The ‘Law & Practice’ sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.
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Stikeman Elliott LLP offers insurance sector clients an unsurpassed combination of top-tier corporate, regulatory, transactional and litigation expertise. Our lawyers are at the forefront of the insurance industry, working on the insurance transactions, cases and issues that are impacting the sector. Our Insurance & Reinsurance Group excels at complex corporate transactions in the insurance sector, including M&A and public offerings. We have handled virtually every regulatory issue that insurance companies may encounter and our depth of experience allows us effectively and efficiently to meet the needs of our domestic, US and international clients. Our insurance litigators provide coverage advice on large, complex insurance disputes, and, when necessary, defend such disputes. We have particular expertise in class actions and precedent-setting disputes that may threaten the operations, reputation or even future prospects of our insurance sector clients. Clients include major Canadian and international insurers and reinsurers, underwriters at Lloyd’s, insurance brokers and agents and investment banks. We also advise governments, government agencies and major US and global industry associations on groundbreaking legislative and regulatory developments in Canada. Our offices are located in Toronto, Montreal, Ottawa, Calgary, Vancouver, New York, London and Sydney.

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1. Regulation

1.1 Regulation of Insurers and Reinsurers

Overview

Canada has a federal system of government, in which jurisdiction over insurance and reinsurance regulation is divided between the federal government and the governments of each of the 13 provinces and territories. Generally, the national regulator, the Office of the Superintendent of Financial Institutions (OSFI), conducts prudential regulation. OSFI is a robust, global-level regulator that plays a leading role in all the key international financial services regulatory organisations (the International Association of Insurance Supervisors (IAIS), Basel, etc).

The provincial regulators, which are similar to US state departments or commissioners of insurance, principally regulate market conduct and the licensing and supervision of insurance intermediaries such as agents, brokers and adjusters. The provincial regulators together comprise an umbrella group called the Canadian Council of Insurance Regulators (CCIR), similar to the National Association of Insurance Commissioners in the United States. There is also an umbrel-
la group of insurance intermediary regulators, the Canadian Insurance Services Regulatory Organizations (CISRO). The principal industry associations are the Canadian Life and Health Insurance Association (for the life industry) and the Insurance Bureau of Canada (for the property and casualty industry). A number of large commercial carrier groups’ operations in Canada have also recently formed their own advocacy group, the Global Commercial Carriers Association. There are industry-run guarantee funds for the property and casualty insurance sector (the Property and Casualty Insurance Compensation Corporation, or PACICC) and the life insurance sector (Assuris), to which property and casualty or life insurers, respectively, must belong.

In some provinces, insurance brokers and agents are regulated in the same fashion and by the same regulator. In other provinces — for example, Ontario — agents are regulated by a government regulator, the Financial Services Commission of Ontario (FSCO), while brokers are regulated by a self-regulatory body, the Registered Insurance Brokers of Ontario (RIBO). In some provinces, all regulation of intermediaries is carried out by self-regulatory organisations with delegated powers.

The insurance regulatory laws of the provinces, other than Quebec, are relatively uniform and are based on common law principles. The laws of Quebec are structured differently and are based on a European-style civil code system.

Most of the largest Canadian insurers are incorporated under a federal Canadian law called the Insurance Companies Act (the Federal Act) and are prudentially regulated by OSFI, which also prudentially regulates licensed Canadian branches of foreign insurers. A number of smaller insurers are incorporated under provincial law and prudentially regulated by provincial regulators.

In the provinces of British Columbia, Saskatchewan and Manitoba, compulsory minimum private automobile insurance is provided by a monopoly government insurer.

In general terms, all contracts of insurance and reinsurance are regulated. However, certain types of quasi-insurance contracts (for example, extended warranty contracts) are, at common law or by administrative practice, not regulated as insurance contracts in some provinces. In addition, the enrolment of individuals under group insurance contracts is, in most provinces, not regulated as an activity requiring licensing as an intermediary.

All insurers and reinsurers must be licensed, federally and provincially, subject to certain exceptions for foreign companies. Insurers and reinsurers are generally regulated in the same way, although certain exceptions apply for reinsurers, given their lack of direct interaction with consumers.

Both OSFI and certain provincial regulators, particularly the Quebec Autorité des marchés financiers (AMF), are very active at the IAIS level and Canadian capital and market conduct requirements are broadly consistent with, and in many cases significantly exceed, international capital requirements and IAIS Insurance Core Principles (ICPs). There have been no insolvencies or bailouts of insurers in Canada since the onset of the global financial crisis in 2008.

The Federal Act imposes a comprehensive set of operating requirements and limitations for Canadian federal insurance companies, including in relation to corporate governance, investments, transactions with related parties, payment of dividends, issuance of shares for consideration other than cash, issuance of debt obligations and other material or fundamental transactions.

