

# Guidance

Interpretation

Approach

Information

Decision



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## Interpretation of Sections 237 & 238 of the *Insurance Act* and Sections 1(1) and 2(1)(5) to 2(1)(8) of Regulation 7/00 *Unfair or Deceptive Acts or Practices* and Approach to Supervision [Take All Comers Rule]

### Purpose

The Financial Services Regulatory Authority of Ontario (“**FSRA**”) is issuing this Interpretation & Approach Guidance (the “**Guidance**”) to replace and reaffirm, where applicable, the Financial Services Commission of Ontario’s (“**FSCO**”) Bulletin No. A-01/09: Automobile Insurance Quoting and Underwriting Practices (the “**2009 Bulletin**”). Specifically, this Guidance provides FSRA’s interpretation of the TAC Rule (as defined below) that any conduct by an insurer which hinders consumers from acquiring automobile insurance, particularly where consumers are dissuaded or forced to abandon a request for a quote, which is the critical part of the contract for automobile insurance coverage, constitutes a declination to issue a contract within the meaning

of s. 237(1) and s. 238(1) of the *Insurance Act* (the “**Act**”).<sup>1</sup> Such conduct may, depending upon the specific circumstances, also result in a contravention of s. 1(1), s. 2(1)(5) to s. 2(1)(8) of Regulation 7/00 *Unfair or Deceptive Acts or Practices* (“**UDAP**”), which along with s. 237(1) and s. 238(1) of the *Act*, is collectively referred to as the “Take-All-Comers Rule” (the “**TAC Rule**”).<sup>2</sup>

FSRA is issuing this Guidance to:

- i. emphasize and remind insurers offering private passenger (“**PPA**”) and non-private passenger (“**Non-PPA**”) automobile insurance (“**Insurers**”) and their officers, employees, agents and brokers (where applicable), of the prohibition against Insurers contravening their filed and approved underwriting rules
- ii. identify how certain practices and conduct in Ontario’s automobile insurance market (the “**Market**”) lead to consumer outcomes which contravene s. 237(1) and s. 238(1) of the *Act* and UDAP, particularly due to the use of current technology in Insurers’ automobile underwriting processes

## Scope

This Guidance affects individuals, Insurers and or other entities writing, selling or dealing with automobile insurance in Ontario.

## Rationale and background – All

A key objective of Ontario’s private passenger automobile insurance regulatory regime (the “**Regulatory Regime**”) is to ensure consumers can readily access an important and mandatory (with respect to non-optional coverages) product necessary for the operation of an automobile on

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<sup>1</sup> FSRA will continue to recognize the practice initiated at FSCO of not requiring Insurers to use filed underwriting rules for making decisions with respect to insuring a “fleet”. However, the prohibitions with respect to prohibited factors set out in s. 237(1) of the *Act* and in UDAP continue to apply to the underwriting and distribution of insurance for automobile fleets.

<sup>2</sup> For greater clarity, the use of the word “Rule” in “Take-All-Comers Rule” and “TAC Rule” is not a reference to a rule created by FSRA under the *FSRA Act* (as defined herein).

Ontario's roads and highways, which could not otherwise be achieved without the ready ability to purchase or renew automobile insurance which:

- is just and reasonably priced
- provides adequate protection against the risk of damage caused by the use and ownership of an automobile

This consumer-focused objective is reflected in the following statutory objects pursuant to the *Financial Services Regulatory Authority of Ontario Act, 2016* (the "**FSRA Act**"):

- contribute to public confidence in the insurance sector
- deter deceptive or fraudulent conduct, practices and activities by insurance sector participants
- promote high standards of business conduct
- protect the rights and interests of consumers
- foster a strong, sustainable, competitive and innovative insurance sector<sup>3</sup>

A key feature of the Regulatory Regime is FSRA's approval of risk classification systems and rates which govern Insurers' pricing practices for the purpose of determining what constitutes a just and reasonable insurance premium for consumers.<sup>4</sup>

Insurers operating in Ontario are obliged to file their automobile insurance underwriting rules with FSRA for approval. FSRA reviews such filings in accordance with applicable Rules under the *Act* and its regulations, which include the prohibited factors that an Insurer cannot utilize in its underwriting rules. Once approved by FSRA, Insurers are then legally required to strictly adhere to the FSRA approved underwriting rules in selling or renewing automobile insurance to consumers.

