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# Ruling

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**Category:** Foreign Banks

**NOTICE\***

**Subject:** Business in Canada – Financing program

**No:** 2004 - 04

**Issue:** The issue was whether a foreign bank, which proposed to set up a financing program with a Canadian entity pursuant to which it would acquire loans made in Canada by the Canadian entity, would be engaging in or carrying on business in Canada, and therefore subject to Part XII of the *Bank Act* (BA).

**Background:** A foreign bank (FB) that is controlled by a foreign commercial entity (FCE) proposed to enter into an agreement with a Canadian finance entity (Finco) to offer a financing program (the Program) to support the sale, in Canada, of the FCE's products. Under the Program, Canadian retailers would refer all customers in need of financing for the purchase of the FCE's products to Finco. Finco would process, analyze and provide financing to customers that meet the criteria developed by the FB in consultation with Finco. The FB's name and the FCE's logogram would appear on Finco's financing arrangements. The FB would generally purchase a 100-per-cent interest in all outstanding financing arrangements originated by Finco under the Program. Customers in Canada would continue to make payments on their loan or credit facility to Finco in Canada. Finco would perform all accounting and administrative functions related to servicing these loans and credit facilities, for which the FB would compensate Finco. To facilitate this process, the FB would maintain two bank accounts in its name in Canada: a purchase account to facilitate the payment of participating interests to Finco, and a collection account in which Finco would deposit all amounts collected in respect of financing arrangements made by Finco under the Program.

**Considerations:** The BA provides that a foreign bank shall not, by itself or through a nominee or agent, engage in or carry on any business in Canada, except as permitted by Part XII of the BA.

The BA does not provide guidance on the factors that OSFI may take into account in determining whether a foreign bank is engaging in or carrying on business in Canada. As such, in making its determination, OSFI generally assesses the particulars of each case against factors comparable to those often considered by judicial bodies in interpreting the concept of "carrying on business in Canada" under other statutes such as the *Income Tax Act*. Furthermore, since the particulars of each case can vary, OSFI will assess only those factors that it considers relevant to the case at issue.

In this case, OSFI considered the following factors to be relevant to its determination:

**1. *Where the agreements would be executed***

The agreement between the FB and Finco setting out the framework for the Program would be negotiated in Canada and outside Canada, but it would be executed outside Canada. However, all financing arrangements between Finco and its customers under the Program would be executed in Canada.

**2. *The location of the operation***

The FB would have no office, place of business or establishment in Canada. However, Finco would operate the Program from its offices in Canada.

**3. *Where the services would be delivered and paid***

The purpose of the Program would be to provide, in Canada, financing for the purchase of the FCE's products. Finco would provide all of the financing from Canada. To facilitate the financing process, the FB would maintain two bank accounts in its name in Canada: a purchase account and a collection account.

**4. *Where the Program would be marketed***

Canadian retailers that sell and service the FCE's products in Canada would market the Program to their customers in Canada.

**5. *The nature of the involvement of the FB in the Program***

OSFI noted the following particulars in relation to the FB's involvement in the Program:

- (a) the credit evaluation standards to be used by Finco would be developed by the FB in consultation with Finco;
- (b) Finco would do a credit review of each credit applicant in accordance with these standards and notify the FB of all credit decisions;
- (c) the FB would have the power to override instances where Finco had rejected a credit application;
- (d) the financing terms (e.g. interest rate, payment schedule) as well as the form of Finco's financing arrangements would be agreed on by the FB and Finco;
- (e) the name of the FB and the logogram of the FCE would appear prominently on Finco's financing arrangements;
- (f) Finco's customers would acknowledge and agree to Finco transferring the financing arrangement to another entity, including the FB;
- (g) the FB would purchase a 100-per-cent interest in the receivables owing under each financing arrangement originated by Finco under the Program; and
- (h) following the FB's acquisition of the 100-per-cent interest in the receivables, Finco would perform in Canada, on behalf of the FB, all accounting and administrative functions related to servicing the loans and credit facilities.

**Conclusion:** On account of the FB's significant involvement in the design and implementation of the Program, its acquisition of a 100-per-cent interest in the receivables owing under each financing arrangement originated by Finco under the Program, the significant visibility of the FB's name on Finco's financing arrangements, and the requirement that customers agree to Finco assigning the financing arrangements to the FB, OSFI concluded that the FB would be engaging in, or carrying on, business in Canada through Finco, a nominee of the FB. Therefore, OSFI concluded that the FB would be required to comply with Part XII of the BA.

**Legislative References:**

Subsection 510(1) of the BA provides that, except as permitted by Part XII of the BA, a foreign bank or an entity associated with a foreign bank shall not:

- (a) in Canada, engage in or carry on any business that a bank is permitted to engage in or carry on under the BA, or any other business;
- (b) maintain a branch in Canada for any purpose;
- (c) establish, maintain or acquire for use in Canada an automated banking machine, a remote service unit or a similar automated service, or in Canada accept data from such a machine, unit or service; or
- (d) acquire or hold control of, or a substantial investment in, a Canadian entity.

Subsection 510(2) of the BA provides that, for the purposes of Part XII of the BA, a foreign bank is deemed to be carrying out or to have carried out anything prohibited by subsection 510(1) if it is carried out by a nominee or agent of the foreign bank acting as such.

**Table of Concordance:** Other federal financial institution legislation does not contain similar provisions.

<p>* Rulings describe how OSFI has applied or interpreted provisions of the federal financial institutions legislation, regulations or guidelines to specific circumstances. They do not negate the need to obtain any necessary approval of the transaction under the relevant federal financial institutions legislation. Rulings are not necessarily binding on OSFI's consideration of subsequent transactions as these transactions may raise additional or different considerations. Legislative references in a Ruling are not meant to substitute provisions of the law; readers should refer to the relevant provisions of the legislation, regulation or guideline, including any amendments that came into effect subsequent to the Ruling's publication.</p>
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