

February 2020

As the “New NAFTA” Approaches Ratification, “Regulated Foreign Entities” Should Anticipate Stricter Record-Keeping Requirements

In late January 2020, the House of Commons introduced Bill C-4, *An Act to implement the Agreement between Canada, the United States of America and the United Mexican States*, which passed second reading on February 6, 2020. Bill C-4 is set to ratify the successor to the North American Free Trade Agreement (“**NAFTA**”): the Canada-United States-Mexico Agreement (“**CUSMA**”).¹

While much of NAFTA remains in CUSMA, the new agreement will bring some notable changes for organizations. This bulletin sets out particular amendments relevant for “regulated foreign entities,” which, as described below, include certain banks and insurance companies.

Overview of CUSMA, or the “New NAFTA”

NAFTA renegotiations began in 2017 and member states informally agreed to new terms in September 2018. On November 30, 2018, Canada, the United States and Mexico formally signed onto CUSMA,

¹ While NAFTA’s successor agreement is referred to as USMCA in the United States and T-MEC in Mexico, the legal Canadian name of the agreement is CUSMA: Global Affairs Canada, [Canada - United States - Mexico Agreement \(CUSMA\)](#), 2018-11-30.

and each country began its respective domestic process towards ratification and implementation. Mexico was the first country to ratify CUSMA in June 2019, followed by the United States on January 29, 2020, leaving Canada as the only country yet to ratify the deal. Currently, the Standing Committee on International Trade in the House of Commons is undertaking a pre-study of Bill C-4 and has invited Canadians to submit their views and recommendations regarding CUSMA.²

CUSMA retains much of NAFTA. For example, while CUSMA departs from NAFTA on its wording around cross-border intellectual property issues, both agreements' essential intellectual property elements substantially overlap. However, substantial differences between the agreements also exist. For example, under CUSMA, Canadians should anticipate increased North American automobile content, removal of British Columbia's wine sale restriction, and increased access to Canadian dairy, poultry and egg products for the United States.

This bulletin describes further notable amendments to the federal *Bank Act* and *Insurance Companies Act* that Bill C-4 will bring into force.

Consequential Amendments to the Bank Act and Insurance Companies Act

Bill C-4 will bring into force 13 amendments to the *Bank Act* and 12 amendments to the *Insurance Companies Act*. These amendments stand to impose stricter record-keeping requirements on "regulated foreign entities", defined as an entity that is (a) incorporated or formed otherwise in a country or territory, other than Canada, in which a trade agreement listed in Schedule IV of the *Bank Act* is applicable, and (b) subject to financial services regulation in that country or territory. A proposed Schedule IV to the *Bank Act* is included in Bill C-4, which may be amended from time to time by order of the Governor in Council.

² Standing Committee on International Trade, *Subject Matter of Bill C-4, An Act to implement the Agreement between Canada, the United States of America and the United Mexican States*, 2020-02-05.

Of particular note, once Bill C-4 is ratified and CUSMA becomes law, if the Superintendent of Financial Institutions is of the opinion that he or she does not have immediate, direct, complete and ongoing access to the corporate records or central securities register of a bank, bank holding company, insurance company or insurance holding company that is a subsidiary of a regulated foreign entity, he or she may direct the entity to maintain a copy of the records or register in Canada. On the other hand, if the Minister of Finance is of the opinion that it is not in the national interest for the regulated foreign entity not to maintain records in Canada, then the Superintendent must direct the entity to maintain a copy of its records or register in Canada. These amendments represent potentially significant changes for regulated foreign entities doing business in Canada.

The amendments do not specify, however, the format in which records must be maintained (e.g. print, electronic, etc.). Bill C-4 simply provides that the Governor in Council may make regulations respecting records, papers and documents to be retained, including “what constitutes immediate, direct and ongoing access” over them.

The existing *Bank Act* and *Insurance Companies Act* specify only that mandatory records must be maintained at the relevant Canadian entities’ head office or another place in Canada as the directors see fit. Under these Acts, such records must also be available for examination by specified parties during usual business hours, must be open for director inspection at all reasonable times and may be electronic if they are reproducible in intelligible written form within a reasonable time. The transitional provisions in both Acts grant the Minister residual discretion to allow a Canadian entity to maintain its records and register outside of Canada.

Takeaways

CUSMA has yet to become law; however, regulated foreign entities should analyze their record-keeping practices and develop a contingency plan for when Bill C-4 receives royal assent. Although Bill C-4 does not specify how copies of corporate records or a central securities register should be maintained in Canada, other federal legislation suggests that regulated foreign entities should be

prepared to develop a records and register maintenance plan that readily allows for verification of compliance with the Superintendent's directions.³

by Darcy Ammerman, Grace Shaw, Eleanor Rock (Articled Student),
and Joshua Sved (Articled Student)

For more information on this topic, please contact:

Ottawa	Darcy Ammerman	613.691.6131	darcy.ammerman@mcmillan.ca
Vancouver	Grace Shaw	236.826.3064	grace.shaw@mcmillan.ca

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2020

³ For example, under the *Excise Act, 2001*, SC 2002, c 22, "books and records must be maintained in an appropriate form and contain sufficient information to allow for the verification of a person's compliance with the [legislation]" (see Canada Revenue Agency, [9.1.1 – General Requirements for Books and Records](#), November 2003).