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<sup>3</sup> Adopted from FSRA's statutory objects, as set out in s. 3(1) and s. 3(2) of the *FSRA Act*.

<sup>4</sup> Note: FSRA has retained in force the Ontario Insurance Commissioner's 1993 order which exempts the Non-PPA categories of automobile insurance from the Rules prescribed by s. 410 and s. 411 of the *Act*.

Underwriting rules establish the sole basis upon which an Insurer must determine whether to decline to issue a new or renewed automobile insurance policy or endorsement, or to alter an existing automobile insurance policy. If a consumer applies to an Insurer, directly or indirectly through an agent, aggregator or broker, and requests a quote for automobile insurance, the Insurer must provide a quote consistent with its approved underwriting rules. In the case of the PPA category of automobile insurance, the Insurer must also make such a determination in accordance with its FSRA approved pricing methodologies.

The 2009 Bulletin expressed to insurance sector participants that certain Insurer practices in the Market constituted a violation of the TAC Rule, by creating difficulty for consumers to receive timely quotes or purchase automobile insurance. Specifically, the 2009 Bulletin described practices and conduct where Insurers were effectively not providing an automobile insurance quote to a consumer in circumstances where the Insurer was legally obliged to provide such a quote in accordance with its approved underwriting rules. In some cases, Insurers were applying prohibited or unapproved factors in contravention of UDAP. These Insurer practices resulted in amendments to the *Act* and UDAP in 2010 to strengthen the pre-existing prohibition of Insurers using unapproved underwriting rules.

### **Examples of insurer non-compliance:**

FSRA has been made aware of the existence of a number of practices in the Market which contravene the TAC Rule. Specific examples of Insurer non-compliance identified by FSRA include, but are not limited to, avoiding issuing automobile insurance quotes to individuals who:

- experienced a prior accident benefits loss, including individuals who were not at fault for the prior accident such as passengers and pedestrians
- were not purchasing a property policy (e.g. homeowners insurance)
- reside in certain Ontario municipalities
- had less than one year of history as an insured under an automobile insurance policy in Canada

# Legislative rules and interpretation

S. 237(1) and s. 238(1) of the *Act* constitute the main part of the TAC Rule provisions and state:

*s. 237(1) If so required by the regulations and unless the insurer has complied therewith, an insurer shall not decline to issue or terminate or refuse to renew a contract in respect of such coverages and endorsements as may be set out in the regulations or decline to issue, terminate or refuse to renew any contract or refuse to provide or continue any coverage or endorsement on any ground set out in the regulations.*<sup>5</sup>

*s. 238(1) An insurer shall not decline to issue, terminate or refuse to renew a contract or refuse to provide or continue a coverage or endorsement, except on a ground filed with the Chief Executive Officer under this section.*

The object of the *Act* is to protect the financial interests of consumers.<sup>6</sup> The basic scheme of the *Act*, which is structured around numerous regulations that impose limits on how Insurers can contract with consumers, supports this broader object and is consistent with a textual reading of the purpose of s. 237(1) and s. 238(1), which is to ensure Insurers' compliance with applicable regulatory limits prescribed for automobile insurance.

The phrase “*shall not decline to issue... a contract*” in both s. 237(1) and s. 238(1) of the *Act* has a common plain meaning, being that an Insurer must issue an automobile insurance contract unless the Insurer is relieved of such an obligation by subsequent language in s. 237 and s. 238. Indeed, while the phrase “*decline to issue... a contract*” in s. 237(1) and s. 238(1) is not defined in the *Act*, it must be interpreted largely and liberally and considered<sup>7</sup> having regard to the statutory scheme of the *Act* and FSRA's statutory objects, specifically in a manner that best protects the rights and interests of consumers, promotes high standards of business conduct and contributes to public confidence in the insurance sector.

