution action would be the most desirable. Therefore, maintaining broad discretionary statutory powers for NVCC and bail-in debt resolution tools may be more appropriate in the circumstances. For these reasons, OSFI may wish to rethink its commitment to contractual

NVCC conversion and consider moving to a statutory regime. If that were done, NVCC conversions and bail-in debt conversions would both be dealt with in the same statutory regime and Canada would then be more in step with the rest of the international community on these important issues.

[*Editor's Note:* **Blair Keefe** is chair of Torys' Financial Institutions Practice and co-chair of the Payments and Cards Practice.

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¹ 124 Stat. 1376–2223 [*Dodd-Frank*].

• BEST PRACTICE FOR THE UNIFORM TREATMENT OF WIRE PAYMENTS •

Benjamin Geva
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Like any method of payment, the wire transfer may be either an “on-us” or interbank payment. In Canada, as long as they are between large banks, interbank wire payments are processed through the Canadian Payments Association’s (“CPA”) Large Value Transfer System (“LVTS”). Payments processed over the LVTS are governed by *By-law No. 7—Respecting the Large Value Transfer System* [*By-law no. 7*]¹ promulgated by the CPA.

Inter alia, in fastening obligations on the receiving participant in making payment to the payee, *By-law No. 7* provides for a legal framework enabling the sending of real-time irrevocable payments throughout Canada. While participants’ customers are not privy to *By-law No. 7* so as to enforce its provisions, participants are free to incorporate relevant provisions in customer agreements and are in any event bound, towards

other participants, to comply with its requirements, even as they operate to benefit customers.

However, wire payments in Canada that are not processed over the LVTS are not covered by *By-Law No. 7*. For such payments, there has been uncertainty as to applicable value-dating, irrevocability, payment finality, and error correction practices. There is, however, no good reason why such payments should be governed by a different set of rules than those processed over the LVTS. Moreover, customers making or receiving wire payments may not realize that they are not made through the LVTS, and as such, not subject to the same rules that apply to LVTS payments.

Endeavoring to provide clarity and address customer expectations, the CPA had been working with a group of member financial institutions and stakeholders to facilitate a dialogue around the

consistent treatment of wire payments. Ultimately, participating financial institutions voluntarily formulated a best practice in which they agreed to treat “on-us” wire payments in the same manner as payments processed over the LVTS.

The best practice indicates that subject to anti-money laundering and fraud policies, the assurances outlined in the CPA *By-law No. 7* regarding timing, finality, and irrevocability available to the beneficiaries as well as rules concerning errors will be applied by endorsing financial institutions also to “on-us” wire payments. In this regard, similar to the way they treat LVTS payments, endorsing institutions will treat “on-us” wire transactions as conferring on the payee

- Payment irrevocability and finality (once funds have been posted to the beneficiary’s account);
- Same day credit (on value date indicated and in accordance with the endorsing financial institution’s daily cut-off schedules); and
- Entitlement to notice from the payee’s financial institution as to funds availability.

What wire payments are governed by the best practice? The LVTS environment consists of direct LVTS participants (“DPs”) and non-participants (“NPs”). DPs send and receive wire payments over the LVTS. An NP makes and receives payments through a correspondent relationship with a DP. Thus, each wire payment is sent by a DP either as an originating institution or as an intermediary institution acting on behalf of a correspondent NP institution. Similarly, each wire payment is received by a DP either as a destination institution or for further transmission to a correspondent NP institution. In all such scenarios, at least part of the payment

itinerary is over the LVTS. There are, however, three scenarios in which wire payments in Canada are not processed even in part over the LVTS:

1. Payments between two parties who have accounts within the same institution (either a DP or an NP—“on-us” payments);
2. Payments between an NP and a DP acting as its correspondent; and
3. Payments between two separate NPs that both use the same DP as a common correspondent.

Provided the DP endorsed the best practice, it will certainly apply to the first scenario. In the second scenario, if the DP has endorsed it, the parties to the transaction should benefit from the best practice because an endorsing DP would be unlikely to reverse the payment. Finally, in the third scenario, the likelihood of a transaction being reversed is minimal because the two NPs would be unlikely to reverse payments between each other directly, and an endorsing DP is unlikely to accommodate them.

Endorsing financial institutions took it upon themselves to work towards the inclusion of provisions in their customer contracts that for the elements outlined above will confirm the institutions’ assurance to treat “on-us” wire payments in the same manner as LVTS payments. To that end, endorsing financial institutions may also consider revising their correspondent agreements.

This best practice applies to all domestic, Canadian dollar business and consumer “on-us” wire payments. However, this best practice is especially relevant to large corporate clients who routinely make large value wire payments. Details of the best practice are posted on the CPA and Canadian Bankers Association websites.

[Editor's note: **Benjamin Geva**, counsel at Torys LLP, is a member of Torys' Payments and Cards Practice. He is a leading international legal expert on payment instruments and methods, bank deposits and collections, credit transactions

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¹ SOR/2001-281.

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