Canadian federal insurance companies and foreign branches must provide corporate and financial information to OSFI on an ongoing basis, including annual audited financial statements and quarterly and annual financial and business returns. OSFI’s continuing supervision includes analysis of this information and regular examination of companies. OSFI has implemented a risk-based methodology for assessing Canadian federal insurance companies and branches, known as its Supervisory Framework. In applying the Supervisory Framework, OSFI considers the inherent risks of the business and the quality of risk management for each significant activity.

Other than in respect of private passenger automobile insurance rates in certain provinces, there is no rate or form filing/approval required in Canada.

Indemnity and Assumption Reinsurance
Certain limitations and restrictions apply to indemnity reinsurance (ordinary course reinsurance) and assumption reinsurance (“transfer and assumption” or “block of business” transactions similar to a UK Part VII transfer).

In relation to indemnity reinsurance for federal companies and foreign branches, OSFI approval is required for reinsurance with an unlicensed affiliate.

For the Canadian ceding company or branch to obtain Canadian regulatory capital credit for amounts reinsured with unlicensed reinsurers, the unlicensed reinsurer must typically also deposit assets with a Canadian financial institution custodian under a reinsurance security agreement. Ceding companies can also obtain letters of credit as security for certain of their reinsurers’ obligations or utilise certain “funds withheld” arrangements.

Each insurer’s reinsurance arrangements must comply with a Reinsurance Risk Management Policy, which must be devel-
opposed and adopted by the insurer pursuant to OSFI Guideline B-3.

In relation to assumption reinsurance, for federal companies, the Minister of Finance’s approval is required under the Federal Act for assumption reinsurance of all, or substantially all, of a Canadian company’s Canadian business and the Superintendent’s approval is required for assumption reinsurance of less than substantially all of a Canadian company’s Canadian business. Superintendent approval is also required for a licensed Canadian branch of a foreign insurer to cause itself to be reinsured, on an assumption basis, against any of the risks undertaken under its policies.

In all cases, the assuming reinsurer must be a Canadian federally regulated entity or, in certain cases, a Canadian provincially regulated entity. In the case of a Canadian company, shareholder and/or policyholder approval may be required.

In the case of a true novation (a “transfer” in Canada), no approval is required. Notice to the Superintendent, however, is required if the policies being transferred constitute all or substantially all of the company’s policies.

There is no Canadian equivalent to UK “statutory novation” and consequently in an assumption reinsurance, the transferring company technically remains residually liable to the policyholders. Policy liabilities, however, can be removed from the books of the transferring company and are instead recorded on the books of the assuming company.

2. Distribution

2.1 Insurance and Reinsurance Products

Overview

A wide variety of distribution channels are utilised in the Canadian market, including a variety of broker models (as described above), independent life insurance agents, tied life and property and casualty agents, and direct distribution via the internet. Overall, the broker channel is more prevalent in retail lines than in other similar markets, such as the UK, and aggregators have much less market penetration than in other similar markets.

Several of the large Canadian banks have significant “ban-cassurance” models through regulated insurer subsidiaries, but Canadian banks are prohibited from distributing most property and casualty insurance products through their branches and, effectively, through their websites.

Licensing

Agents and brokers must be licensed by the applicable provincial insurance intermediary regulator. In most provinces, legal entities must be licensed, in addition to the individual brokers or agents they employ. For individuals, the application process includes, generally, passing qualifying examinations, obtaining the sponsorship of one or more insurers, meeting certain educational or experience credentials or qualifications, obtaining minimum errors and omissions insurance, and the completion of background or police checks.

In Ontario, wholesale brokers (that do not deal directly with the public) are not required to be licensed; however, most other provinces require licensing of all intermediaries, including wholesalers.

Insurance adjusters must also be licensed by provincial insurance regulatory authorities and, typically, are similarly required to pass certain qualifying examinations, have and maintain certain educational or experience requirements or credentials and be sponsored, employed or supervised by an adjusting company. Individual adjuster employees of insurers are not required to be licensed.

Third-party administrators and other persons performing purely clerical, administrative or adjudicative functions are generally not required to be licensed in most provinces.

Reinsurance brokers are also not required to be licensed.

In Ontario, registered travel agents acting in respect of travel accident and sickness, baggage or trip cancellation insurance are also not required to be licensed. Certain other exemptions exist under the Insurance Act (Ontario) (the Ontario Act) from the agent licensing requirements and similar exemptions are found in the licensing provisions of most of the other common law provinces, including:

- a collector of insurance premiums who does not solicit applications or act or aid in negotiating insurance contracts, if the collection fee does not exceed 5% of any amount collected;
- an officer or employee of the head office of an insurer who solicits life and accident and sickness insurance on behalf of the insurer and who does not receive any commission; and
- a transportation company, or officer or employee of a transportation company, when acting as an agent for an insurer with respect to travel insurance, accident and sickness insurance or baggage insurance.

