Ruling

Category: **Foreign Banks** **NOTICE***

Subject: **Business in Canada – Credit card activities**

No: **2011 – 02**

Issue: The issue was whether the undertaking of certain activities in Canada in support of a foreign bank's (FB) credit card program (the Program) would cause the FB to engage in or carry on, directly or through a nominee or agent, business in Canada for the purposes of Part XII of the *Bank Act* (BA).

Background: The FB proposed to extend the Program that it offers to U.S. corporate clients to include their Canadian affiliates. The FB had, and would continue to have, no office or other establishment in Canada. The FB would, from outside Canada, negotiate, execute and deliver the Program agreements. In certain cases, representatives of a Canadian affiliate would participate in the negotiations from Canada, but in all cases, the participating representatives of the FB would be outside Canada. Furthermore, the FB would not promote in Canada the Program and all of the FB's decisions relating to the Program, including credit granting decisions, would be made outside Canada.

Under the extended Program, employees of the Canadian affiliates would receive Canadian dollar credit cards (the Cards) produced and issued by the FB from outside Canada. To efficiently fulfill its obligations relating to the Cards, the FB proposed to enter into an arrangement with a third party Canadian credit card issuer (CI) under which the CI would facilitate the processing, clearing and settlement of Card transactions. As a part of this arrangement, the FB proposed to make deposits in accounts with the CI to settle its payment obligations arising from the Card transactions. The FB also proposed to use these accounts to receive Card payments from the Canadian affiliates. In addition, the FB proposed to arrange occasional visits to Canada by its representatives to explain the features of the Program to employees of the Canadian affiliates.

All other services relating to the Program, including the production and the issuance of account statements based on information received from the CI and the reception and processing of requests for Cards, would be performed outside Canada by the FB.

Considerations: The BA provides that an FB shall not, by itself or through a nominee or an 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 an FB 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 considered by judicial bodies in interpreting the concept of "carrying on business in Canada" under other statutes such as the *Income Tax Act*, keeping in mind that policy considerations under other statutes may not be the same as under the BA.

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

1. ***Where the elements leading to the formation of the agreements would take place***
   The FB would, from outside Canada, negotiate, decide to enter into, execute and deliver all Program agreements.

2. ***Where the operations would be carried out***
   The FB had, and would continue to have, no office or other establishment in Canada.

3. ***Where the services would be delivered and paid***
   All Program services relating to Canadian affiliates would be performed outside Canada, other than:
   (a) the processing, clearing and settlement services provided to the FB by the CI in respect of Card transactions with the use of the FB's funds on deposit with the CI;
   (b) the reception by the CI of Card payments from Canadian affiliates; and
   (c) the occasional visits to Canada by representatives of the FB to explain features of the Program to employees of the Canadian affiliates.

4. ***Where the Program would be marketed***
   The FB would only promote the Program outside Canada.

5. ***The relationship between the activities in Canada and outside Canada***
   The activities described in 3(a) and (b) above, which would be carried out by the CI, would merely be to assist the FB in fulfilling obligations it undertook entirely in the context of its credit card business outside Canada. The activity described in 3(c) above would be a customer support function of an occasional nature related to those obligations.

Conclusion: OSFI concluded that the undertaking of the activities in Canada noted above in support of the Program would not cause the FB to engage in or carry on business in Canada.[1] The services of the CI in respect of the FB, including the provision of accounts by the CI, as well as the FB's occasional customer support visits would merely be more efficient ways for the FB to fulfill obligations that it undertook from outside Canada. None of these would constitute separate profit-making activities for the FB.

Consequently, there was no need to examine whether the CI was acting as the FB's agent or nominee.

[1] This is consistent with OSFI's view regarding the activities of the payment agent in *Ruling 2007-01* entitled *Business in Canada – Access to the Canadian capital market* and with the Federal Court's view regarding the activities of the plaintiff in *Pullman* v. *R.*, [1983] C.T.C. 52 (F.C.T.D.).

Legislative References: Paragraph 510(1)(a) of the BA provides that, except as permitted by Part XII of the BA, an FB shall not, in Canada, engage in or carry on any business.

Subsection 510(2) of the BA provides that an FB is deemed to be carrying out or to have carried out anything prohibited by subsection (1) if it is carried out by a nominee or an agent of the FB acting as such.

Table of Concordance: The *Insurance Companies Act*, the *Trust and Loan Companies Act* and the *Cooperative Credit Associations Act* do not contain similar provisions.