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GETTING FINANCIAL REGULATIONS RIGHT: AVOIDING UNINTENDED EFFECTS

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SUMMARY

Canada's financial system made it through the 2008 global financial crisis better than many other economies did, but Canadian regulators nonetheless hastened to introduce a spate of new regulations to increase financial stability. However, all new regulations create effects, intended and unintended, and the process in Canada for assessing the impact of new regulations is not as useful as it could be. This could lead to regulations having unforeseen and unwanted effects on efficiency and investor protection, even if stability is improved. Such unwelcome effects might be minimized with a system that better assesses impacts both before and after new regulations are enacted.

While Canada's regulatory-impact analysis system is relatively less burdensome than that of the EU, which has adopted an elaborate process to ensure full transparency in its consultation with stakeholders, with that lack of burden comes a much higher risk of unnecessarily increased compliance and administrative costs. Since regulatory changes necessarily lead to uncertainty in markets, the lack of transparency in the Canadian system is also cause for concern. Chief risk officers tend to rank inconsistent regulation as the most prominent risk factor, far higher than any other, yet Canada does not rank very well in an OECD evaluation of regulatory-impact analysis systems compared to, for instance, the U.K. In addition, the lack of transparency, particularly at the federal level, heightens the risk of "regulatory capture," which can harm individual and business consumers of financial services as well as smaller firms.

While the sort of lengthy and costly regulatory reviews required by the U.S. and EU could prove counterproductive, there are issues in the Canadian system that could be improved without going that far. For instance, the Canadian system offers a much shorter time frame for stakeholder consultations, which could feasibly be remedied without adding undue cost or complexity to the system.

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Canada's system tends also to focus on the effects of regulation on large institutions, without enough regard for smaller firms, where costs of compliance and administration are usually higher, potentially decreasing competition in the financial sector. At the provincial level there tends to be less accommodation for public input before new regulations are implemented. Once regulations are in place, the Canadian system does not require a thorough assessment of the subsequent (or ex post) impacts.

A better regulatory-impact assessment system in Canada is achievable without becoming overly burdensome. Beginning with a statement of clear objectives and outcomes for a proposed regulation, an improved system would then provide a clear set of measurements by which the regulation's success will be evaluated, both before and after it is enacted. A white paper with regulatory proposals (rather than draft rules) issued to stakeholders followed by consultation with all parties to determine whether there are other options, besides the proposal, and to better assess the costs of the changed regulation, would minimize the possibility of implementing a suboptimal (or worse, damaging) regulatory change.

Finally, meaningful transparency throughout the entire process so that all parties can see the entire process as well as its results will help protect against regulatory capture, would encourage participation from all those potentially affected by a rule change, and would help everyone involved appreciate the intended benefits of the proposed regulation. It is also important for purposes of transparency to republish after a new regulation is implemented the original objectives, the measurements and the evaluation research. Canada's reputation for having a stable financial system is not enough; it is important, given the post-crisis pressures for regulatory reform, that the system also maintains efficiency and fairness.

In the wake of the 2008 financial crisis, Canada, with its well-regarded reputation for sound principle-based financial regulation, has adopted many new regulations consistent with international trends. No doubt many regulations further strengthen the goal of financial stability. However, financial regulations should not only improve financial stability, critical to performance, but should also improve market efficiency and investor protection, which are two other important goals for a strong financial market regulatory system.

By and large, many new regulations, such as stronger capital requirements and increased transparency in financial markets, will improve financial market stability and investor protection with less well-known impacts on market efficiency. For Canada, newly adopted regulations will have many beneficial effects that should be made known to the stakeholders and the broad public. However, despite their benefits, the regulations can also result in unintended effects whereby unnecessary costs could be avoided by smarter regulatory policy. This is particularly important to smaller financial businesses that do not have the same capacity to bear high compliance costs.

Many of the unintended regulatory costs can be avoided by a review process that enables full consultation with stakeholders to minimize their effects. The European Union has adopted an elaborate regulatory-impact analysis process for a transparent regulatory review with stakeholders.[1] The United States also reviews regulations through formal processes with stakeholders. In Canada, federal and some provincial public authorities conduct a formal public review,[2] although it is not applicable to all laws, is not fully transparent and does not necessarily play a role in adoption of policies, as we discuss in the final section. One could argue that the European approach to regulatory approval is overly cumbersome, reflecting the more prescriptive approach used for regulation compared to Canada's principle-based approach to regulation. Yet, as discussed further below, some important attributes are worth considering in Canada to ensure that regulations are developed to minimize administrative and compliance costs as well as unintended effects. These include the following:

- A statement of clear objectives and outcomes the regulation or rule is expected to address and achieve.
- A clear set of measurements that will be used to assess whether the objectives and outcomes have been achieved.
- Where possible, a white paper, rather than draft rules, should be issued first to solicit and encourage broad comment and alternative solutions to the problem needing to be solved.
- A framework of minimum requirements to assess whether a regulation is (in net) good or bad.
- Consultation with parties to determine whether other options may be available, as well as the costs of the proposed regulation or rule, its possible unintended effects, and to help understand the benefits of regulation.
- Transparency so that all can see the entire process as well as the results.
- A republishing of the original objectives and outcomes, the measurement criteria, and post-evaluation research that is made public.
- A joint federal-provincial approach to regulatory-impact analysis to encourage harmonization.

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1 We commend reading Andrea Renda, "From impact assessment to the policy cycle: drawing lessons from the EU better regulation agenda," University of Calgary School of Public Policy Research Paper (forthcoming).

2 The federal government and some provincial governments have a formal process for regulatory-impact analysis similar to other OECD countries (the federal process is further discussed in a later section). On the other hand, some bodies such as security regulators do not carry out regulatory-impact analysis.

This paper discusses improvements to the financial regulatory process in Canada. It is based on presentations and discussions at a roundtable held Nov. 13, 2015 on "Financial Market Regulatory Impact Analysis" sponsored by The School of Public Policy with the participation of academic, government and private sector representatives. A review of the European approach provided a basis for discussion of Canada's approach to regulatory review. Some of the views expressed at the roundtable are therefore reflected in this paper.

In this paper we provide a brief review of the role and objectives for financial market regulation. We then review the European and American approaches to regulatory-impact analysis (RIA). This is followed by our observations as to the lessons learned for Canada.