In addition, in many provinces, the administrative practice is not to require licensing of persons enrolling individuals under group creditor insurance coverage.

Quebec law also provides an exemption from licensing for a unique category of market intermediaries known as “distributors.” A distributor is a person who offers or arranges for insurance as an accessory to the goods the distributor
sells, including, in particular, travel insurance, vehicle rental insurance (if the rental period is less than four months), credit and debit card insurance, and replacement insurance (property insurance under which the insurer guarantees the replacement of the insured vehicle or insured parts). Insurers are permitted to offer insurance products through distributors, which include, among others, travel agents, banks and trust companies. The distributor and the insurer have disclosure obligations to the client and there are filing and approval requirements with the Quebec regulator.

Ownership Limitations
In Quebec, financial institutions and their affiliates are prohibited from acquiring more than 20% of the voting shares of an intermediary firm that acts through individual damage insurance brokers.

Operating Requirements
The key ongoing requirements for insurance brokers and agents are filing annual returns and/or renewal documentation, maintaining required levels of errors and omissions insurance, complying with minimum continuing education requirements (for individual registrants) and maintaining a designated broker or agent with certain education and experience qualifications or credentials (for corporate or partnership registrants).

There are similar requirements for adjusters.

There are no ongoing requirements for third-party administrators in most provinces.

3. Overseas Firms Doing Business

3.1 Overseas-Based Insurers and Reinsurers

Overview
In order for a non-Canadian insurance company to carry on insurance business in Canada, it must comply with the licensing and other requirements of the Federal Act and the applicable insurance legislation in each province/territory where it wants to carry on business. It is accordingly, in each case, a question of interpretation as to whether the proposed activities of the insurer in relation to Canada/the province/territory fall within the applicable definition of carrying on insurance business in Canada/the province/territory; put another way, whether there is a sufficient activity connection or nexus to Canada/the province/territory to require licensing under the Federal Act or the applicable provincial/territorial insurance legislation. In some cases, a foreign insurer can readily insure, from outside Canada, a risk located in Canada, without being required to be licensed under the Federal Act or the applicable provincial/territorial legislation.

Insuring on an Unlicensed Basis — Canadian Federal Regime

Under the Federal Act, a non-Canadian insurance company “shall not insure in Canada a risk” unless it is authorised to do so pursuant to an order made by OSFI under the Federal Act. The extent to which a non-Canadian insurance company’s activities in respect of Canada constitute the company “insuring in Canada a risk” is, as noted above, a factual matter dependent on all the facts and circumstances of the proposed arrangements.

In this regard, OSFI has published an Advisory (the “Advisory”), most recently revised in May 2009, which sets out detailed criteria for determining whether a company’s business model would, in OSFI’s view, constitute insuring in Canada a risk (thus requiring licensing). The Advisory focuses on the extent to which the insurance business activity (solicitation, underwriting, servicing, etc) occurs within Canada and not whether the risk is located in Canada.

Section 2 of the Advisory sets out the criteria to be considered, as follows.

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:

• promotes 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);
• 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 (eg, telemarketing, door-to-door solicitation, direct/targeted mail);
• receives in Canada a request for insurance coverage from a policyholder;
• negotiates from Canada the terms and conditions of insurance coverage;
• decides in Canada to bind the foreign insurer to insurance coverage;
• communicates from Canada an offer to provide insurance coverage, or the acceptance of a request for insurance coverage, to a policyholder;
• receives in Canada an acceptance of the foreign insurer’s offer to provide insurance coverage from a policyholder;
• receives in Canada payment for insurance coverage from a policyholder; and
• interacts in Canada with the policyholder in the provision of services related to the insurance coverage (eg, providing information about the coverage and receiving claims).
Sections 4 and 5 of the Advisory set forth OSFI’s view, as follows, of the mixes of those activities that would constitute “insuring in Canada a risk” (thus requiring licensing) vs “not insuring in Canada a risk” (thus not requiring licensing).

Section 4 - OSFI considers that a foreign insurer is insuring in Canada a risk where its business model encompasses the following:

• 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 (ie, this Scenario contemplates that, in addition to 2(d), at least one additional activity referred to in 2(e) through (g) would apply).

Section 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.

Thus, in certain cases, it is possible for a foreign insurer to structure its business model with sufficiently minimal connection to Canada such that, under the Advisory, it could insure a risk located in Canada without being required to be licensed under the Federal Act. This business model is quite common for the coverage of certain niche types of large commercial risks such as aviation and aerospace risks, and also quite common for reinsurance, and would entail effecting the solicitation, negotiation, binding, etc outside Canada.

