

Decisions



Effective Date: May 28, 2022

Identifier: No. AU0139DEC

Acquisitions Warranting Relief from Lowest Available Rate Requirement

Purpose

The Financial Services Regulatory Authority of Ontario’s (“FSRA”) determination in this Decision Guidance (“Guidance”), is intended to clarify the extent to which the circumstances of a particular acquisition warrant relief from paragraph 8 of s. 2(1) of O.Reg. 7/00: Unfair or Deceptive Acts or Practices (the “UDAP Regulation”).¹

This Guidance specifically relates to one company’s acquisition of another company where both own multiple affiliated insurers which provide Ontario automobile insurance (“Ontario Auto”) through broker distribution networks and are otherwise required to provide the lowest rate available for Ontario Auto having regard to all of the circumstances.

¹ For greater clarity, because paragraph 8 of s. 2(1) of the UDAP Regulation applies to private passenger automobile insurance and non- private passenger automobile insurance, the defined term “Consumers” includes personal and commercial lines applicants and policyholders.

Scope

This Guidance affects consumers, as well as all entities writing, selling or dealing with automobile insurance in Ontario.

Rational and background

Legislative requirements

i. UDAP Regulation²

Paragraph 8 of s. 2(1) of the UDAP Regulation prescribes as an unfair or deceptive act or practice (“UDAP”), an insurer failing to provide the lowest rate available from the insurer or its insurance affiliates in accordance with such an insurer’s declination grounds and rates and risk classification systems.

S. 2(2) of the UDAP Regulation states that the “lowest rate available” refers to the lowest rate available having regard to all the circumstances, including the means of distribution through which the request, application or offer is made.

ii. *Financial Services Regulatory Authority of Ontario Act* (the “FSRA Act”)

S. 3(2)(c) of the FSRA Act states that a statutory object of FSRA in respect of financial services sectors is to foster strong, sustainable, competitive and innovative financial services sectors.

iii. *Insurance Act* (the “Act”)

² On December 20, 2021, FSRA submitted a proposed rule defining unfair or deceptive acts or practices under the *Insurance Act* (“UDAP Rule”) to the Minister of Finance for approval. The UDAP Rule, if approved and made effective, will replace the UDAP Regulation while continuing to include provisions related to auto insurance rates offered by affiliated insurers. This Guidance will remain reflective of FSRA’s approach to determining, for the purposes of assessing compliance with s. 10(1) of the UDAP Rule, whether insurers “recently became affiliated”.

S. 65.1(3) of the Act states that an insurer that intends to withdraw from the business of automobile insurance must file with the CEO a notice in the form provided by the CEO.

Background

A company (“Buyer”) which owns multiple insurers offering Ontario Auto, provided FSRA with written notice (“Notice”) of the Buyer’s intention to acquire (the “Acquisition”) another company (“Target”) which also owns multiple insurers providing Ontario Auto. Both the Buyer and Target provide Ontario Auto through a broker distribution network and share multiple common insurance brokers. Following the Acquisition’s closing, the Buyer and Target intend to cause the Target to formally withdraw from the Ontario Auto market (the “Market”). The Buyer and Target do not intend to provide the lowest rate available for Ontario Auto amongst their newly affiliated insurance companies for a reasonable period of time, commencing upon the closing of the Acquisition and concluding upon the Target’s withdrawal from the Market (“Special Circumstances Period”).

Within the Notice, the Buyer requested confirmation from FSRA that the newly affiliated insurance companies of the Buyer and Target would not be in contravention of paragraph 8 of s. 2(1) of the UDAP Regulation during the Special Circumstances Period, as the Acquisition’s circumstances justify not being required to provide the lowest rate available for Ontario Auto to applicants and policyholders (collectively “Consumers”) during the Special Circumstances Period.

Decision

Based on the specific facts and circumstances of the Acquisition, FSRA has determined it is appropriate to provide the Buyer and Target with confirmation that the lowest rate available for Ontario Auto will not need to be provided to Consumers of the Buyer or Target but only during the Special Circumstances Period. In making such a determination, FSRA has considered the circumstances of the Acquisition, with particular consideration being given to the statutory object set out in s. 3(2)(c) of the FSRA Act, “fostering strong, sustainable, competitive and innovative financial services sectors.”

