Regulatory and legislative advisory

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Note:

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.

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 its insurance business in Canada, including the insurance in Canada of risks, is subject to record keeping, vesting of assets in trust in Canada and other requirements imposed by Part XIII of the ICA.

This Advisory provides guidance on key indicia to consider in determining, for the purposes 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 (paragraphs 3 to 5). It also provides guidance regarding other ICA and provincial and territorial insurance matters related to foreign entities (paragraphs 6 to 9).

Where a foreign entity is authorized to insure in Canada risks falling within the class of life insurance, this Advisory also applies in determining, for the purposes of the ICA, whether that foreign entity is issuing annuities and/or policies of endowment insurance in Canada. When applying the Advisory to such matters, it should be read with such modifications as the circumstances require (e.g., any reference to "insuring in Canada a risk" is to be read as a reference to "issuing annuities in Canada" and/or "issuing policies of endowment in Canada").

Legislative Reference:

Part XIII of the *Insurance Companies Act*.

Definitions:

In this Advisory,

"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);

"insurance", "insure", "insurer" and "insuring"

include reinsurance, reinsure, reinsurer and reinsuring, respectively; and

"policyholder"

means a prospective or an actual holder of an insurance policy, and includes a person acting for, or on behalf of, that prospective or actual holder.

Interpretation:

1. The ICA does not define "insuring in Canada a risk" which, when read in the context of Part XIII of the ICA, falls within the "insurance business in Canada" of a foreign insurer. A review of case law indicates that courts have not interpreted these concepts, but have interpreted the analogous concept of "carrying on business in Canada". Based on these interpretations, the location where operations are carried on is of significant importance in determining the location where business is carried on.

2. To determine whether a foreign insurer is insuring in Canada a risk, consideration should be given to whether any person acting for, or on behalf of, the foreign insurer[1]:

    a. promotes[2] the foreign insurer or the foreign insurer's insurance products through a medium of communication that is primarily circulated, transmitted, broadcasted or otherwise accessible in Canada (other than in the course of the activity referred to in subparagraph 2(b) below);

    b. directly incites a person located in Canada to request insurance coverage (where that person is specifically identified and targeted), and that person is provided with the opportunity and/or means with which to make a request for insurance coverage in the course of that activity (e.g., telemarketing, door-to-door solicitation, direct/targeted mail);

    c. receives in Canada a request for insurance coverage from a policyholder;

    d. negotiates from Canada the terms and conditions of insurance coverage;

    e. decides in Canada to bind the foreign insurer to insurance coverage;

f. communicates from Canada an offer to provide insurance coverage, or the acceptance of a request for insurance coverage[3], to a policyholder;

g. receives in Canada an acceptance of the foreign insurer's offer to provide insurance coverage from a policyholder;

h. receives in Canada payment for insurance coverage from a policyholder; and

i. interacts in Canada with the policyholder in the provision of services related to the insurance coverage (e.g., providing information about the coverage and receiving claims).

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; and

b. where an activity referred to paragraph 2 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.

4. OSFI considers that a foreign insurer is insuring in Canada a risk where its business model encompasses:

- Scenario 1: Two or more of the activities referred to in any of subparagraphs 2(b) to (h).
- Scenario 2: Any one of the activities referred to in any of subparagraphs 2(b) to (h) and both of the activities referred to in subparagraphs 2(a) and (i).
- Scenario 3: Reaching an agreement, actual or in principle, on most or all of the material terms and conditions of the insurance coverage in the course of its negotiations in Canada (i.e., this Scenario contemplates that, in addition to 2(d), at least one additional activity referred to in 2(e) through (g) would apply).

5. OSFI considers that a foreign insurer is not insuring in Canada a risk where its business model encompasses no more than one of the activities referred to in paragraph 2.

Other Guidance:

6. A foreign insurer that is authorized under the ICA to insure in Canada risks operates in Canada on a branch basis. That Canadian operation is not a separate legal entity. Therefore, depending on its business model, that foreign insurer may insure in Canada a risk (through its Canadian branch) **or** it may insure outside Canada a risk (through its head office or a branch located outside Canada), irrespective of the location of that risk. However, only risks that are insured in Canada are subject to the ICA regime. In the event that a foreign insurer becomes insolvent, the assets it has vested in trust in Canada under the ICA regime would be available to satisfy claims made under the *Winding-up and Restructuring Act* by holders of policies covering risks insured in Canada. In that regard, subsection 578(5) of the ICA will assist policyholders in determining whether they benefit from the protection afforded by the ICA, when dealing with foreign insurers. This provision will require a foreign insurer to set out or cause to be set out in legible characters in all premium notices, applications for policies and policies related to its insurance in Canada of risks, a statement that the document was issued or made in the course of its insurance business in Canada.

7. Where a foreign insurer is not insuring in Canada a risk, the ICA does not restrict that foreign insurer from carrying on any activity or business in Canada. Subject to other applicable Canadian laws, it could, for example, 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.

8. In Canada, the federal and provincial/territorial governments share jurisdiction over foreign insurers. While a foreign insurer may, for the purposes of the ICA, be considered not to be insuring in Canada a risk, its activities may cause that foreign insurer to require a license under one or more of the insurance statutes of the provinces/territories in Canada. For example, some of these statutes require a foreign insurer to obtain a license merely to promote its products in, insure a person domiciled or resident in, or provide insurance coverage on a property situated in the province/territory. Accordingly, OSFI recommends that foreign insurers consult these statutes and the agencies that administer them.

9. 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.

1 In determining whether a person is acting on behalf of a foreign insurer, reference should be made to the Canadian common law principles of agency, and where applicable, the *Civil Code of Québec*.

2 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".

3 If a policyholder is informed of the foreign insurer's acceptance only upon receiving the policy, then such acceptance is communicated through the issuance of the policy.