Insuring on an Unlicensed Basis — Canadian Provincial/Territorial Regimes (Generally, and Ontario Specifically)

The interplay between the Federal Act and the various provincial/territorial insurance Acts is nicely summarised in Section 8 of the Advisory, as follows: “In Canada, the federal and provincial/territorial governments share jurisdiction over foreign insurers. While a foreign insurer may, for the purposes of the Canadian Act, be considered not to be insuring in Canada a risk, its activities may cause that foreign insurer to require a licence 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 licence 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.”

In Ontario, for example, under the Ontario Act, the scope of carrying on insurance business in Ontario is defined very broadly so as to encompass virtually any activity associated with the business of insurance. Those activities include if the insurer in Ontario:

• “maintains or operates, either in its own name or in the name of its agent or other representative, an office for the transaction of the business of insurance either in or out of Ontario”;
• “distributes or publishes or causes to be distributed or published any proposal, circular, card, advertisement, printed form or like document” (in respect of which, the Ontario regulator noted in a 2004 decision that “the Act does not specify the subject matter of the distributed or published documents, but we think it ought to be something that is in aid of, or in the hope or expectation of, the transaction of the business of insurance”);
• “makes or causes to be made any written or oral solicitation for insurance”;
• “issues or delivers any policy of insurance”;  
• “collects or receives or negotiates for or causes to be collected or received or negotiated for any premium for a contract of insurance”;
• “inspects any risk or adjusts any loss under a contract of insurance”; or
• “prosecutes or maintains an action or proceeding in respect of a contract of insurance”.

That said, as under the federal test, it may be possible for a foreign insurer to structure its business model with sufficiently minimal connection to Ontario such that, under the Ontario Act, it could insure risk located in Ontario without being required to be licensed under the Ontario Act.

The licensing triggers in most provinces/territories are similar to those in Ontario; however, in a number of provinces (particularly British Columbia, Alberta, Manitoba and Quebec) in certain circumstances, licensing is required to insure a risk or person located in the applicable provinces. Consequently, in order to determine whether licensing would be required at the provincial/territorial level, it is necessary to examine the type and circumstances of the risk and the relevant provinces in question. Even if no licensing is required in the applicable provinces, in some provinces only a specially licensed broker can place coverages with an unlicensed insurer and additional procedures/documentation may be required. Significant additional federal and provincial taxes can also apply on insurance placed with unlicensed insurers as opposed to licensed ones. Lastly, the provincial regulators have requested (through the CCIR) that foreign companies with licensed branches voluntarily undertake that, to the extent they write risks that would require provincial licensing, they will do so in a fashion that would constitute “insuring in Canada a risk” under the Advisory. By taking this approach, the business would be required to be reported in the licensed branch.
4. Transaction Activity

4.1 Mergers and Acquisitions Activities
Consolidation of the Canadian property and casualty insurance market has continued in recent years, with major transactions including Aviva Canada’s 2016 acquisition of RBC General and the entering into of a long-term distribution partnership with RBC Insurance, and Intact Insurance’s 2015 acquisition of Canadian Direct Insurance from Canadian Western Bank. There have also been a number of significant brokerage transactions, including Wawanesa’s 2017 acquisition of Western Financial Group from Desjardins.

Carrier and broker acquisitions are expected to continue over the next decade, driven by the need for scale, access to new distribution channels and emerging underwriting and distribution technologies powered by big data and advances in artificial intelligence (AI)/machine learning. Consolidation has also occurred as a result of global merger transactions (ACE/Chubb, XL/Catlin, Liberty/Ironshore, etc). The currently proposed acquisition of Genworth Financial by the China Oceanwide group would (subject to regulatory approval) result in an indirect change of control of Genworth’s Canadian mortgage insurance subsidiaries, the first such acquisition of control of a Canadian financial institution by a PRC acquirer.

Major Canadian and international private equity funds and pension plans are also expected to continue to be active investors and acquirers in the Canadian insurance sector in relation to insurers and distribution and services platforms.

There have also been a number of substantial life insurance sector M&A transactions in recent years, although these are much less frequent than in the property and casualty insurance sector.

5. Insurtech

5.1 Insurtech Development and Collaborations
In general, the same products and trends (big data, AI/machine learning, blockchain, etc) are emerging in Canada as in other major markets, as described in the March 2017 IAIS Report on Fintech Developments in the Insurance Industry. In particular, aggregator sites, activity-based health insurance products and (as described in 6.1 Risks and Regulator’s Responses to Risks) auto insurance telematics and usage-based insurance (UBI) offerings are slowly becoming more popular.

