

OSFI Releases Much-Anticipated Guideline - E-4: Foreign Entities Operating in Canada on a Branch Basis

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On June 28, 2021, the Office of the Superintendent of Financial Institutions Canada (OSFI) released its much-anticipated guideline *E-4: Foreign Entities Operating in Canada on a Branch Basis* (Guideline E-4), which replaces guideline *E-4A: Role of the Chief Agent and Record Keeping Requirements* (Guideline E-4A). OSFI expects all foreign branches operating in Canada to comply with Guideline E-4 by January 2022.

While Guideline E-4 represents an important step toward further clarifying what is expected from a governance perspective of foreign branches of insurance companies operating in Canada, there is nothing within it that should fundamentally change the operations of most Canadian branches.

Guideline E-4 also represents a new focus on all of the individuals responsible for the management of the branch (Branch Management) instead of just the Chief Agent. OSFI appears to be imposing in Guideline E-4 a higher knowledge standard on Branch Management and has not tried to impose minimum qualifications on Chief Agents.

Guideline E-4 is also modernized to be harmonized and more consistent with other OSFI guidelines.

For your convenience, we have highlighted below some important practical takeaways from Guideline E-4:

1. **Branch Management to Have Collective Knowledge of Rules.** Composed of individuals who have the authority and responsibility of overseeing the branch's business in Canada, OSFI expects Branch Management, as a collective, to have sufficient knowledge of all applicable Canadian legislation, regulations, guidelines, and any other supervisory or regulatory matters related to the branch. OSFI does not expect any one individual to have all such knowledge. This is an important distinction, as it allows branches to maintain an effective Branch Management composition suited to their size and complexity where respective members of the Branch Management team can focus most on regulatory requirements specific to the businesses or operational units for which they are responsible.
2. **Branch Management to Have Collective Oversight.** OSFI expects Branch Management to have a comprehensive, in-depth understanding of the foreign entity's federally regulated business in Canada carried on through the Branch. OSFI expects Branch Management to be responsible for, and have the necessary authority to carry out, the overall management of that business in Canada.

In conducting its oversight activities, Branch Management should be satisfied that strategies, business plans, and policies are appropriate for the business in Canada and comply with relevant Canadian regulatory requirements. This is an important shift in responsibility to the Branch Management team collectively from being the Chief Agent's responsibility only – at least as interpreted from the outgoing Guideline E-4A.

3. **Documenting Material Arrangements with Home Office.** Where a branch's home office performs material functions on the branch's behalf, OSFI expects Branch Management to document such arrangements. In keeping with its principles-based oversight approach, OSFI does not provide prescriptive guidance on what is "material" for these purposes. This provides Branch Management the discretion to decide what is "material" based on the nature of the services; however, it is prudent to consult OSFI's *Guideline B-10: Outsourcing of Business Activities, Functions and Processes* to help determine materiality. Since branches are, technically, not a separate legal entity from their home offices, OSFI will allow Branch Management to document the arrangement in a way that makes sense for them – for instance, with a memorandum of understanding.
4. **Reduced Notice Period for Flow of Funds.** OSFI now provides for a 10-day notice period for fund transfers between a branch and its home office. This notice period is much shorter than the previous notice period, allowing for greater flexibility and responsiveness to intra-group operational needs with respect to such fund transfers.
5. **Records Maintained Daily in Canada.** For those records that branches are required to maintain in Canada pursuant to the *Insurance Companies Act* (Canada) (Records), OSFI requires them to be accurate at the end of each business day and in a state that (i) allows OSFI to conduct an examination and inquiry into the branch's business; (ii) allows 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 (iii) allows the liquidator to conduct an effective liquidation of the branch's assets in Canada. It is important to note that Records that update less frequently than daily only need to be updated when they change.
6. **Electronic Records Reproduced.** Where Records are in electronic form, OSFI requires them to be capable of being reproduced in intelligible form within a reasonable period of time. They must also be accessible and intelligible without incurring additional costs and using readily-available commercial applications. Practically, this means Branch Management should ensure such Records are stored in a readily accessible manner and format.
7. **Records Maintained Outside Canada.** Pursuant to Canada's obligations under certain trade agreements (like the *Canada-United States-Mexico Agreement*), some branches are permitted to maintain Records outside Canada. For instance, branches with home offices located in the United States may be permitted to maintain the Records in the United States. In these circumstances, OSFI requires immediate, direct, complete and ongoing access to such Records. Practically, this may mean that such Records are nevertheless still required to be maintained in a manner discussed at point #6 above.
8. **Branch Management to Inform OSFI of Issues and Changes.** OSFI expects Branch Management to promptly notify OSFI of substantive issues and changes affecting the management of the

branch's operations. This may mean Branch Management notifying OSFI of issues such as major shifts in the matrix reporting of Branch Management members and similar operational matters.

9. **Branch Management to Inform OSFI of Changes to Team.** As early as possible, OSFI expects to be informed of any potential changes to the members of Branch Management and any circumstances that may adversely affect their suitability (e.g. a departure of the branch's chief agent, chief actuary, chief financial officer, or general counsel).

Of note, OSFI has declined to make any significant changes or provide any significant new guidance with regard to the electronic storage of Records. Similarly, Guideline E-4 does not really recognize the effects of cloud computing, global IT platforms, and managing cyber security risks; however, we do expect additional OSFI guidance on technology risk in the coming months, which may very well complement the new Guideline E-4.

Interestingly, OSFI indicated in its letter enclosing Guideline E-4 that it is currently reviewing *Guideline B-10: Outsourcing of Business Activities, Functions and Processes*) as a separate policy initiative. There is no indication of when this initiative will be complete; however, we understand the target is the end of 2021 or early 2022. We will keep you posted on these developments.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.