Global Financial Services Regulatory Guide - Canada

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

To get started, select a topic from the list on the left side of the screen

# 1. Who regulates banking and financial services in your jurisdiction?

## Who regulates banking and financial services in your jurisdiction?

The federal and provincial governments share jurisdiction over various aspects of the financial services sector in Canada. While the federal government has sole jurisdiction over banks, the provinces regulate credit unions, mortgage brokers/dealers, loan and trust companies, securities dealers, mutual fund companies and distributors, credit unions and *caisses populaires*, and other financial services providers such as payday lenders. Both levels of government regulate insurance and trust and loan companies. The allocation of responsibilities is as follows:

The Bank of Canada is Canada’s central bank. It is an independent Crown corporation with considerable autonomy to manage the country’s financial system. The Bank of Canada is responsible for monetary policy in cooperation and consultation with the Department of Finance for central banking services, bank rates, currency, foreign exchange reserves and the administration of public debt. However, the Bank of Canada does not play any part in the regulation or daily administration of commercial banks in Canada.

In Canada, banks are federally regulated by the Bank Act and carry on business under the supervisory authority of the federal Office of the Superintendent of Financial Institutions (OSFI). Banks operating in Canada may be licensed as Schedule I (domestic Canadian banks), Schedule II (foreign bank subsidiaries in Canada) or Schedule III (foreign bank branches in Canada). A foreign bank that does not have a branch in Canada through which it conducts business may establish an approved representative office in Canada to promote services of the foreign bank in Canada and act as a liaison between the foreign bank and its customers and potential customers in Canada.

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) is Canada’s financial intelligence unit, an independent federal government agency that operates at arm’s length from law enforcement agencies. FINTRAC’s mandate is to analyze the information it collects from financial entities, intermediaries, and others to identify patterns of suspicious financial activity and to uncover associations among people and businesses linked to the patterns of suspected money laundering and terrorist financing. FINTRAC is responsible for registering money services businesses and their compliance with anti-money laundering and anti-terrorist financing requirements.

The Financial Consumer Agency of Canada (FCAC) is an independent body established by the federal government with a mandate to protect and inform consumers of financial products and services. The FCAC also oversees payment card network operators and their commercial practices.

Payments Canada (PC) is established under the Canadian Payments Act to establish, operate, and maintain systems for the clearing and settlement of payments among member financial institutions. It is Canada’s main financial market infrastructure for payments. The Bank of Canada and all chartered banks operating in Canada are required to be members of PC. Trust and loan companies, credit union centrals, federations of *caisses populaires* and other deposit-taking institutions, life insurance companies, as well as securities dealers and money market mutual funds that meet certain requirements are also eligible to be members. PC develops, implements, and updates the rules and standards that govern the clearing and settlement of payments between member financial institutions, and facilitate the interaction of its systems with other national and international payment systems and allow for the development of new payment methods. The Payment Clearing and Settlement Act gives the Bank of Canada the responsibility to oversee clearing and settlement systems for the purpose of controlling systemic risk or payments system risk.

# 2. What are the main sources of regulatory laws in your jurisdiction?

## What are the main sources of regulatory laws in your jurisdiction?

Financial services law in Canada is found in both federal and provincial laws and regulations, as well as in regulatory guidance from the financial regulators. Banks are federally regulated under the Bank Act, insurance companies are both federally and provincially regulated, and most other financial services are provincially regulated. Money laundering compliance is a matter of federal jurisdiction under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA). In June 2018, the Department of Finance announced proposed amendments to the PCMLTFA. The proposed amendments are expected to, among other things, update customer due-diligence requirements and beneficial ownership reporting requirements, allow the regulation of businesses dealing in virtual currency and update the foreign money service businesses regime. The Federal Interest Act includes certain rules regarding the charging of interest.

The insurance industry in Canada is highly regulated by both federal and provincial legislation. The federal government has jurisdiction over the licensing in Canada of foreign-incorporated insurance companies in Canada insuring risks, and it has paramountcy and exclusive jurisdiction over the financial stability and solvency matters relating to federally and foreign-incorporated insurance companies that insure risk in Canada. Provincial and territorial governments have jurisdiction over most other insurance matters, including the form and content of insurance contracts, business and marketing practices, agent and broker licensing, and the handling of premium money. Provincial regulation extends to all companies intending to do business in a particular province, regardless of whether they are incorporated under federal, provincial or foreign legislation.