To date, Canadian Fintech activity has focused more on the banking and payments sectors than on insurance. However, most of the leading life and property and casualty (P&C) insurers are actively collaborating with or investing in Fintech/Insurtech start-ups and a number of the leading P&C players have established or collaborate with innovative digital “garages” or accelerators. A number of leading Canadian insurers have also partnered with pre-eminent technology firms (Google, Uber, etc) in the launch of the Vector Institute, a global-scale AI research hub in downtown Toronto.

5.2 Regulator’s Response to Insurtech Issues
Canadian insurance and financial services regulators are keenly following Fintech/Insurtech developments, although they face the types of challenges described in the IAIS report. The Canadian Securities Administrators (the umbrella organisation of the country’s 13 securities regulators) has established a “regulatory sandbox” similar to those in the UK and other jurisdictions, and the Quebec AMF has an active Fintech working group focused on analysing Fintech innovations and anticipating regulatory and consumer protection issues. At the federal level, as noted in 8.1 Promoting Alternative Risk Transfer, two of the key focuses of the current federal financial sector review exercise are (i) Fintech powers of financial institutions and (ii) Fintech collaboration.

6. Emerging Risks and New Products

6.1 Risks and Regulator’s Response to Risks
As in many advanced markets, in recent years a number of new insurance products have become available to protect against new and emerging threats.

- Cyber threats: cyber and privacy breach coverages are now widely available and frequently placed.
- Flood/water damage: a greatly increasing risk reflecting, among other things, the impact of extreme weather. Over the last few years, most major property and casualty carriers have begun offering personal lines overland water protection, in response to market demand and opportunity following a number of significant floods in major urban centres. As described below, the CCIR’s Personal Property Insurance Working Group has recently released an initial Issues Paper and a follow-up Finding Reports and Position Paper outlining its expectations and recommendations relating to natural catastrophe risk and the Canadian personal property insurance marketplace.
- M&A representations and warranties: as in the USA, representations and warranties coverage for M&A transactions is enjoying a notable resurgence in its current “Version 2.0” incarnation, with many carriers and managing general agents (MGAs)/brokers entering or re-entering the market.
- Sharing economy and usage-based risks: a number of auto carriers have introduced specialised auto coverages for ride-sharing platforms and their drivers, and regulators in Ontario and Alberta have adopted new rules for such coverages/markets. Relatedly, most private passenger auto carriers have introduced some form of telematics/usage-based coverage, although, to date, there has not been wide-
spread take-up of such coverages. Such UBI coverages are tightly regulated and in Ontario, for example, can only be used for rate discounting purposes, not increases. Other “on-demand” property and casualty coverages increasingly available in other markets are also expected to be launched in Canada in the short to medium term. 

- Legal expenses risks: several years ago, a new, start-up monoline legal expenses insurance (LEI) carrier entered the market, which at that time was virtually undeveloped in comparison to European countries. This carrier, and several other MGAs, have recently been actively underwriting/distributing “after-the-event” LEI covering litigation plaintiffs.

- Longevity risks for pension plan sponsors: as in the UK, there has increasingly been interest from pension plan sponsors in “de-risking” their plans through longevity insurance/reinsurance solutions (as well as potentially through derivatives). OSFI has issued administrative guidance outlining its regulatory expectations in this regard. In far by the largest such transaction, in 2015, BCE, the parent company of the Bell Canada telecom group, entered into a CAD5 billion longevity insurance transaction with a Canadian life insurer, which was heavily reinsured to two locally licensed life reinsurers.

7. Recent and Forthcoming Legal Developments

7.1 Legal Developments and Impact
As discussed below in respect of regulatory developments.

8. Other Developments

8.1 Promoting Alternative Risk Transfer
Over the past year there have been a number of significant regulatory developments in Canada, at the federal and provincial/CCIR levels.

Federal
Financial Sector Framework Consultation
Under the federal financial institutions statutes (the Federal Act, the Bank Act, etc), sunset provisions historically automatically required Canadian federal financial institutions to cease carrying on business at the end of successive five-year periods, with the next such expiry occurring in 2017. In the 2016 federal budget, that expiry was extended until 2019 to facilitate a customary process of review and updating of the statutes, and in August 2016, the Department of Finance released a consultation paper, with comments due in November 2016. The consultation paper outlined three core policy objectives guiding financial sector policy and framed the review around those objectives: (i) stability, (ii) efficiency and (iii) utility. Submissions received were to inform the development of a policy paper for further consultation in 2017. The paper also surveyed the Canadian financial services landscape, including in respect of life insurers, and key trends and environmental factors, including:

- the macroeconomic backdrop;
- increased concentration;
- internationalisation of Canadian financial institutions; and
- Fintech.