THE ROLE OF REGULATION IN FINANCIAL MARKETS

Financial markets play an important role in a modern economy by matching lenders with borrowers at the lowest possible financial intermediary costs. Financial institutions including banks, insurance companies, credit unions, investment funds, stock exchanges, brokerage firms and other intermediaries help reduce three types of costs: transaction costs, risk and informational asymmetries.

By bringing many lenders and borrowers together, financial intermediaries *reduce transaction costs* by *spreading fixed costs* over a large market. These transaction costs include the documentation, advice, financial and legal analysis, distribution and other activities that enter into the financial intermediation process.

Transferring risk from those with less tolerance to those with higher tolerance reduces risk costs. Financial institutions *pool risks* over a set of projects with uncorrelated returns that result in more stable returns. Financial institutions also owned by a large group of investors can *spread risks* to reduce risk costs per investor.[3]

Financial institutions can also reduce informational asymmetry costs by more effective monitoring on behalf of investors. In financial markets, *adverse selection* — the tendency for bad projects (or "lemons") to crowd out good projects due to the inability of market participants to judge good from bad projects — can be reduced as financial intermediaries are able to obtain information not assembled in broader markets. Financial institutions also reduce *moral hazard* costs that arise from borrowers (or insured parties) being encouraged to take actions, beneficial to them, that increase the probability or size of financial losses for others.

While financial institutions play a significant role supporting market performance, regulations can improve further financial performance by overcoming certain market failures. Even though financial firms can reduce adverse selection and moral hazard costs by screening and monitoring applicants, it is never possible to eliminate them, so the existence of "lemons" increases the financing costs for better firms who must pay a premium to compensate investors who are unable to judge fully the quality of various investments. Regulations that make it more difficult for bad firms to mimic good firms help reduce informational asymmetry costs of this form.[4] Further, a run induced by investors withdrawing funds at one financial institution might signal to investors that other institutions are potentially in trouble due to liquidity shortages or counter-party risk.

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3 See E. Malinvaud, "The Allocation of Individual Risks in Large Markets," *Journal of Economic Theory* 4 (1972): 312-318.

4 See Jean-Jacques Laffont and David Montimort, *The Theory of Incentives: The Principal-Agent Model* (Princeton, New Jersey: Princeton University Press, 2002). For an application to exempt security markets, see J. Mintz, "Muddling up the Market: New Exempt Market Regulations Can do More Harm than Good to the Integrity of Markets," University of Calgary School of Public Policy Research Paper 7, 35 (November 2014).

Economies of scale in the provision of financial services (which can arguably be exacerbated by regulatory costs) can lead to large institutions crowding out smaller ones. This can lead to concentrated markets and higher lending rates to borrowers or lower returns paid to investors.

Financial regulatory policy therefore strives to achieve three goals: market efficiency, financial stability, and investor protection.[5] Market efficiency ensures financial intermediation — offering a range of products desired by borrowers and lenders — is provided at the lowest cost possible. Regulations that support financial stability and investor protection create confidence in markets, helping to overcome adverse selection and moral hazard problems.

Of course, the above objectives could complement each other — or not. For example, financial stability itself can contribute to market efficiency if regulations provide beneficial confidence (but not over-confidence) in financial markets that lessen risk and information costs.[6] On the other hand, regulatory policies that impose significant costs and few benefits could undermine market efficiency. These can only be understood through a well-developed review process that looks at regulations on a case-by-case basis to determine net benefits.

Regulatory changes themselves lead to uncertainty in markets, so they need to be transparent and well developed. As one participant at the roundtable noted, a 2015 survey of chief risk officers by Ernst & Young noted that inconsistent regulation was selected as the most prominent risk factor by 40 per cent of participants, three times more than cyber-products and the economy more generally. While assessments can easily change as new problems arise, the survey indicates that well-designed regulatory policy can help reduce uncertainty as well as improve net benefits.

A relative lack of transparency (e.g., compared to the EU and U.S. models) in the Canadian RIA process also runs the risk of "regulatory capture," which in turn can disadvantage both consumers of financial services (both individuals and businesses) and small financial firms.[7]

HOW REGULATION IS ASSESSED ELSEWHERE

Canada is in a good position to make use of "lessons learned" from elsewhere in the world with regard to improvements in regulatory-impact analysis over the past several years, both generally and in the specific area of financial sector regulation. Most relevant for Canada are other wealthy, industrialized regions, including both the U.S. and the EU, which have somewhat different approaches to RIA processes.

Regulatory-Impact Analysis in the United States — General Approach

Current U.S. federal government RIA policy[8] is summarized in a 16-page "primer"[9] based on more detailed executive orders, a circular prepared by the U.S. Office of Management and Budget (OMB), and an array of agency-level directives. The primer describes key elements of required

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5 See John F. Chant, "Keeping the Genie in the Bottle: Grading the Regulation of Canadian Financial Institutions," University of Calgary School of Public Policy Research Paper 7, 8 (March 2014).

6 For an analysis of the risks of "overconfidence" see Hyman Minsky, "The Financial Instability Hypothesis" Working Paper 74 (Levy Economics Institute of Bard College, 1992).

7 See for example D. Carpenter and D. Moss (ed.), "Preventing Regulatory Capture: Special Interest Influence and How to Limit It" (Cambridge: Cambridge University Press, 2013).

8 "(A)gencies are required to provide to the public and to OMB a careful and transparent analysis of the anticipated consequences of economically significant regulatory actions."

9 "Regulatory Impact Analysis: A Primer," available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

RIAs, steps for preparing an RIA, and guidance on summarizing the results of an RIA. (See key text excerpted from the primer in Appendix i).