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<sup>5</sup> S. 237(1) refers to the list of prohibited factors set out in s. 5(2) of Regulation 664.

<sup>6</sup> See Boivin, Denis. *Insurance Law*. 2nd ed, Irwin Law, 2015, p.56 and p66.

<sup>7</sup> See s. 64(1) of the *Legislation Act, 2006*, SO 2006, c 21, Sch F, which provides that, “An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.”

Ontario's Regulatory Regime provides that a contract of insurance is created or issued when the Insurer makes an offer to insure by providing a quote, and that offer is accepted by the person to be insured who also commits to pay a premium as consideration. Within the framework of the Regulatory Regime, an Insurer deciding to avoid or delay offering a quote or simply not offering a quote, which must otherwise be provided in accordance with its approved underwriting rules, is in FSRA's view, declining to issue a contract within the meaning of s. 237(1) and s. 238(1) of the *Act*.

The TAC Rule with respect to prohibited factors extends beyond s. 237(1) of the *Act*, as the use of prohibited factors in quoting automobile insurance is related to unfair or deceptive acts or practices set out in paragraphs (4)-(7) of s. 2(1) of UDAP.<sup>8</sup>

In light of modern-day practices and technological advancements in how automobile insurance is purchased and sold in the Market, it is reasonable to interpret, "*an insurer shall not decline to issue... a contract*" as not only applying to an Insurer explicitly communicating a refusal to issue a quote to a consumer but also to situations where there is an unjustified delay in providing the quote such that the consumer is forced to place insurance elsewhere. This interpretation aligns with the modern-day realities of the Market. Indeed, any restrictive interpretation of this phrase which would limit its application only to circumstances where a formal declination is issued by an Insurer would result in the *Act's* underwriting approval processes being futile, as Insurers could circumvent the need to comply with their approved underwriting rules through mere silence or otherwise ignoring consumer requests for quotes.

Notably, s. 237(1) and s. 238(1) were incorporated into the *Act* at a time when the automobile insurance business was generally paper based, and automobile insurance quotes were processed with significant manual processes. However, the processes for how automobile insurance quotes are provided to consumers has progressed to the point of full automation. Presently, nearly every Insurer is able to process and issue PPA and Non-PPA quotes in real-time.

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<sup>8</sup> Please refer to s. 2(1) of UDAP, a copy of which is attached as Schedule 1 to this Guidance.

Due to technological advancements, the amount of time an Insurer needs to process a consumer request for a quote has, in almost all situations, been reduced to mere seconds. In light of the advanced state of technology in the Market, where Insurers are able to issue instantaneous quotes by using technologically advanced systems, any Insurer slowing its response time where the risk otherwise falls within its underwriting rules, effectively means that a quote will not be available to the consumer as an option when making a decision to purchase or renew automobile insurance.<sup>9</sup> Accordingly, an Insurer slowing its response time as outlined above, is, in FSRA's view, properly characterized as declining to issue a contract within the scope of s. 237(1) and s. 238(1) of the *Act*.

FSRA's interpretation in this Guidance aligns with the overall scheme of the *Act* and with FSRA's statutory objects. Particularly, in relation to FSRA's statutory objects, "decline to issue" must be interpreted in a manner which:

- i. protects the rights and interests of consumers
- ii. promotes high standards of business conduct
- iii. fosters a strong, sustainable, competitive and innovative insurance sector
- iv. deters deceptive or fraudulent conduct, practices and activities
- v. contributes to public confidence in the insurance sector

Considered in the context of FSRA's statutory objects, FSRA's interpretation of the TAC Rule:

- contributes to public confidence in the insurance sector by protecting the accessibility of a critical and mandatory product for consumers, while simultaneously providing confidence that consumers will not be discriminated against on the basis of prohibited or unapproved underwriting rules
- deters deceptive or fraudulent conduct, practices and activities by insurance sector participants and protects the rights and interests of consumers, by aiding consumers in accessing the lowest rate available from the Insurers with whom they are shopping

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<sup>9</sup> Insures who do not currently have access to a system for processing insurance quotes described in this paragraph do not need to acquire access to such a system.