The paper also included five questions for consideration against that background and the policy goals.

In August 2017, the Department of Finance released the follow-up consultation paper, expressing the government's positions and requesting further input on a number of topics arising out of the first paper, including:

- Fintech powers of financial institutions;
- Fintech collaboration;
- infrastructure investment powers for life insurers;
- a number of corporate governance matters, including the possibility of adopting a "comply or explain" model to promote the participation of women on the boards of directors and in senior management of financial institutions;
- potential financial system-wide risks of an extreme earthquake;
- the insolvency regime for life insurers; and
- a number of miscellaneous technical statutory amendments.

At the time of writing, comments were due on 29 September 2017.

OSFI Corporate Governance Review and Branch Guideline Review
OSFI is engaged in a broad review of its corporate governance guidance contained in a variety of its publications. This latest initiative was described in a speech delivered by the Superintendent in 2016, in which it was noted that OSFI is seeking to create conditions for boards to “raise their game” on governance. OSFI is specifically intending to streamline expectations of boards and better adapt its expectations to reflect the varying size, complexity and risk profile of institutions, in order to allow boards to concentrate on the prudential responsibilities “that truly matter.” The effort is focused on principles-based regulation, on the view that effective governance cannot be achieved by box-ticking, while acknowledging that principles-based regulation can be even more challenging for institutions than rules-based regulation.

OSFI has particularly noted that many directors feel inundated with massive meeting materials that do not meet the directors’ needs and that create a risk that the board gets
stuck in the weeds and loses sight of key prudential risks. Such huge board packages can also be indicative of a board’s inability to control or gain traction with senior management.

Following a 2015 consultation with boards, OSFI is now actively reviewing all board expectations set out in its more than 60 guidelines. It intends to prune, simplify and gather all the expectations in a revised Corporate Governance Guideline, to create a “one-stop shop” approach to governance. An annex is to be added to the revised Guideline containing more detailed expectations for large/complex institutions. OSFI began further consultations with the industry and boards in connection with this in late 2016.

Relatedly, OSFI has for some time been in the process of significantly updating and revising its Guideline E-4A — Role of the Chief Agent and Record Keeping Requirements, which sets out OSFI’s expectations for branch governance. An update to that Guideline is long overdue and it was expected that a draft of the revised Guideline would have been released for public consultation some time ago; however, that process is on hold pending completion of the larger corporate governance exercise, which will then inform the branch process. For many years there has been a sense in the Canadian industry that branches had it much easier from a governance standpoint than Canadian-incorporated insurers and that there was consequently an unlevel playing field in favour of branches, which resulted in, among other things, most new entrants to Canada establishing operations by way of a branch rather than a subsidiary.

It is expected that Guideline E-4A will be modernised to ensure that expectations for branch governance are consistent with governance principles found elsewhere in the OSFI Guidelines, including particularly the revised Corporate Governance Guideline. This update is also likely to address:

- heightened expectations for chief agents, including standards respecting competencies and expectations regarding time and resources;
- risk oversight and management; and
- new expectations for home offices of branches.

It is not expected that there would be many changes with respect to electronic record-keeping (ie, cloud computing) as guidance on that topic still needs to be developed more generally for all federally regulated institutions.

OSFI Guideline E-21 on Operational Risk Management

In August 2015, OSFI released for review a new draft Guideline on best practices in Operational Risk Management. The final version was published in June 2016. The Guideline provides consolidated guidance for operational risk management across all federally regulated institutions and is consistent with OSFI’s Corporate Governance Guideline as well as reflecting international risk management standards. In the Guideline, operational risk is defined as the risk of loss resulting from people, internal or failed internal processes and systems, or from external events. OSFI expects all institutions to have a framework for operational risk management and to have fully implemented the new Guideline and demonstrated adherence to the four high-level principles outlined in the Guideline by June 2017. Those principles are:

- operational risk should be integrated into overall risk management programmes and with appropriate documentation;
- operational risk management should support the overall corporate governance structure;
- institutions should ensure effective accountability for operational risk; and
- institutions should ensure comprehensive identification and assessment of operational risk. Management of operational risk should also form part of an institution’s ORSA (Own Risk and Solvency Assessment) required under OSFI Guideline E-19.

OSFI Supervisory Focus on Related Party Reinsurance

Significant quota share reinsurance with unlicensed reinsurers (particularly affiliates) continues to be a significant OSFI supervisory concern and focus, and was highlighted in speeches delivered by the Superintendent in June 2015 and September 2016. OSFI is concerned about counterparty credit risk and lack of capital in Canada or Canadian "skin in the game," notwithstanding that such reinsurance must be fully collateralised in accordance with OSFI’s requirements in order for Canadian cedents to obtain regulatory capital credit.