One area where U.S. RIA policy is lagging somewhat is in the lack of requirement for systematic ex post evaluation or sunset provisions in primary legislation. While the majority of OECD countries display deficiencies in this regard, the U.S. is one of only eight out of 35 members of the OECD that "never" requires mandatory ex post evaluation of primary legislation, nor does it require the inclusion of sunset provisions or any automatic evaluations of such laws. Canada has at least "some" such requirements. By comparison, the U.K. requires periodic ex post evaluation of existing primary laws, requires automatic evaluation for "major primary laws" and requires sunset clauses for "some" primary laws.[10]

Good practice in ex post evaluation, according to the OECD, includes assessments of the achievement of goals of the law or regulation, a comparison of the actual versus predicted impacts, identification of unintended consequences, examination of the consistency of regulations, and a comparison with comparable international standards and rules. The U.S. has no requirements for such assessments, while Canada has "some." By contrast, the U.K. requires an assessment of the achievement of goals for all periodic ex post evaluations of all existing primary laws, as well as identification of unintended consequences and consideration of the consistency of regulations.[11]

This is not to say that the U.S. government fails to do any ex post evaluations, but rather that there is a lack of any comprehensive requirement for systematic evaluations. For example, the U.S. Environmental Protection Agency (EPA) "is required to issue a report every five years on the benefits and costs of regulations promulgated by the agency." There are similar requirements for the U.S. Geological Survey and the Manpower Development Commission.[12]

As of 2011, the Obama administration issued an executive order on "Improving Regulation and Regulatory Review" that included a provision for "Retrospective Analysis of Existing Rules" stating that "agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome" and to initiate improvements. It also called for each agency to "develop and submit to the Office of Information and Regulatory Affairs (within the Office of Management and Budget) a preliminary plan … under which the agency will periodically review its existing significant regulations …." [13] Since such executive orders apply strictly to the executive branch, the Obama administration also issued a similar order aimed at independent agencies (such as the U.S. Federal Reserve) encouraging them to "consider how best to promote retrospective analysis of rules …."[14]

Common challenges for ex post evaluations include accessing the relevant data. For example, ex ante RIAs typically use "estimated" costs and benefits while ex post evaluations are expected to collect and analyze "actual" costs, but usually lack a clear counterfactual (i.e., what would have been the costs and benefits in the absence of a particular law or regulation). Another challenge is weighing competing objectives that might involve tradeoffs (e.g., economic efficiency versus distributional fairness). Similarly, it is often difficult to assess attribution for various different inputs into the RIA process (for example when conflicting cost estimates are presented by different interested parties; which estimates were deemed most "reliable" and therefore given more weight

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10 OECD, "Ex post evaluation of regulation" in *Government at a Glance 2015* (Paris: OECD Publishing, 2015).

11 ibid.

12 Winston Harrington and Richard D. Morgenstern, "Proceedings from the OECD Expert Meeting on Regulatory Performance: Ex Post Evaluation of Regulatory Policies" (Paris: OECD, 2003).

13 U.S. Government 2011 Executive Order 13563, "Improving Regulation and Regulatory Review," January 18, 2011.

14 U.S. Government 2011 Executive Order 13579, "Regulation and Independent Regulatory Agencies," July 11, 2011.

in the RIA and which may have been found, ex post, to be closest to the actual outcome?). Probably the most valuable aspect of an ex post evaluation is the opportunity to learn how to improve the RIA process.

U.S. Financial Sector RIA and Public Consultation — The Example of the U.S. Consumer Financial Protection Bureau

Federal agencies involved in financial sector regulation (e.g., the Consumer Financial Protection Bureau), are covered by the same requirements described above, and often face particular challenges with the issue of "distributional effects" (e.g., the costs and benefits of restrictions on interest rates for various types of market lending products such as "payday loans" used primarily by low-income individuals) and with public consultation in a sector fraught with difficult technical terminology and analytical techniques. The recently created Consumer Financial Protection Bureau (CFPB), which is still in the process of creating many new regulations within its mandate, has developed a special-purpose web portal[15] to encourage input from the public at large (including both industry associations and consumer-advocacy groups).

At the beginning of the process of developing a new regulation, the CFPB posts a "request for information," where it announces that it is seeking comments from the public related to the market that might become subject to new regulation (e.g., student loan servicing). The website provides a very brief summary of the issue (e.g., "to assist market participants and policymakers on potential options to improve borrower service, reduce defaults, develop best practices, assess consumer protections, and spur innovation.")

The website provides instructions on how to submit comments electronically, which will be posted, becoming part of the "public record." The site then provides "supplementary information" with more detail about the issue of concern, the deadline for submission of comments, data relevant to the issue, and specific questions of interest to the regulators. (A recent example of such a request for information on the CFPB website is presented in Appendix ii).

The CFPB is then able to categorize the responses in order to compare which types of problems seem most common or severe in order to help determine priorities for possible regulatory action, and to consider evidence regarding the nature of the problems as well as suggestions for solutions.

Once the CFPB has developed a proposed rule (often an amendment to existing legislation or regulations), it posts it for comment and feedback.

The posting includes a summary of the proposed rule, the wording of the proposed new rule, information on potential benefits and costs for those affected by it (including specific sub-groups, such as small businesses), potential impacts on access to credit in general and on specific sub-groups (such as rural areas), and compliance costs.

A good example of the process was summarized by the CFPB[16] in its development of new "Know Before You Owe" mortgage forms. (For details, see Appendix iii).

The CFPB also uses the website to announce minor revisions and amendments to rules, soliciting feedback to proposed revisions and using it to make adjustments if deemed necessary. Final

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15 Consumer Financial Protection Bureau website, "Notice and opportunities to comment," http://www.consumerfinance.gov/notice-and-comment/.

16 Consumer Financial Protection Bureau website, "Testing 'Know Before You Owe' Mortgage Forms," November 20, 2013, http://files.consumerfinance.gov/f/201311_cfpb_factsheet_kbyo_testing.pdf.

versions of the amended rules are published by the Federal Register,[17] including an "official interpretation." However, the approach can also be criticized for possible "overload" of constituents and thus a potential mechanism to "bury" significant proposed changes to regulations amid trivial ones or substantial feedback amid large volumes of uninformed complaints.

However, in most respects, the CFPB feedback process, using its website, appears to be a cost-effective approach for most of its outreach and dialogue with its constituency, enhancing transparency and accountability and making use of the information obtained to improve the efficiency and effectiveness of its regulations. It also helps level the playing field by encouraging access to the RIA process from individuals, small businesses and organizations.