- promotes high standards of business conduct and fosters a strong, sustainable, competitive and innovative insurance sector, by creating a fair, competitive market for insurance sector participants and prevents one Insurer from gaining an unfair advantage over its competitors by effectively refusing to provide automobile insurance to a consumer which the Insurer has determined is not desirable risk

In accordance with a broad and purposive interpretation of the TAC Rule, the overall scheme of the *Act*, and consistent with FSRA's statutory objects, any variance of formal or informal processes and procedures which make it more difficult for consumers to interact with an Insurer, broker or agent and which discourages or delays such persons from applying for, renewing or obtaining automobile insurance, is a contravention of the TAC Rule. In this sense, any conduct by an Insurer appointed insurance broker or agent (who is an Insurer's legal agent), which facilitates the Insurer's ability to refuse to issue a quotation based on non-approved underwriting rules on this basis, amounts to a contravention of the TAC Rule by that Insurer.

Further, any agent or broker who facilitates a violation of the TAC Rule which relates to a prohibited factor, whether on their own accord or based on instructions from any third party, may be engaging in an unfair or deceptive act or practice as prescribed by paragraphs (4)-(7) of s. 2(1) of UDAP.

### **Consumer harm:**

The impact of multiple Insurers breaching the TAC Rule and/or where there is a systematic use of unapproved or prohibited factors (e.g. credit or lifestyle information), results in a lack of readily available automobile insurance for consumers. In turn, this can create an availability issue for consumers who are not otherwise eligible for the residual market administered by the Facility Association. In particular contexts, Insurer practices which circumvent the TAC Rule result in consumers, who may not represent an Insurer's "ideal" customer but otherwise fall within the approved underwriting rules, being unable to receive a formal declination which is necessary for Facility Association access.

FSRA has also observed that when a few Insurers begin forcing consumers to seek automobile insurance elsewhere by instituting practices which amount to non-compliance with the TAC Rule, there is often a reaction by other Insurers, who have otherwise been compliant in their own practices. Previously compliant Insurers respond by reducing their own exposure to risks which are being forced into the Market out of concern for attracting a disproportionate share of that

business, thus causing them to institute their own non-compliant practices related to the TAC Rule. The overall impact of this is that the Market fails to serve consumers' interests. It also seems likely that this increases the incidence of consumer misrepresentations in order to obtain an automobile insurance quote.

FSRA is particularly concerned about circumstances where a consumer is relying on a third party, such as a broker, to obtain quotes, and the broker does not advise the consumer that an Insurer declined to respond to a sales lead generated by the consumers application or refused to provide a quote in a manner which contravenes the TAC Rule, and otherwise would have resulted in a lower premium for that consumer. This results in the consumer being unaware that they have suffered harm due to the Insurer's non-compliance with the TAC Rule, while also denying that consumer the opportunity to obtain a quote to which they are entitled through another means, such as using a different broker.

## Compliance requirements

In the 2009 Bulletin, FSCO identified compliance requirements, which remain FSRA's current requirements. They are supplemented by additional requirements which align with FSRA's interpretation of the TAC Rule as it relates to the current use of advanced quoting technologies. At a minimum, FSRA's compliance requirements for the TAC Rule in the Market are the following:

1. An Insurer must only request, collect and consider information that it requires in order to apply its filed and approved underwriting rules and risk classification elements to determine a consumer's eligibility for insurance coverage and to rate the consumer.
2. Consumers must be provided a quote based on information that the consumer provides to the broker, agent or Insurer according to standard timelines that the insurer provides for all quotes from the time that the quote is requested.
3. There is no reason to require, collect or use credit information for the purposes of providing a quote for automobile insurance, nor is a full application required or justified for the purposes of providing a quote.
4. Practices that hinder, delay or frustrate consumers' efforts to shop for or purchase automobile insurance are not in the public interest and conflict with the intent of the *Act*, UDAP and the *FSRA Act*, particularly where such practices discourage a consumer from

making or pursuing a request for a quote or for coverage from a particular insurer or affiliated group of insurers, or results in a consumer having to abandon such a request.

