

OSFI'S NEW DRAFT GUIDELINE E-4 RELATING TO FOREIGN ENTITY BRANCHES: A COMPARATIVE ANALYSIS TO EXISTING GUIDANCE

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On October 27, 2020, the Office of the Superintendent of Financial Institutions (OSFI) issued a [letter](#) seeking feedback on draft *Guideline E-4: Foreign Entities Operating in Canada on a Branch Basis* ([Draft Guideline E-4](#)), which will replace existing guidelines *E-4A: Role of the Chief Agent and Record Keeping Requirements* (relating to insurers) and *E-4B: Role of the Principal Officer and Record Keeping Requirements* (relating to banks).

Draft Guideline E-4 sets out OSFI's expectations of foreign insurers that are authorized to operate in Canada and foreign banks that are authorized to carry on business in Canada, in each case, on a branch basis, including in respect of branch management and the administration of business in Canada. Specifically, Draft Guideline E-4 underscores the responsibilities of the foreign entity and its management in overseeing the day-to-day operations of its business in Canada.

The new guideline is distinguishable from, and comparable to, the existing guidelines as follows:

- *Overall focus:* The new guideline focuses on OSFI's expectations of the foreign entity with respect to its business in Canada, rather than OSFI's specific expectations of the chief agent or principal officer.
- *Branch Management:* It introduces the concept of "branch management", which refers to the individuals who have authority and responsibility for the oversight of the foreign entity's business in Canada. Under the new guideline, branch management includes the chief agent in the case of a foreign insurance branch, the principal officer in the case of a foreign bank branch, but also includes the senior officers of the foreign entity located in or outside of Canada, as applicable, that are involved in and responsible for the branch's operations in Canada. OSFI expects the composition of branch management to be commensurate with the overall size and complexity of the foreign entity's federally regulated business in Canada. In contrast to the existing guidelines (which ascribe accountability for the branch's operations in Canada to the chief agent or principal officer, as the case may be), the new guideline looks to the foreign entity, through its designated branch management, for overall accountability.

- **Changes to Management:** Reporting obligations have been added in respect of branch management, which do not currently exist in respect of the chief agent or principal officer in the current guidelines. More specifically, the foreign entity must notify OSFI of any potential changes to the members of branch management and any circumstances that may adversely affect the suitability of any member of branch management.
- **Record Keeping:** The new guideline introduces updates to the record keeping requirements to align with upcoming amendments to the *Insurance Companies Act* (ICA) and the *Bank Act* (BA), which will come into force in July, 2021, and the ratification of the Canada-United States-Mexico trade agreement. For instance, unless exempted under the ICA or BA (in which case the branch must provide OSFI with immediate, direct, complete and ongoing access to records stored outside Canada), branches under the ICA must keep copies of the records at the chief agency of the foreign company in Canada. Again, unless exempt, complete copies of electronic records must be kept on a computer server physically located at either the chief agency (for a branch under the ICA) or at the principal office, or any other place in Canada that the principal officer thinks fit (for a branch under the BA).
- **Currency of Records:** Similar to the existing guidelines, records regarding the branch's business in Canada must be updated and accurate as at the end of each business day. Such records must be sufficiently detailed to enable OSFI to manage the branch's assets prior to the appointment of a liquidator (should the Superintendent take control of the branch's assets in Canada), and to enable a liquidator to conduct an effective liquidation of the branch's assets in Canada, if one is appointed.
- **Outsourcing to Home Office and Flow of Funds:** The new guideline adds a section on administration of the foreign entity's business in Canada. Although the requirement for written service level agreements in circumstances where the foreign entity's home office is performing material functions on behalf of the branch is not novel, OSFI has added a new requirement that arrangements involving flow of funds from the branch to home office be documented in detail, with such details to be provided to OSFI. In addition, OSFI expects to be provided with 30-days' advance notice of any proposed fund transfer(s) or series of proposed fund transfers to the foreign entity's home office that materially deviate from the documented process.
- **Delegation:** Specific references to the delegation of branch responsibilities to branch employees in the existing guidelines have not been incorporated into Draft Guideline E-4. Instead, the new draft guideline highlights OSFI's expectation that branch management be responsible for, and have the necessary authority to carry out, the overall management of the federally regulated business in Canada.
- **Compliance:** Of note, there is a continued emphasis on OSFI's expectation that there be a thorough understanding of and compliance with all applicable Canadian legislation, regulations, guidelines and any other supervisory or regulatory matters related to the foreign entity's federally regulated business in

Canada carried on through the branch.

The consultation closes on December 18, 2020, and the final new guideline is expected to be published in the spring of 2021. OSFI will also issue revised risk management and capital guidance at that time incorporating consequential amendments to remove references to chief agents and principal officers (and presumably to replace them with references to branch management).

by Darcy Ammerman, Carol Lyons and Shahnaz Dhanani (Articling Student)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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