Regulatory-Impact Analysis in the European Union — General Approach18

The overall goals of the RIA process in the European Union are similar to those in the U.S. The EU launched its first comprehensive "better regulation" agenda in 2002 largely in response to growing complaints about "over-regulation" and over-reliance on the "precautionary principle,"[19] and has since then been regularly modifying and improving its approach. The first better-regulation agenda followed the pioneering experience of some of its member states (particularly the Netherlands and the United Kingdom) and introduced a formal procedure of ex ante impact assessment (IA) as well as minimum criteria for stakeholder consultation. Much of the initial focus was on reducing administrative burdens for businesses in order to help improve competitiveness, and cost-benefit analysis as the primary measure of regulatory quality.

More recently, the European Union has put a growing emphasis on a more holistic approach, incorporating RIA principles throughout the "policy cycle" to ensure that legislative or regulatory proposals that have been assessed ex ante are also monitored over time and evaluated ex post after a number of years, to check whether the rules in place have achieved the intended results.

In May 2015, the European Commission formally adopted a new "better regulation" package, which introduced some significant changes. In particular:

- The European Commission launched a new permanent consultation platform termed "Lighten the load — have your say," which constitutes an open channel for anyone willing to provide views on aspects of EU legislation that he or she finds irritating, burdensome or worthy of improvement. At the same time, it announced the creation of a "Regulatory Fitness" (REFIT) stakeholder platform, which will involve high-level experts from business and civil society stakeholders as well as all 28 member states appointed through an "open and transparent process."
- For the first time, the European Commission accepted to open the doors of its "watchdog" Regulatory Scrutiny Board to external members. As a general rule, all members of the board should act independently and autonomously and should "disclose any potential conflict of interest … and can be requested not to participate in the scrutiny of any impact assessments or evaluations or fitness checks where such potential conflict of interest arises."
- Moreover, the commission's communication announces that the commission will start consulting before and even "during the impact assessment process." This would happen after

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17 Federal Register website, https://www.federalregister.gov/articles/search.

18 This section and the following section are largely excerpted from Renda, "From impact."

19 The precautionary principle implied that the introduction of a new product or process whose ultimate effects are disputed or unknown should be resisted. According to the European Commission, the precautionary principle may be invoked when a phenomenon, product or process may have a dangerous effect, identified by a scientific and objective evaluation, if this evaluation does not allow the risk to be determined with sufficient certainty.

the publication of a new “inception impact assessment” document. What is still unclear is whether this procedure will be mandatory for all proposals subject to impact assessment; and at what state of advancement of the proposal the consultation would be run.

- Finally, the new better-regulation communication marks a step forward on the application of better regulation tools to the thousands of regulatory decisions that are taken every year to ensure the implementation of primary legislation. As a matter of fact, these rules are more similar to the types of rules on which regulatory-impact analysis (RIA) is mandatory in the United States and Canada.

E.U. Financial Sector RIA

The financial sector, and in particular the banking and insurance sector, present important peculiarities when it comes to the EU’s better-regulation agenda. First, these sectors had been subject to rushed interventions due to the economic and financial crisis, new interventions in cross-border payments, and more general rules aimed at redesigning the governance of EU financial markets, including recent legislation related to the creation of a banking union.

After the past years, in which regulation in this sector has been approached under emergency due to the financial crisis, the European Commission has now decided to open up a public consultation on the EU regulatory framework for financial services. Specifically, the commission is currently (as of the end of 2015) looking for empirical evidence and concrete feedback on several issues (for details see Appendix iv).

It is expected that the outcome of this consultation will provide a clearer understanding of the interaction of the individual rules and the cumulative impact of the legislation as a whole, including potential overlaps, inconsistencies and gaps. It will also help inform the individual reviews and provide a basis for concrete and coherent action where required. Over the next four years, many of the rules put in place will come due for review at scheduled intervals.

The evaluation of recent reforms and their implementation may indicate the need for legislative adjustments. Evidence is not only sought on the impacts of the EU financial legislation but also on the impacts of national implementation (e.g., gold-plating) and enforcement.

Responses to this call for evidence will be assessed against the following objectives:

- Promoting economic and financial stability in the EU;
- Maximizing the benefits of the financial system to the economy, jobs and sustainable growth and promoting better access to finance, notably for SMEs;
- Completing the EU single rulebook and promoting the single market for all 28 member states;
- Restoring trust in the financial system following the crisis and ensuring a high level of consumer and investor protection;
- Ensuring the EU rules are as simple and clear as possible and keeping the regulatory burden to the minimum necessary; and
- Promoting the competitiveness of the EU economy.

Following this call for evidence, commission services will report on the main findings and next steps by mid-2016. The consultation document accompanies an ambitious proposal by the European Commission to build a capital markets union (CMU), announced on Sept. 30, 2015, which forms a key pillar of the so-called “Juncker Plan” and aims to tackle investment shortages head-on by increasing and diversifying the funding sources for Europe’s businesses and long-term projects. Also part of the proposal is a new initiative on relaunching securitization markets in Europe.

The commission explained that alternative sources of finance, complementary to bank-financing — including capital markets, venture capital, crowdfunding and the asset-management industry — are more widely used in other parts of the world and should play a bigger role in providing financing to companies that struggle to get funding, especially SMEs and startups (which in turn therefore need to be encouraged to participate in the RIA process). Having more diversified sources of financing is good for investment and business but is also essential to financial stability, mitigating the impact of potential problems in the banking sector on companies and their access to finance. For this reason, CMU is also an important part of the work on the completion of the European Economic and Monetary Union. The commission also wants to break down barriers that are blocking cross-border investments in the EU to make it easier for companies and infrastructure projects to get the financing they need, regardless of where they are located.

The accompanying paper by Renda[20] provides a more detailed example of an impact assessment of securitization regulation in the E.U. (See Appendix v).

Another example contained in Renda[21] is the European system of financial supervision and evolving impact-assessment practices. From its onset in 2007, the global financial crisis revealed both gaps in the legislation that governs the financial system and shortcomings in the practice of financial supervision. In the EU, the crisis additionally highlighted deficiencies in the structures for cross-border crisis resolution; it shed light on the inconsistent application of the EU's legal framework for financial services and it tested supervisory co-operation and co-ordination between member states, in some cases affecting the trust between national supervisors. In order to address these issues and to achieve a more effective system of supervision, a new architecture for European financial supervision was developed based on the recommendations of the 2009 de Larosière Report. This new arrangement, the European System of Financial Supervision (ESFS),[22] was adopted in late 2010.