5. Insurers must not use prohibited criteria, or criteria otherwise unapproved for use, for rating or underwriting purposes (e.g., criteria related to a consumer's social, personal and/or economic status) to decline to provide quotes, to hinder or delay a consumer's efforts to obtain insurance coverage or an automobile insurance quote, or as a basis for differential treatment (whether by affiliated Insurers or otherwise) of consumers in the quoting, application or renewal process. Such practices include, but are not limited to screening, prioritizing or delaying quotes; segmenting risks within groups of affiliated Insurers, whether by back-end systems, scoring models, filters or otherwise; and instructions or suggestions to agents or brokers concerning placement of risks.
6. Insurers must not give formal or informal direction to brokers or quote aggregators which result in the differential treatment of consumers in the automobile insurance quoting or application process unless the basis for such differential treatment is reflected in an approved underwriting rule.
7. Insurers must not design or permit their quoting or underwriting systems to treat consumers seeking automobile insurance differently unless the basis for such differential treatment is reflected in an approved underwriting rule.
8. Insurers must comply with the TAC Rule for all PPA and Non-PPA categories of automobile insurance, including commercial lines.<sup>10</sup>

## **Compliance requirements with respect to aggregators and quoting technology**

Since the issuance of the 2009 Bulletin, there has been a significant growth in automobile insurance quotations processed through aggregators on behalf of Insurers. Aggregators utilize a website where consumers or brokers can input their underwriting information expecting to be provided quotes and in turn, the website provides quotes from Insurers who are partnered with the aggregator based on underwriting rules provided by the Insurer which may be inconsistent with the Insurer's approved underwriting rules. Where aggregators apply a methodology which

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<sup>10</sup> As noted above, FSRA will continue to recognize the practice initiated at FSCO of not requiring insurers to use filed underwriting rules for making decisions with respect to insuring a "fleet". However, the prohibitions with respect to prohibited factors set out in s. 237(1) of the Act and in UDAP continue to apply to the underwriting and distribution of insurance for automobile fleets.

allows Insurers to effectively implement non-approved underwriting rules, this amounts to a contravention of the TAC Rule by the Insurer who supplied the underwriting information.

An Insurer that allows any third party, such as an aggregator or technology provider, to generate or present a quote on the Insurer's behalf to an appointed broker or a consumer website, must maintain full responsibility and oversight for ensuring that all consumers who through a broker or otherwise request a quotation for automobile insurance, are provided a quotation in accordance with the Insurer's approved underwriting rules. An Insurer is not relieved of this responsibility because a quote was generated or produced by an agent or broker using technology owned or licensed to the broker, where the Insurer has provided the underwriting rules for the purposes of generating the quote in the technology provider's licensed system.

Similarly, an agent or broker who uses an aggregator or technology provider in relation to that person's automobile insurance business must maintain full responsibility and oversight for ensuring that their business activities do not violate the aspects of the TAC Rule established by s. 1(1), s. 2(1)(5) and s. 2(1)(8) of UDAP.

# Approach

## Supervision and enforcement

FSRA intends to supervise against this Guidance, and review complaints related to the TAC Rule, by using its investigation and examination powers under the *Act*.

To that end, Insurers are advised that FSRA may, pursuant to s. 101 of the *Act*<sup>11</sup>, require additional regulatory reporting on matters related to its automobile insurance underwriting technology, practices and processes to assess the risk of an Insurer's non-compliance with the TAC Rule. Such reporting may include a detailed summary of the number of requests for quotes for automobile insurance which the Insurer has not provided an immediate quotation, along with the basis for the Insurer having not done so. FSRA may, in accordance with s. 237(2) require Insurers to provide such additional information, material and evidence as it determines necessary to determine compliance with the TAC Rule.

