



Advisory

Category: Regulatory & Legislative **NOTICE***

Subject: Insurance in Canada of Risks

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Introduction: Section 573 of the *Insurance Companies Act* (ICA) provides that a foreign entity shall not insure in Canada a risk unless it is authorized by order of the Superintendent to do so and the risk falls within a class of insurance that is specified in the order. Where a foreign entity has been granted such an order, every aspect of the insurance business that it carries on in Canada, including the insurance in Canada of risks, is subject to record keeping, vesting of assets and other requirements imposed by Part XIII of the ICA.

This Advisory provides guidance on indicia to consider in determining, for the purpose of the ICA, whether a foreign entity is insuring in Canada a risk (paragraph 2) and how OSFI will apply these indicia to a particular business model (paragraph 3). It also sets out certain circumstances where OSFI would generally consider a foreign entity to insure either in or outside Canada a risk (paragraphs 4 and 5).

Legislative Reference: Part XIII of the *Insurance Companies Act*.

Definitions: In this Advisory,

“agent” means a person with the authority to bind, or act in place of, a foreign insurer or a policyholder in relation to a policy;

“foreign insurer” means an entity incorporated or formed by or under the laws of a country other than Canada that insures risks, including an association and an exchange (as those terms are defined in section 571 of the ICA), and includes an agent acting on its behalf;

“insurance”, “insure” and “insuring” include reinsurance, reinsure and reinsuring, respectively, unless the context requires otherwise;

“policy” means any written contract of insurance, whether contained in one or more documents, and in the case of a foreign fraternal benefit society (as that term is defined in section 571 of the ICA), any contract of insurance whether evidenced by a written document or not and any certificate of membership relating in any way to insurance; and

“policyholder” means a prospective or current policyholder, and includes an agent acting on behalf of either.



Interpretation:

1. The ICA does not provide guidance on what constitutes “insuring in Canada a risk”. A review of case law indicates that courts have not interpreted the concept of “insuring in Canada a risk”, but have interpreted analogous concepts that encompass the undertaking of obligations by foreign entities such as “carrying on business in Canada” and “proper law of contracts”. The location where operations are carried out and where contracts are made is generally important in determining the location of a business. The jurisdiction with which a contract has its closest and most substantial connection is key to determining the “proper law”, unless the contract contains a governing law provision. A combination of certain indicia underlying both of these tests is relevant to the interpretation of the concept of “insuring in Canada a risk”.
2. The following four indicia are relevant in assessing the location where a foreign insurer insures a risk:
 - (a) the location where interaction leading to the formation or renewal of a policy takes place having regard to:
 - (i) the location of the policyholder when contacted and incited to apply for a policy¹,
 - (ii) the location where the foreign insurer receives an application for a policy,
 - (iii) the location of the person(s) who, on behalf of the foreign insurer, negotiates the terms and conditions of a policy,
 - (iv) the location of the person(s) who, on behalf of the foreign insurer, communicates an offer, or an acceptance of an offer, to provide or renew coverage,
 - (v) the location where the acceptance of an offer to provide or renew coverage is received by the foreign insurer, and
 - (vi) the location where the policyholder receives the policy (it is generally at that location that the insurance contract is made, renewed or significantly clarified);
 - (b) the representations made by the foreign insurer either in the course of the interaction leading to the formation or renewal of a policy, or in a policy,
 - (i) regarding the location from which it will interact with the policyholder in the performance of activities related to the policy², and
 - (ii) on whether it will, from that location, decide on all matters related to the policy³, or merely act as a liaison⁴ between the policyholder and another office that will decide on all these matters;

1 Contrast this activity with the one described in subparagraph 2(d), which is general in nature.

2 For example, where it will provide information about the policy and receive premium payments, claims and requests to amend coverage.

3 For example, decisions on the settlement and payment of claims and on requests to amend coverage.

4 In *Ruling 2004-07 – Foreign Bank Representative Offices – Asset management services*, OSFI expressed the view that a Canadian branch of a foreign bank is acting as a liaison where the branch merely acts as an information link or a “go-between” between a foreign office of the foreign bank and its Canadian clients, and does not make any investment decisions on behalf of the foreign bank.