The relevant European Supervisory Authorities (ESAs) established have a mandate to "contribute to:

a) Improving the functioning of the internal market, including in particular a sound, effective and consistent level of regulation and supervision;

b) Ensuring the integrity, transparency, efficiency and orderly functioning of financial markets;

c) Strengthening international supervisory coordination;

d) Preventing regulatory arbitrage and promoting equal conditions of competition;

e) Ensuring the taking of related risks are appropriately regulated and supervised; and

f) Enhancing customer protection."

For what concerns impact assessment, the role of the supervisory authorities is primarily that of responding to specific requests for technical advice sent by the European Commission. However, according to the ESAs' regulation, ESAs have to carry out a cost-benefit analysis when drafting implementing technical standards, and submit it to public consultation. Pursuant to this disposition,

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20 Renda, "From impact."

21 ibid.

22 Adopted in the form of regulations agreed to by the European Parliament and the Council in late 2010 establishing:
- The European Systemic Risk Board (ESRB), responsible for the macro-prudential oversight of the financial system, focusing on systemic risk;
- Three European Supervisory Authorities (ESAs), responsible for micro-prudential supervision of financial markets and activities: the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Market Authority (ESMA);
- The Joint Committee to foster co-ordination among the three authorities; and with participation of national competent authorities (NCAs) in the three financial sectors.

ESAs have conducted impact assessments and included both the draft standards and the whole IA process in the consultation paper, so that they can be evaluated and commented on by the stakeholders. It is also a means of communication between the ESAs, the different national regulators involved, the regulated firms and other affected or interested parties. The three ESAs have produced common cost-benefit/impact-assessment guidelines to help achieve this, although the guidelines are not yet public.

WHAT WE HEARD ABOUT THE CANADIAN REGULATORY PROCESS

By and large, Canada's relatively successful experience with financial market regulation, reflected in its experience during the 2008 financial crisis, has been developed through a strong consultative process between government authorities and financial institutions or advocacy groups. The Canadian "principles-based" approach to regulatory-impact analysis is formalized at the federal level and on a limited basis at the provincial level.

Principles-based regulation is largely prudential in nature, while rules-based regulation is largely market-conduct-oriented in nature. Both the U.K. and Canada have traditionally relied more on principles-based regulation while the EU and U.S. have tended to emphasize more rules-based regulation. Since the global financial crisis, both Canada and U.K. have adopted a somewhat more rules-based approach. RIA in the context of the former is usually regarded as more difficult in that one would have to make assumptions about how the principles would be complied with, and then assess the relevant costs, adding an additional step and dealing with an additional level of uncertainty. Thus, an RIA of principles-based regulation would need to incorporate even more risk analysis and mitigation strategies by formulating expectations on how the principles would be complied with, and what monitoring and enforcement costs this might entail from public authorities. In addition, principles-based regulation has often been coupled with private governance or co-regulatory schemes, and this has arguably created problems in assessing the costs and benefits of alternative regulatory options. [23]

A recent OECD report[24] provides a useful comparison of the federal approach in Canada to regulatory-impact analysis with other OECD countries. The cabinet, supported by the Privy Council Office, provides oversight in the areas of consultation and ex post analysis and reviews the quality of impact assessments. The Treasury Board of Canada Secretariat provides oversight for subordinate regulations including helping ensure regulatory quality.

With respect to primary laws, evidence and evaluation is not transparent to the public or made available on a systematic basis (primary laws are subject to scrutiny by Parliament including review and public consultation at committee stages). A periodic review may be required as in the case of the five-year review of the Bank Act.

Subordinate regulations are subject to detailed processes. RIAs are required for all subordinate regulations and made available publicly through the Canada Gazette.[25] The OECD ranks the Canadian RIA approach among 33 countries with respect to overall quality of RIA processes and ex post evaluation of regulations. Canada ranks seventh highest in a composite indicator of RIAs of primary laws and is fourth highest for RIAs of subordinate laws (the U.K. is highest in both categories). While Canada is relatively high with respect to methodology, it is weak with respect to

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[23] For a quick introduction to this problem, plus additional references, see Fabrizio Cafaggi and Andrea Renda, "Public and Private Regulation: Mapping the Labyrinth," *The Dovenschmidt Quarterly* 1 (2012).

[24] Organization for Economic Co-operation and Development, "OECD Regulatory Policy Outlook 2015" (Paris: OECD, 2015).

[25] Canada Gazette Assessment of Financial Institution Regulations 150 (May 28, 2016).

oversight and quality control (transparency and systematic adoption is average). With respect to its ex post evaluation of regulations, Canada scores seventh highest with respect to primary laws and fourth highest for subordinate regulations. For ex post evaluation, Canada is stronger with respect to transparency and systematic adoption but weak with respect to methodology, oversight and quality control.

With respect to financial market regulatory-impact analysis, the process is strongest in some areas at the federal level but rather uneven in approach. A recent federal RIA statement, sponsored by the Office of the Superintendent of Financial Institutions was published in the Canada Gazette with respect to risk-related assessments charged to recover costs from financial institutions. The report provides detailed background information, a review of regulatory objectives, a description of the proposal, consultation within 45 days, results, and the rationale for adoption. On the other hand, a document describing the RIA process for determining crucial Basel-III amendments to regulatory capital-adequacy requirements, was less detailed, providing only the limited options of either adopting the changes or not. [26] The RIA report regarding changes to Canada Deposit Insurance Corp. premiums was fairly brief, with a reference to an unexplained process for consultation.[27]

While the federal government has a developed RIA process especially for primary laws, provincial RIA approaches vary considerably. Most provinces have some review process for regulations but methodology, coverage, evaluation and consultation is not as well developed. As of 2011, only four provinces have benefit-cost evaluations for regulations (Alberta, Ontario, New Brunswick and Newfoundland and Labrador) and only British Columbia, Alberta and Nova Scotia have some sort of public reporting of regulatory assessments.[28]

Overall, participants at the Canadian roundtable felt that lengthy and costly regulatory reviews as in Europe and the United States would be counter-productive compared to a more simplified approach. However, the approach to regulatory-impact analysis has limited scope. Specific concerns included:

- The use of the RIA approach in Canada leads to unnecessary compliance costs and unintended effects if consultations are not sufficiently thorough.
- Participants noted that insufficient time was given for reaction in some cases.
- Concerns were raised that the consultation process focuses more on large institutions without due regard to the compliance costs imposed on smaller institutions, which could lead to less competition in the financial sector.
- The Canadian approach involves little public input at the provincial level. Nor is the approach fully transparent even at the federal level (where there is a risk of regulatory capture).
- Insufficient ex post evaluation of regulations is undertaken to determine their impacts and if they should be improved. Few automatic "sunset provisions" are used that would require particular regulations to be reviewed and either re-authorized, revised, or eliminated by a specific date.
- And then there is the typical Canadian problem whereby financial regulation involves federal banking powers but also provincial control, under the Constitution Act, over property rights

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[26] Office of the Superintendent of Financial Institutions, "Capital Adequacy Requirements Guideline, Guideline Impact Analysis Statement," December 2012, http://www.osfi-bsif.gc.ca/Eng/fi-if/rg-ro/gdn-ort/gl-ld/Pages/CAR_chpt_gias.aspx.

[27] Canada Gazette 149, 42, October 17, 2015, http://www.gazette.gc.ca/rp-pr/p1/2015/2015-10-17/html/reg1-eng.php.

[28] David Redmond and Associates, "Regulatory Reform: A Review of Provincial Government Approaches and Initiatives" (2011), http://www.chba.ca/uploads/Urban_Council/Feb2011/Tab%209%20-%20Preliminary%20Report%20on%20Provicial%20Regulatory%20Reform%20Initiatives.pdf. For an example of provincial-level reform see Brent Aitken, "Another Way Forward for Securities Reform: Presentation to the Task Force to Modernize Securities Legislation in Canada" (2005).

and contracts. The current lack of regulatory harmonization in certain areas leads to internal barriers to trade for financial services. Harmonization of federal and provincial regulations would help reduce compliance costs for the financial sector as well as improve the efficiency of markets. It would also be useful if the federal and provincial levels worked towards common regulatory-assessment regimes, especially in areas where regulatory powers overlap.

Overall, our impression is that the current regulatory-impact-assessment approach lacks some rigour that is found in the European and American RIA methodologies even though it is less cumbersome and costly. It would be useful to take some of the virtues in the RIA approach of other countries and strengthen the regulatory approach in Canada to achieve certain objectives. It is also unclear the extent to which RIAs have a clear impact on regulatory policy. The federal government has the most elaborate approach but post-evaluation is weak. At the provincial level, less is accomplished with respect to RIA. As senior officials from one province told us, RIA is done for many regulations but the assessments often play little role in developing policies. We cannot judge the comprehensiveness of these views as little third-party analysis has been published regarding the actual impact of RIA on the regulatory policy.

The aforementioned Renda paper[29] includes a number of "lessons learned" from the reform of the EU RIA process and recommendations for consideration within Canada:

Recommendation #1 — assess cumulative effects of legislation. It is fair to state that the EU has put more emphasis than Canada has on the policy cycle. While ex post evaluation, REFIT and cumulative cost assessment are becoming the rule in Europe, the role of ex post evaluation in Canada appears weaker. In particular, the assessment of the cumulative effects of legislation appears as a much-needed initiative, especially in the financial sector, where the consistency and overall effectiveness of the overall corpus of legislation should be appraised, in addition to the overall fitness for purpose of individual pieces of legislation.

Recommendation #2 — adopt a methodological framework for impact assessment at both federal and provincial levels. The analysis of the prospective impacts of new regulation in Canada would benefit from the adoption of a general, transparent framework for the identification and assessment of direct and indirect impacts (including stakeholder input), as well as emerging risks and ways to manage/mitigate them at both federal and provincial levels with shared responsibility over financial market regulations. The taxonomy of costs and benefits of regulation can provide a starting point for the elaboration of a more systematic, comprehensive framework for all agencies in charge of impact assessment and ex post evaluation in Canada.

Recommendation #3 — consider strengthening policy appraisal at primary legislation level. Canada seems very well-equipped to scrutinize secondary legislation, but much less geared towards a thorough assessment of the prospective impacts of primary legislative proposals. Systematic appraisal in the Canadian Parliament, for example, would likely improve the overall governance of the better regulation system in Canada. In line with recent suggestions by the OECD,[30] parliamentary scrutiny of legislative proposals, both ex ante and ex post, could help Canada guarantee better regulation at all levels of government.

These recommendations are generally consistent with views expressed at the roundtable by participants for an improved approach to regulatory-impact analysis, keeping in mind that making the RIA process should be effective in improving policy formation and not burdensome. Specific areas suggested for improvement include: more development of benefit/cost analysis for review

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[29] See Andrea Renda, "From impact."

[30] *OECD Regulatory Compliance Cost Assessment Guidance* (Paris: OECD, April 28, 2014), http://dx.doi.org/10.1787/9789264209657-en.

in consultation; greater opportunity for broader consultations with smaller businesses and the public, going beyond the existence of the current comfort zone; more transparency by publishing background information and ex post evaluations by inviting comments from the public about specific regulations (including publication of relevant background information); and a federal-provincial joint approach to regulatory-impact analysis would be useful to promote federal-provincial harmonization.

CONCLUSIONS

This paper discusses the potential value of introducing a better approach for regulatory-impact analysis in Canada based on lessons learned from Europe and United States. Since 2008 a spate of new regulations were introduced in Canada to improve the process for policy formation and consultations between government authorities and the private sector. While this approach is much less complex than the regulatory-impact analysis process used in Europe, its simplicity and lack of full transparency results in outcomes that can lead to unnecessary compliance costs and unintended effects, including a non-level playing field that may disadvantage both consumers and relatively small financial firms.

Many of the unintended regulatory costs can be avoided by a review process that enables full consultation and ex post review with stakeholders to minimize their effects. One could argue that the European approach to regulatory approval is perhaps too cumbersome, but some important attributes are worth considering in Canada to ensure that regulations are developed to minimize administrative and compliance costs as well as unintended effects. These include the following:

- A framework of minimum requirements to assess whether a regulation is beneficial.
- Consultation with parties to estimate costs, unintended effects and to help understand the benefits of regulation.
- Transparency, so all can see the entire RIA process, and regulators can hear from all interested stakeholders.
- Post-evaluation that is made public.
- A joint federal-provincial approach to regulatory-impact analysis to encourage harmonization and improved RIA processes at the provincial level.
- A requirement for regular “sunsetting” provisions requiring that all regulations be subject to periodic review before being either re-authorized, revised, or eliminated.