Pursuant to the provisions of the *Act*, FSRA has the authority to:

- issue a compliance order to<sup>12</sup>
- impose an administrative monetary penalty on<sup>13</sup>
- lay provincial offence charges against<sup>14</sup>

Insurers, agents or brokers who contravene the TAC Rule.

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<sup>11</sup> S. 101 of the *Act* allows FSRA to require Insurers to prepare and file with FSRA a return respecting the experience of the insurer's business in a form approved by FSRA and containing such information as FSRA may require.

<sup>12</sup> FSRA may issue compliance orders pursuant to s. 441(2) of the *Act* or seek a court issued compliance order pursuant to s. 448(1) of the *Act*.

<sup>13</sup> FSRA may impose an administrative penalty pursuant to s. 441.3 and s. 441.4 of the *Act*.

<sup>14</sup> FSRA may pursue the laying of provincial offences as set out in s. 447(2) of the *Act*.

FSRA also has the discretion to suspend or cancel an Insurer's licence to operate in Ontario pursuant to s. 58(2)(a) of the *Act* where an Insurer contravenes the TAC Rule.

Following the issuance of this Guidance FSRA will consider steps undertaken to promptly, accurately and comprehensively identify and disclose to FSRA any past conduct which contravened the TAC Rule to be a mitigating factor in determining its enforcement response.

## Effective date and future review

This Guidance, which simply reiterates existing compliance requirements, is effective immediately. It will be reviewed no later than **November 15, 2024**.

## About this guidance

This document is consistent with [FSRA's Guidance Framework](#). As Interpretation guidance, it describes FSRA's view of requirements under its legislative mandate (i.e. legislation, regulations and rules) so that non-compliance can lead to enforcement or supervisory action. As Approach guidance, it describes FSRA's internal principles, processes and practices for supervisory action and application of CEO discretion where applicable.

## Schedule 1

### Excerpts from s. 2(1) of UDAP

2. (1) For the purposes of the definition of “unfair or deceptive act or practice” in section 438 of the *Act*, an action described in this section by an insurer, by an officer, employee or agent of an insurer or by a broker is prescribed as an unfair or deceptive act or practice:
1. When such a person makes or attempts to make, directly or indirectly, an agreement with a person insured or applying for insurance in respect of life, person or property in Ontario as to the premium to be paid for a policy that is different from the premium set out in the policy.
  5. When such a person applies any information or other factor in a prohibited manner on receiving a request for a quotation for automobile insurance, a request for an application to apply for automobile insurance, an application for automobile insurance or in connection with an offer to renew an existing contract of automobile insurance.
  6. When such a person requires someone to consent or to obtain the consent of another person to the collection, use or disclosure of any credit information as a condition for providing a quotation for automobile insurance or an offer to renew an existing contract of automobile insurance.
  7. When such a person collects, uses or discloses any credit information about someone in any manner in connection with automobile insurance, other than,
    - i. for the limited purposes, if any, described in the form of application for insurance approved by the Chief Executive Officer under subsection 227 (1) of the *Act*, or
    - ii. in accordance with the consent obtained in compliance with the *Personal Information Protection and Electronic Documents Act* (Canada) of the person to whom the information relates.
  8. When, in connection with a request for a quotation for automobile insurance or an application for automobile insurance made to an affiliated insurer, or an offer by an affiliated insurer to renew an existing contract of automobile insurance, such a person fails to provide the lowest rate available from the insurer or any of the insurers with which it is affiliated in accordance with,
    - i. their declination grounds, and
    - ii. their rates and risk classification systems as approved under the *Act* or the *Automobile Insurance Rate Stabilization Act, 2003*. O. Reg. 7/00, s. 2; O. Reg. 37/10, s. 2 (1); O. Reg. 128/19, s. 2.