OSFI New Capital Guideline for Life Insurance Companies (LICAT)

Effective 1 January 2018, life insurers will be subject to a new Capital Guideline, the LICAT, which will replace the former Minimum Continuing Capital and Surplus Requirements (MCCSR) Guideline. The LICAT will impact capital requirements for individual companies, but is not expected to impact the industry as a whole. OSFI’s objective in adopting the LICAT was to address key issues with the MCCSR and develop a new capital framework leading to an overall improvement in the quality of available capital, greater risk sensitivity, better measurement of certain risks and closer alignment of risk measures with economic realities. The LICAT is very different from the MCCSR and it is expected that LICAT ratios will behave very differently from MCCSR ratios. The LICAT’s key new concept is the Base Solvency Buffer, the amount of assets a life insurer needs to hold to meet its regulatory requirements over and above the assets required to back its actuarially determined policyholder liabilities. The LICAT is largely consistent with Solvency II and the proposed new Insurance Capital Standard (ICS) being
developed by the IAIS. Foreign life insurers that operate in Canada as branches are subject to the Life Insurance Margin Requirements and Adequacy of Assets Test (LIMAT) set out in Chapter 12 of the LICAT Guideline.

P&C Demutualisation Framework and Process
Regulations respecting the demutualisation of federal property and casualty insurers were finalised in 2015 and the Economical Mutual Insurance group is proceeding through the required process. Court-appointed committees are negotiating the allocation of financial benefits resulting from the proposed demutualisation and the company is preparing a conversion proposal. The proposal, including the negotiated allocation, must be submitted to OSFI by 22 February 2018.

Provincial/CCIR
CCIR Harmonised Market Conduct Statement
In late 2016, the CCIR finalised the form of a new annual information return required to be filed by insurers regarding their governance, practices and policies with respect to the fair treatment of customers. The Annual Statement was developed by the CCIR as a harmonised approach to improve the understanding and assessment of the insurance marketplace and insurer conduct. The first filings were due from most insurers in May 2017. The establishment of the required filings and forms followed a long consultation and negotiation with the industry.

CCIR Travel Health Insurance Products Position Paper
In July 2016, the CCIR's Travel Insurance Working Group released a Travel Health Insurance Products Issues Paper for public consultation. The Issues Paper outlined the CCIR's current view of the Canadian travel health insurance marketplace and focused on the identification and assessment of potential issues impacting consumer protection and the fair treatment of customers, including issues relating to:

- product design;
- marketing and sales;
- involvement of third-party service providers;
- claims management and complaints;
- education and training of sellers; and
- data collection.

The CCIR Travel Insurance Working Group was formed in 2014 in response to growing concerns over public confidence in travel health insurance and the manner in which it is manufactured and distributed. The Working Group conducted a thorough review and survey of the Canadian travel health insurance market in 2015 and the Issues Paper reflected its findings. The purpose of the Issues Paper was to build a common base of understanding of topics and issues, stimulate discussion and launch a consultation process that would help to achieve the fair treatment of customers. Submissions to the CCIR were due in September 2016.

In May 2017, following further consultation, the Working Group released a follow-up Position Paper outlining proposals for enhanced consumer protection in the design and delivery of travel health insurance. Overall, the CCIR concluded that Canada has a strong and reliable travel insurance market; however, from the comprehensive review that was undertaken to enhance the understanding of the issues and concerns raised, it was the CCIR's conclusion that there are opportunities for improvements to be made within the travel insurance marketplace, especially in the fair treatment of consumers. It also observed that key stakeholders in the industry are taking a proactive approach to improve the consumer experience to ensure improved confidence in the product. The industry has collectively come together to propose certain possible solutions and the CCIR acknowledged the engagement of the industry in this regard, and it will continue to work with those stakeholders.

The Position Paper focused on the same areas as the Issues Paper and set out a number of recommendations in each of those areas. While acknowledging the value of the consultation and commending a number of existing industry initiatives, the CCIR recommendations called for a somewhat more extensive reform of existing practices than was generally envisaged by the stakeholders. In particular, the CCIR appeared to be less confident than industry participants that alleged consumer confusion can be best addressed via education, rather than improvements in the design of insurance products themselves. In a related development, the Travel Health Insurance Association of Canada, the Canadian travel health industry association, recently released a new Travel Insurance Bill of Rights and Responsibilities.