APPENDICES: EXAMPLES OF REGULATORY-IMPACT ANALYSES

UNITED STATES

(i) U.S. Federal Government Primer on Regulatory Impact Assessment

The goals of RIA within the U.S. federal government are:

(1) To establish whether federal regulation is necessary and justified to achieve a social goal; and

(2) To clarify how to design regulations in the most efficient, least burdensome, and most cost-effective manner.

The primer also notes that "Regulatory analysis also has an important democratic function; it promotes accountability and transparency and is a central part of open government."

The key elements for RIA include a statement of the need for regulatory action, a clear identification of a range of regulatory approaches, and an estimate of the benefits and costs of the proposed regulatory action and its alternatives.

The key steps for undertaking an RIA include the following:

- Describe the need for the regulatory action (including a description of the problem that the agency seeks to address).
- Define the baseline (i.e., the agency's best assessment of what the world would be like absent the action, accounting for likely future scenarios).
- Set the timeframe of analysis (e.g., how long the regulation being analyzed is likely to have economic effects, up to a statutory "sunset" date for the regulation, or a period for which reasonable forecasts are possible).
- Identify a range of regulatory alternatives (e.g., instead of a federal regulation, alternatives might include deferral to state or local regulation or market-oriented approaches; different enforcement methods; different levels of stringency; different requirements based on firm-size).
- Identify the consequences of regulatory alternatives (including ancillary benefits/costs, countervailing risks, distributional effects).
- Quantify and monetize the benefits and costs (including private sector compliance costs/savings, government administrative costs/savings, estimates of people's "willingness to pay" for public goods or "willingness to accept compensation" for public "bads," estimates of the "value of statistical life or life-years," etc.).
- Discount future benefits and costs (using a range of real interest rates currently between about three to seven per cent).
- Evaluate non-quantified and non-monetized benefits and costs (e.g., making use of cost-effectiveness comparisons in cases where cost-benefit analysis is not feasible; including quantified estimates along with detailed qualitative descriptions).
- Characterize uncertainty in benefits, costs, and net benefits (including the need to specify potential scenarios, calculate benefits and costs associated with each scenario, and estimate the probabilities for each scenario).

Agencies are required to prepare a "clear, plain language executive summary," including the following:

- Alternative regulatory approaches considered.
- Categories of benefits and costs (those that are (1) quantified and monetized; (2) quantified but not monetized; and (3) neither quantified nor monetized).
- Separate reporting of distribution effects, including transfers (e.g., likely benefits or costs falling disproportionately on certain groups within the population).
- Rank qualitative impacts in terms of importance (e.g., certainty, likely magnitude, and reversibility).
- Transparency (e.g., notes at the bottom of tables that enable readers to interpret the information correctly).

(ii) Example of U.S. CFPB Request for Information: Student Loan Servicing[31]

Part One: General Questions on Common Industry Practices Related to Student Loan Repayment

The following section seeks to solicit input on common practices, policies, and procedures in the student loan servicing market. Respondents may wish to address any structural features of the student loan servicing market as they relate to specific practices, including but not limited to:

- The traditional compensation model for third-party student loan servicing…
- Information systems used by student loan servicers, …; or
- Existing federal and state statutory or regulatory protections for student loan borrowers in repayment. …

Practices Related to Student Loan Repayment

Please describe the extent to which issues related to the following common student loan servicing policies and procedures should inform policymakers and market participants considering options to improve the quality of student loan servicing, …

Number of responses: 5323

Examples of responses received:

1. "[The Student Loan Servicer] has sold my loan multiple times and I cannot track the original loans anymore. I have so many late fees and added interest that I no longer wish to make payments and have accepted defeat at the hands of my debt. I feel helpless and distraught at merely the thought of my debts"

"On behalf of more than 3 million members, the National Education Association (NEA) submits the following comments in response to the U.S. Consumer Financial Protection Bureau's request for information regarding a joint investigation with the Department of Education and the Department of Treasury concerning student loan servicing practices ….

"The student loan debt explosion has had serious consequences for our members, as well as the overall economy. NEA believes that we need fundamental reinvestment in our colleges and universities from both the federal and state governments. To achieve those goals, NEA

[31] Federal Register website "Request for Information Regarding Student Loan Servicing," https://www.federalregister.gov/articles/2015/05/21/2015-12276/request-for-information-regarding-student-loan-servicing.

has launched a grassroots campaign, Degrees Not Debt, which calls for increased need-based student aid, less expensive student loans—including the ability to refinance existing loans—expanded loan-forgiveness programs to increase public service careers, and the call for both state and federal governments to reinvest in higher education.

"We have had extended exchanges with our members and others concerning all aspects of the issue, and have directly solicited comments concerning the Bureau's request. Those comments have been forwarded directly to the CFPB in a separate email. The vast majority of the comments we received revolve around complaints about incomplete or inaccurate information. Whether these comments indicate confusion over available information or actual bad practice by loan servicing entities is unclear, and, therefore, a suitable topic for investigation."

(iii) Example of U.S. CFPB Draft Proposed Rule and Invitation for Comment

The goal of the revamped forms for "Know Before you Owe," in the aftermath of the U.S. financial sector crisis, was "for (loan) consumers to know upfront what they are getting into — the terms of the loan, their obligations, and what could possibly change." Both market efficiency and investor protection would be enhanced. The process was carried out over a period of two years, including outreach and dialogue with "consumer advocates, industry groups, financial institutions, designers, and government policy makers." The final output was two new mortgage disclosure forms, using "plain language." The first is an initial loan estimate, received after a consumer submits an application for a loan, followed by the closing disclosure, required three days before closing.

As the CFPB described the process, it started with 10 rounds of qualitative testing on prototype forms, with the help of a design and consumer research firm, in nine cities, before even preparing and issuing the proposed new rule. During that process the CFPB also invited the public to provide feedback on the prototypes on its website. It reported receiving "more than 150,000 unique visitors and more than 27,000 individual comments and e-mails from consumers and industry."