Securities law matters are generally governed by provincial or territorial laws. There is no national securities regulator or legislation in Canada, but there are certain harmonized securities rules that have been adopted by all provinces and territories in the form of national instruments.

# 3. What types of activities require a license in your jurisdiction?

## What types of activities require a license in your jurisdiction?

A broad range of banking and financial activities require licensing or registration in Canada, either at the federal or provincial level, including the following:

Accepting deposits

Carrying on insurance business (life, property and casualty, etc.), including acting as an insurer, underwriter, agent or broker

Providing investment, fund management and financial advice, and engaging in investment management activities

Trading and distributing securities and other investments, including a broker or dealer

Dealing in, trading in, and administering mortgages and mortgage lending, including acting as a mortgage agent, broker, administrator or lender

Providing money services including dealing in foreign exchange; transferring funds from one individual or organization to another using an electronic funds transfer network or any other method; and cashing or selling money orders, traveler’s checks or anything similar

Providing payday loans as a lender or broker

Providing credit reports

Collecting debts on behalf of another

# 4. How do the licensing requirements apply to cross-border business in your jurisdiction?

## How do the licensing requirements apply to cross-border business in your jurisdiction?

**Banking**

Foreign banks that are not approved under the Bank Act are prohibited from undertaking any business in Canada, directly or indirectly, except in certain limited and expressly identified ways. Furthermore, any prohibited activity carried out by an agent or nominee in Canada on behalf of a foreign bank constitutes an activity of the foreign bank.

However, a foreign bank and its financial agent are not within the regulatory control of OSFI if they do not establish any physical presence in Canada and their business is not conducted in Canada. From a banking law perspective, there are generally no restrictions on residents of Canada engaging in offshore banking and becoming clients of a foreign bank that is not licensed in Canada, provided the foreign bank conducts business on an offshore basis and is not considered to be carrying on business in Canada. In order to avoid any Canadian banking regulatory compliance issues, the products and services of the foreign bank must be provided outside Canada, with no agent or representative of the foreign bank having a business presence in Canada or traveling to Canada to carry on business. Therefore, the value of utilizing an agent is limited in this context.

Generally, with respect to solicitation and marketing activities of a foreign bank in Canada, there is no law, regulation or other definitive guidance issued by OSFI or provided through jurisprudence to define precisely which activities, or combination of activities, would cause a foreign bank to be in contravention of the Bank Act in its dealings with Canadian residents. In its Ruling 2008-01, OSFI remarked that “in assessing whether a business is carried out in a jurisdiction, judicial decisions support the view that under the common law, promotional activities alone do not constitute carrying on business” and noted that the Bank Act “contains no provision that deems promotional activities to constitute the carrying on of business in Canada.” The Bank Act does, however, permit a foreign bank to advertise within Canada in respect of its facilities outside Canada, provided the foreign bank does not carry on the business of banking in Canada.

Although the treatment of e-commerce transactions in Canadian banking law is not entirely clear, a foreign bank that is not approved under the Bank Act should be able to offer certain financial services to residents of Canada electronically, provided that it does not carry on business in Canada, which would mean that its employees, representatives, agents and servers are located offshore.

A foreign bank that is not approved under the Bank Act cannot engage local agents to offer or provide products or services to residents of Canada. Any activity carried out by a nominee or agent of the bank in Canada is deemed to have been carried out by the foreign bank directly.

**Insurance**

There is some ambiguity as to what it may mean to carry on the insurance business in Canada. Ultimately it is a fact-driven analysis to determine whether or not a foreign insurer is carrying on business in Canada or insuring in Canada. In general, the federal Insurance Companies Act has no application to foreign insurers that are neither carrying on business in Canada nor negotiating and concluding insurance policies in Canada, directly or indirectly.

Provincial insurance law generally provides more specific restrictions on the activities of foreign insurers and their agents engaged in business with Canadians. Provincial regulation extends to all companies that do business in a particular province, regardless of whether they are incorporated under federal, provincial or foreign legislation. Specifically, provincial insurance regulation includes the form and content of insurance contracts, business and marketing practices, agent and broker licensing and conduct, and the handling of premium money.