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- (c) the jurisdiction with which the policy is most closely connected, without regard to any governing law provision, but rather having regard to:
- (i) the jurisdiction that requires the policyholder to obtain the coverage or that prescribes terms and conditions of the policy,
 - (ii) the location of the person, property or risk covered by the policy,
 - (iii) the location where decisions are made by the foreign insurer to provide, renew or amend the coverage, or to settle and pay claims, and
 - (iv) the location where the parties consider the risk to have been insured; and
- (d) the location where the foreign insurer promotes⁵ its insurance products, other than in the course of the activity referred to in clause (a)(i) above, having regard for the representations made in promotional material, and the location where the medium of communication used to carry out the promotion is primarily circulated, transmitted, broadcasted or otherwise accessed.
3. While each business model must be assessed on the basis of its own components, OSFI is of the view that:
- (a) the indicia in paragraph 2 are not necessarily exhaustive;
 - (b) the indicia in subparagraph 2(a) carry the most weight;
 - (c) where a particular activity in respect of a policy (e.g., the negotiation of the terms and conditions) occurs partly in Canada and partly outside Canada, the location where most of the material aspects of that activity occur should be regarded as the location where it occurs; and
 - (d) where in the course of the negotiations of the terms and conditions of a policy, the foreign insurer and the policyholder reach an agreement, actual or in principle, on most or all of the material terms and conditions, the location from which the person(s) who, on behalf of the foreign insurer, conducted the negotiations should be regarded as the location where the activities referred to in clauses 2(a)(iii) and (iv) occurred.

Examples:

4. OSFI would generally conclude that a foreign insurer is insuring in Canada a risk where its business model encompasses any one of the following four scenarios:

Scenario 1: Two or more of the activities referred to in any of clauses 2(a)(i) to (vi) occur in Canada.

Scenario 2:

- One of the activities referred to in any of clauses 2(a)(i) to (vi) occurs in Canada.
- The persons, properties or risks covered by the policies are located in Canada and the terms and conditions of the policies are prescribed by a Canadian law.
- The foreign insurer represents to policyholders that it will receive in Canada their premium payments.

⁵ In *Ruling 2004-07 – Foreign Bank Representative Offices – Asset management services*, OSFI acknowledged that promotion “encompasses activities in furtherance of the sale of a product or service”.

Scenario 3:

- One of the activities referred to in any of clauses 2(a)(ii) to (vi) occurs in Canada.
- The foreign insurer's insurance products are promoted through a medium of communication that is primarily circulated, transmitted, broadcasted or otherwise accessed in Canada.
- The foreign insurer represents to policyholders that it will, from Canada, interact with them in the performance of all activities related to their policies.

Scenario 4:

- One of the activities referred to in any of clauses 2(a)(ii) to (vi) occurs in Canada.
- The foreign insurer's insurance products are promoted through a medium of communication that is primarily circulated, transmitted, broadcasted or otherwise accessed in Canada.
- The policies are most closely connected to Canada because three of the indicia referred to in subparagraph 2(c) relate to Canada.

5. OSFI would generally conclude that a foreign insurer is insuring outside Canada a risk where its business model encompasses any one of the following two scenarios:

Scenario 1: None of the activities referred to in any of clauses 2(a)(i) to (vi) occur in Canada.

Scenario 2:

- No more than one of the activities referred to in any of clauses 2(a)(i) to (vi) occurs in Canada.
- There is no significant promotion in Canada of the foreign insurer's insurance products.
- The policies are most closely connected to a foreign jurisdiction because three of the indicia referred to in subparagraph 2(c) relate to the foreign jurisdiction.
- The foreign insurer represents to policyholders that:
 - (i) it will, from outside Canada, interact with them in the performance of all activities related to their policies; or
 - (ii) its office in Canada will merely act as a liaison between them and another office located outside Canada that will decide on all matters related to their policies.

Other Guidance:

6. Where a foreign insurer is not insuring in Canada a risk, the ICA does not restrict the foreign insurer from carrying on any activity or business in Canada. For example, it could carry on any insurance business in Canada that does not involve the insurance of a risk by it, such as providing underwriting, policy administration or product development services to other insurers.
7. For more information on how OSFI applies the guidance set out in this Advisory to specific circumstances, please refer to [Rulings](#) relating to insurance in Canada of risks posted on OSFI's website.

* Advisories describe how OSFI administers and interprets provisions of existing legislation, regulations or guidelines, or provide OSFI's position regarding certain policy issues. Advisories are not law; readers should refer to the relevant provisions of the legislation, regulation or guideline, including any amendments that came into effect subsequent to the Advisory's publication, when considering the relevancy of the Advisory.