Once the proposed forms and associated rules were issued, the CFPB conducted a large-scale quantitative validation test of the proposed forms, involving 850 consumers in 20 locations, to compare them with the previously used disclosure forms. The CFPB also received nearly 3,000 public comments online.

The quantitative-validation tests compared the new proposed forms to the old ones with regard to the understanding of participants of key features including:

- How the interest rate could increase after closing.
- Identifying negative amortization features.
- Short-term and long-term overall costs.
- Monthly payments of principal and interest.
- Comparing competing loan offers regarding:
    - Total monthly payment (and possible changes);
    - Highest possible total monthly payments; and
    - Closing costs.
- Comparing between estimated and final terms of the loan offers at closing regarding:
    - Estimated and final loan amounts; and
    - Estimated and final closing costs.

The associated rule mandated a three-business-day period between receipt of the final offer and the actual closing, giving time for the applicant to query and negotiate changes.

The CFPB noted that the public feedback had led to a number of alterations in the final version of the mortgage disclosure forms, including:

- Spanish-language forms (including additional rounds of testing on the translated forms).
- Less-stringent requirements for an additional three-day waiting period for certain changes in the loan offer (to avoid more frequent delays in closing).
- Removal of Saturdays from the "three-business-day" waiting period (because the compliance costs for "small entities, like community banks and credit unions" and associated possible "reduction in access to mortgage credit for consumers" outweighed the benefits).

EUROPEAN UNION

(iv) EU Regulatory Framework for Financial Sector: Issues Presented for Public Consultation

- *Rules affecting the ability of the economy to finance itself and grow*. The rules in place to ensure financial stability and investor protection are essential for the functioning and the safety of the system and to restore investors' trust in financial services. At the same time, building on a 2014 communication on long-term financing and the Action Plan on Building a Capital Markets Union, it is important to ensure that the balance is right and that rules do not unduly discourage long-term investment and sustainable economic growth.
- *Unnecessary regulatory burdens*. There may be areas of EU legislation that impose burdens not commensurate with the intended policy objectives, for example, without proportionate associated material benefits in terms of making the system safer, or where they create unintended consequences. Burdens may also arise due to excessive complexity or duplicative reporting requirements. Some rules may also have become outdated due to technological change.
- *Interactions, inconsistencies and gaps*. EU financial rules were passed at different points over the past six years as a series of important individual measures, based on thorough impact assessments. Some rules might, taken together, give rise to unintended consequences. This might be due to, for example, duplications, inconsistencies, regulatory gaps and/or loopholes and/or lack of proper enforcement at national level.
- *Rules giving rise to unintended consequences*. Rules to discourage excessive risk-taking or to de-risk the financial system may give rise to unintended consequences such as regulatory arbitrage or increasing pro-cyclicality.

(v) EU Securitization Products and Associated RIA Process

The key problems faced include low demand for securitization products in the EU and high operational costs for investors and issuers. The market-efficiency and financial-stability objectives are to revive a safer securitization market that will improve the financing of the EU economy, weakening the link between banks' deleveraging needs and credit tightening in the short run, and creating a more balanced and stable funding structure of the EU economy in the long run. This should in turn benefit end users of credit intermediation: households, SMEs and larger corporations.

Reaching these general objectives requires the achievement of the following, more specific policy objectives:

- Remove stigma from investors[32] and regulatory disadvantages for simple and transparent securitization products. Reduce/eliminate unduly high operational costs for issuers and investors.

Several options were considered, with detailed comparisons of estimated benefits and costs. A public consultation on a possible EU framework for simple, transparent and standardized securitization was carried out between Feb. 18 and May 13, 2015. An impact-assessment steering group was set up to ensure consistency across the various agencies and interests involved. On that basis, the EU Regulatory Scrutiny Board recommended (among other things) deeper consideration of the securities market (and associated regulation) within the individual member states of the E.U. before moving ahead with the reform process (including associated RIA).

[32] This is particularly relevant for the EU securitization market, which performed well during the crisis, generating negligible losses, but was nevertheless tarnished by practices and events taking place elsewhere, mainly in the U.S.

About the Authors

Jacqueline Coolidge is an economist who has over 25 years of professional experience with private sector development, with a focus on policy, tax, legal and regulatory reforms to improve the investment climate. She worked for the World Bank Group for fifteen years, most recently as Lead Investment Policy Officer in the Foreign Investment Advisory Service, and has continued to work as an independent consultant and researcher. She has extensive expertise in tax and regulatory reform and related results measurement, especially compliance costs for businesses with regard to business taxes, licensing and regulation. She has authored manuals used in the World Bank Group for business surveys to measure compliance costs for taxes and regulations. She is also an expert in monitoring and evaluation of reforms to improve the investment climate, including development of Lessons Learned to improve future reform efforts. She has degrees in economics and public policy from the University of Michigan, Princeton University, and Johns Hopkins University.

Jack M. Mintz became the President's Fellow of The School of Public Policy at the University of Calgary on July 1, 2015, after serving as the Director and Palmer Chair in Public Policy since January 2008. He serves on the boards of Imperial Oil Limited and Morneau Shepell, and is Chair and Vice-President of the Social Sciences and Humanities Research Council of Canada. He also serves as an Associate Editor of *International Tax and Public Finance* and the *Canadian Tax Journal*, and is a Research Fellow of CESifo, Munich, Germany, and the Centre for Business Taxation Institute, Oxford University.

Dr. Mintz has consulted widely with the World Bank, the International Monetary Fund, the Organization for Economic Co-operation and Development, federal and provincial governments in Canada, and various businesses and non-profit organizations. Dr. Mintz became a member of the Order of Canada in 2015 in addition to receiving the Queen Elizabeth Diamond Jubilee Medal in 2012. Widely published in the field of public economics, he was touted in a 2004 U.K. magazine publication as one of the world's most influential tax experts. The *Financial Post* named him one of the five most influential Canadians in regulation in 2012. In the 2015 Who's Who Legal, he was named one of the top experts in the world and the Public Policy Forum honored him for his contribution to public policy in 2015 at its annual dinner.

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