PAYMENTS CANADA

Guideline: By-Law No. 6

Investigations by the President under By-law No. 6 — Compliance

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Introduction

The *Canadian Payments Association By-law No. 6 — Compliance* (the Compliance By-law) sets out processes for investigating and addressing alleged contraventions of Payments Canada's by-laws and rules. The purpose of this guideline is to provide information about how the President may exercise its discretion in determining whether to investigate a matter without referral to a committee, where the President reasonably believes that a member or a non-member has committed a contravention.

Application

This guideline applies where the President reasonably believes that a member or non-member[1] has committed a contravention pursuant to paragraph 2(1)(a) of the Compliance By-law. In determining whether to investigate a matter, the President will consider the factors set out in this guideline, along with any other relevant information. If a matter is not investigated by the President, it may be referred to a committee.

While this guideline is an objective and practical resource, it is not applied rigidly. Determinations by the President are made on a case-by-case basis, in consideration of the factors outlined in this guideline and any other relevant information. This guideline is intended to provide a flexible assessment to assist the President in determining when to investigate a matter under paragraph 2(1)(a) of the Compliance By-law and to assist the President in making consistent decisions across different matters with similar facts.

Background

Payments Canada's mandate is established under the *Canadian Payments Act* (the "CP Act") and includes the following objects:

- Establish and operate national systems for the clearing and settlement of payments and other arrangements for the making or exchange of payments;
- Facilitate the interaction of its clearing and settlement systems and related arrangements with other systems or arrangements involved in the exchange, clearing and settlement of payments; and
- Facilitate the development of new payment methods and technologies.

[1]As defined in the Compliance By-law, a non-member means a local that is not a member and belongs to a central or cooperative credit association that is a member.

To further these objects, the CP Act provides Payments Canada's Board of Directors with the power to make by-laws and rules. These by-laws and rules are critical to ensuring the safety, soundness and efficiency of Canada's national payments infrastructure. Payments Canada members and participants must comply with the requirements set out in the CP Act, by-laws and rules.

The Compliance By-law outlines how alleged contraventions are investigated and the sanctions that may follow if a contravention has been committed.[2] A member commits a contravention when the member fails to comply with a provision of the by-laws or rules that imposes a duty on the member. A non-member commits a contravention when the non-member fails to comply with a provision in the by-laws or rules in respect of which a clearing member is responsible for ensuring compliance by the non-member under *Canadian Payments Association By-law No. 3 - Payment Items and Automated Clearing Settlement System* and *Canadian Payments Association By-law No. 10 - RTR*.

The Compliance By-law requires that investigations be conducted in a fair and impartial manner and provides for other procedural protections.

Investigations by the President

Amendments to the Compliance By-law introduce an expedited process for the President to investigate without referral to a committee where the President reasonably believes that a member or non-member has committed a contravention.

This process streamlines investigations, promotes efficiency in the resolution of contraventions, and decreases the administrative burden on Payments Canada and its members. Where the President investigates a matter, a hearing will not take place. Other procedural protections set out in the Compliance By-law will apply. Alternatively, the President may decide to refer a matter to a committee to conduct an investigation. In such a case, the committee will establish a compliance panel, and a hearing will take place.

Conflict of Interest and Fairness

Payments Canada is committed to ensuring that members and non-members are afforded a fair process when suspected of committing a contravention. This commitment extends to investigations conducted by the President.

[2] Alleged contraventions may be in the form of complaints by other members or matters that are discovered by the President.

The Compliance By-law requires that the President or a member of a compliance panel withdraw from an investigation if they have, or appear to have, a conflict of interest. This requirement applies to investigations conducted by the President. If the President has, or appears to have, a conflict of interest, they will not conduct the investigation; instead they will refer the matter to a committee.

In addition, while a hearing will not take place when the President investigates, the Compliance By-law requires that investigations be conducted in a fair and impartial manner. This means that a member or non-member subject to an investigation will be provided with information to understand the case against them and a fair opportunity to respond.

If the President investigates, the Compliance By-law permits them to refer the matter to a committee at any point during the investigation. Parties also have a right to seek a review, by a committee, of the President's decision.

Framework for determining investigatory process

Under the Compliance By-law, if the President reasonably believes that a member or non-member has committed a contravention, the President may:

(a) investigate the matter and, as necessary, appoint one or more persons to assist in the investigation; or
(b) refer the matter, for the purposes of an investigation, to a committee that has relevant expertise.

The President, in determining whether to investigate a matter under paragraph 2(1)(a), will consider the following factors:

- The complexity of the matter;
- Whether the contravention is admitted and/or not contested; and
- The severity of the matter .

None of these factors are exhaustive and the President may also consider other factors relevant to the unique circumstances of each matter.

In some cases, one factor may lead the President to conduct an investigation. In other cases, the President may decide to investigate based on a balance of some or all of the factors below and other relevant information.

Each factor is explained in more detail, below.

Complexity of the matter

Payments Canada has a wide variety of by-laws and rules. Some of these rules impose objective measures that members must meet. Other by-laws and rules require members to implement processes or adopt procedures before taking certain actions.

Where the President reasonably believes there has been a contravention, the President will consider the nature of the matter to assess its complexity. In making this assessment, the President may consider the following:

- Whether the matter concerns an objective or measurable requirement like a missed deadline, cut-off time, or specific performance standard, making it more simple or straightforward, or whether the matter pertains to more complex processes or procedures.
- Whether objective evidence of the failure to meet the requirement is readily available, and whether the assembly of an evidentiary record will present difficulties.
- Whether the complexity of the fact situation renders the interpretation of the relevant processes or procedures more difficult or makes it more difficult to obtain evidence.
- Whether the matter raises a standalone issue or is part of, or is likely to raise, a broader set of issues with other potential contraventions.
- Whether an investigation would require the operational expertise of a committee (for example, about a specific member or non-member's practices).

Ultimately, the intent of the President's assessment is to determine whether, in light of the complexity of the matter, the President can efficiently and expeditiously investigate, or whether the committee's expertise is necessary.

Whether the contravention is admitted and/or not contested

In determining whether to conduct an investigation, the President will consider whether the member or non-member has admitted to a contravention, contested or is likely to contest the matter, considering the following:

- Whether a member or a non-member has notified Payments Canada of a contravention and/or admitted to having committed such contravention.
- Whether a member or a non-member has admitted to a contravention after the President begins to consider whether there is a reasonable basis to believe that a contravention has been committed.

In these cases, where a contravention is admitted or not contested, or is likely to be uncontested or admitted in light of the facts, it will generally be more efficient and expeditious for the President to investigate the matter.

Severity of the matter

In assessing the severity of the matter, the President will consider the following:

- The real or potential impact(s) on other members, the safety and soundness of Payments Canada's systems.
- Whether the nature of the matter could cause reputational harm to Payments Canada or undermine confidence in the national payments infrastructure.

The President will assess whether, in consideration of the severity of the matter, the President can efficiently and expeditiously investigate or whether the matter should be referred to a committee.

Other Relevant Factors

In some cases, the President may consider other factors relevant to ensuring an efficient and expeditious investigation. These factors may include the compliance history of the member or non-member, the necessity of an expedited investigation and timely resolution of the matter and other circumstances unique to the matter.