For example, the Insurance Act of Ontario regulates the business of insurance in Ontario and requires every insurer undertaking insurance in Ontario or carrying on business in Ontario to obtain and hold a license. It is restrictive in its approach to unlicensed foreign insurers and their agents and representatives marketing to residents of Ontario. The Act requires that unlicensed insurance is to be effected outside Ontario and without any solicitation whatsoever in Ontario, directly or indirectly, on the part of the insurer or an agent or representative of the insurer.

Even without a business presence in Ontario, a foreign insurer will be deemed to be carrying on business in Ontario within the meaning of the Insurance Act if such insurer, its employees, agents or other representatives market or solicit insurance products in Ontario, issue or deliver a policy of insurance in Ontario, or collect or receive premiums in Ontario. Furthermore, a foreign insurer will be deemed to be undertaking insurance in Ontario if it maintains an action or proceeding in Ontario in respect of a contract of insurance.

**Securities**

Generally, in Canada, entities in the business of dealing or transacting in securities are required to register in some capacity as a dealer unless an exemption from registration is available. Interpretation of Canadian securities laws takes a broad approach to the concepts of “trading,” “securities,” “advising” and “acting in furtherance of a trade,” so most activities involving securities of a company are caught in one way or another, including on a cross-border basis. Often, international dealers and/or international advisers are able to benefit from the international dealer exemption and/or international adviser exemption, which is available across Canada, provided certain eligibility criteria are met.

**Other financial services**

Other provincial financial services statutes that require licensing may apply regardless of the location of the financial services provider if the customer is located within the province. This is particularly true for consumer transactions.

# 5. What are the requirements to obtain authorization in your jurisdiction?

## What are the requirements to obtain authorization in your jurisdiction?

The requirements to obtain a required license or registration vary according to the particular financial service in question and the type of license or registration sought.

In general, OSFI will assess a wide range of factors, including ownership and financial strength, business plan, structure, proposed activities, credit products and underwriting criteria, trading and investment strategy, information technology environment, risk management controls, internal audit practices, regulatory compliance management, and exit strategy in the event that the financial institution is unable to execute its business plan.

# 6. What is the process for becoming authorized in your jurisdiction?

## What is the process for becoming authorized in your jurisdiction?

The incorporation of a bank or federally regulated trust and loan company involves a three-phase process:

Phase 1 (Pre-Application) – This involves initial discussions with OSFI, submission of preliminary information (ownership and financial strength, business plan, credit products and underwriting criteria, trading and investment strategy, information technology environment, etc.), business plan discussion with OSFI, and receipt of a letter from OSFI outlining its expectations regarding material risks or concerns and additional information requirements.

Phase 2 (Letters Patent) – This involves submission of a notice of intention to apply for Letters Patent (to inform the public) in a form approved by OSFI setting out the name, geographical location/jurisdiction of the applicant, proposed name of institution, and a brief description of proposed activities; submission of formal application including information about ownership and financial strength, including capitalization, business plan, management, risk management, board of directors and committees, internal audit, regulatory compliance management, information technology, and other requirements such as proposed name, by-laws, non-refundable service charge, etc. The institution comes into existence on the date provided in the Letters Patent when issued.

Phase 3 (Order) – The institution may only commence business once an Order providing for the same is issued by the Superintendent. Once Letters Patent have been issued, and before an Order is made by the Superintendent, OSFI must be satisfied that the institution has the necessary systems, management structure, control processes and regulatory compliance systems in place. The Order may impose conditions or limitations on the business to address supervisory or regulatory concerns.

A similar approval process exists for a foreign bank intending to operate in Canada as a branch (full service or lending), consisting of a pre-notice period, a post-notice period and an order permitting a foreign bank to establish a branch in Canada. In the case of a full-service branch, the foreign bank will generally not be permitted to accept “retail” deposits, defined for this purpose as amounts less than CAD 150,000, and it is generally required to maintain assets on deposit with a Canadian financial institution approved by the Superintendent equal to at least 5% of branch liabilities or CAD 5 million, whichever is greater.

Some restrictions can be objective and set by the Superintendent as stipulations in return for a license. The application process for banking approval is heavily dependent on the intended purpose of the bank, the proposed structure, the benefit provided to the industry and the overall viability of the proposal.

# 7. What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

## What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

Canada has no financial services “passporting” arrangements with any other jurisdiction. However, international securities dealers and advisers may be able to deal with certain Canadian-permitted clients as long as certain eligibility criteria are met and filing and fee payments are made.

# 8. Authors and Contact Information

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