CCIR Natural Catastrophes and Personal Property Insurance Issues Paper and Position Paper
In July 2016, the CCIR's Personal Property Working Group released an Issues Paper summarising its understanding of the impact of natural catastrophes — particularly floods, wildfires and earthquakes — on the personal property insurance marketplace in Canada. Following a review of the submissions received in response to a number of questions posed in the paper, the CCIR would then be better positioned to determine what work, if any, was required to ensure acceptable levels of consumer protection and an innovative and competitive marketplace for personal property insurance in Canada. Comments were due in September 2016. In July 2017, the CCIR released a follow-up Findings Report and Position Paper presenting the results of the consultation and outlining its positions and expectations on the topics, including in relation to:

- risk-modelling;
- risk-sharing;
- climate change;
- insurance coverages in the market; and
The CCIR Electronic Commerce Committee continues to work with key officials and stakeholders on the implementation of optional electronic proof of auto insurance. Implementation has recently been delayed to address certain concerns raised by provincial privacy regulators. The CCIR expects that the option will be available to drivers by the end of 2017.

**CCIR Segregated Funds Issues Paper**

In May 2016, the CCIR Segregated Funds Working Group released a Segregated Funds Issues Paper for public consultation. The Issues Paper sets out the CCIR’s preliminary understanding with respect to the comparative regulatory frameworks in Canada for segregated funds/individual variable insurance contracts (IVICs) and mutual funds, including current and potential gaps that may need to be addressed to ensure the protection and fair treatment of customers. The Issues Paper also reviewed the current international focus on the regulation of financial products and the fair treatment of customers and recent changes to disclosure rules for mutual funds, and requested responses from stakeholders on a number of specific questions. The purpose of the Issues Paper was to outline the regulatory frameworks for IVICs and mutual funds, and identify gaps that exist in the regulation of these products; insurance regulation of IVICs is principles-based, while securities regulation of mutual funds is rules-based. The objective of the regulatory harmonisation of these two sectors is not to create identical frameworks, but instead to harmonise outcomes, with the ultimate outcome being that customers are treated fairly. Submissions were due in July 2016. At the time of writing, a follow-up Position Paper was targeted to be released in autumn 2017.

**Financial Services Commission of Ontario Restructuring into the Financial Services Regulatory Authority of Ontario**

In June 2016, the Ontario Minister of Finance released the Final Report of an expert review panel considering the mandate of FSCO and the Ontario Financial Services Tribunal. The final recommendations of the panel were generally similar to those in its November 2015 Preliminary Position Paper. Principally, the FSCO was proposed to be replaced by a new body, the Financial Services Regulatory Authority of Ontario (FSRA) and the panel believed “radical change is required.” The proposed FSRA is to operate on a cost recovery basis, with the ability to recruit outside the public service collective agreements, more like provincial securities commissions, particularly the Ontario Securities Commission. FSRA is to be headed by a chief executive officer with three divisional superintendents (market conduct, prudential oversight and pensions) and its governance structure is to include a board of directors. Each of its three divisions is to publish an annual “statement of approach” outlining how it intends to fulfil its mandate. There is intended to be a focus on consumer protection, with an “Office of the Consumer” created to encourage market transparency. Enforcement is also intended to be emphasised. FSRA will continue to be responsible for auto insurance rate review/approval — ideally to de-politicise a politicised process — but additional government input and legislation will be required to address improved auto rate regulation. Finally, the Financial Services Tribunal would have increased authority, resources and independence. The process of establishing FSRA is under way, with the necessary legislation passed in June 2017 and three initial directors appointed.

**Saskatchewan Insurance Act Updating**

Extensive amendments to The Saskatchewan Act are expected to come into force in 2018. The main focus of the updated Act is to enhance consumer protection by aligning Saskatchewan’s insurance legislation with the regulatory framework in Alberta and British Columbia. Notable changes in the new Act include:

- specific market conduct rules regarding payments, disclosure and the role of intermediaries with respect to the insurance contract;
- a requirement to identify provisions in an insurance policy where the amount payable for a loss will be reduced, in contrast to current wording, “this policy contains a clause which may limit an amount payable”;
- limits on an insurer’s ability to void a policy for alleged fraud after the first two years following issuance of the policy;
- a prohibition on the sale or trade-in of a policyholder’s life insurance policy (viatical settlements), unless specifically permitted by the regulations;
- a new regulatory regime for intermediaries, including separate licensing categories for managing general agents and third-party administrators;
- additional requirements for insurers and managing general agents to carry out screening of any applicants that they recommend for an agent’s licence; and
- a licensing exemption for employers and unions that offer extended health benefit plans, subject to certain regulatory requirements.

**Quebec Position Paper on Distribution Incentives**

In July 2017, the AMF released an issues paper intended to further discussions on the risk of certain types of compensation incentives negatively impacting the fair treatment of customers and on the control and supervision mechanisms that should be implemented to mitigate such risks. The paper surveys the common types of incentives and categorises each as perceived higher or lower risk. It also contains specific questions for stakeholders. At the time of writing, comments were due in October 2017.