Considerations

Strong, sustainable, competitive and innovative financial services sectors

In accordance with s. 3(2)(c) of the FSRA Act, the strength, sustainability, competitiveness and innovativeness of the Market are important considerations which were central to FSRA's decision to provide the Buyer and Target with confirmation that the lowest rate available for Ontario Auto does not need to be provided during the Special Circumstances Period.

i. the Buyer and Target cannot coordinate Ontario Auto Renewals prior to the closing of the Acquisition

Prior to the closing of the Acquisition, the Buyer and Target cannot reasonably be expected to exhaustively complete operational integration, including completing the steps required to provide the lowest rate available to Consumers for Ontario Auto amongst the newly affiliated insurance companies of the Buyer and Target. In order to foster a strong and sustainable Market, FSRA's view is that it is both reasonable and practically necessary in the specific circumstances to provide the Buyer and Target with a time-limited window to complete operational integration, such that the lowest rate available for Ontario Auto does not need to be provided to Consumers during the Special Circumstances Period.

ii. FSRA is preserving and enhancing competition in the Market

If FSRA were to decide that the lowest rate available for Ontario Auto must be provided by the Buyer and Target during the Special Circumstances Period, then a precedent would be established that paragraph 8 of s. 2(1) of the UDAP Regulation would be applied in a manner that could create a disincentive for both new entrants coming into the Market and consolidations within the Market which may create economies of scale, thus improving expenses and facilitating lower costs.

Mitigating potential Consumer Harm

In addition to s. 3(2)(c), the protection of Consumers is also a principal consideration which supports FSRA's decision.

i. commitment to withdraw the Target from the market as promptly as is reasonably possible

Within the Notice, the Buyer has committed to FSRA that the Target will file an underwriting rule with a withdrawal notice after the Acquisition's closing in accordance with s. 65.1(3) of the Act, thereby limiting the duration of the Special Circumstances Period. This reduces the number of impacted Consumers who will not automatically be provided the lowest rate available for Ontario Auto and also provides a formal oversight mechanism for FSRA to monitor the Buyer's commitment which was a significant factor in FSRA's decision.

If the Target does not withdraw from the Market as promptly as is reasonably possible after the Acquisition's closing, FSRA will no longer consider the Acquisition's circumstances justifiable for failing to provide the lowest rate available for Ontario Auto during the Special Circumstances Period. The Buyer and Target will consequently become responsible for complying with paragraph 8 of s. 2(1) of the UDAP Regulation and may be subject to additional conditions as determined by FSRA's in its discretion (e.g. a requirement to retroactively provide the lowest rate available and issue applicable refunds).

ii. unfair underwriting practices are unlikely to occur in the Acquisition's Circumstances

FSRA has received appropriate assurance that the Buyer will cause all of the Target's Consumers to be offered Ontario Auto by the Buyer, other than those Consumers whom the Buyer is not required to insure in accordance with its filed underwriting rules. Consequently, the risk of the Buyer or Target improperly using their newly affiliated insurance companies as an underwriting tool to assist in redirecting Consumers or deterring Consumers whom they do not want to insure during the Special Circumstances Period is substantially limited.

iii. disclosures and notices

The Buyer and Target have committed to FSRA that impacted Consumers will be provided with written notice about the inability to provide the lowest rate available for Ontario Auto during the Special Circumstances Period, which will alert those Consumers to contact their insurance brokers if they want to inquire about the availability of a potentially lower rate with another insurer. Specifically, the Buyer and Target have committed to advise Consumers that the lowest rate for Ontario Auto may not necessarily be available during the Special Circumstances Period by:

- prominently posting disclosures on appropriate pages of their respective websites for Consumers interested in Ontario Auto
 - sending clear, plain, accurate and transparent letters to impacted Consumers that the lowest rate available will not necessarily be provided for Ontario Auto
 - sending a letter to impacted insurance brokers of the Buyer and the Target, including a reminder that FSRA's comfort applies exclusively to paragraph 8 of s. 2(1) of the UDAP Regulation during the Special Circumstances Period
- iv. FSRA's expectation is that Insurance Brokers who sell Ontario Auto from the Buyer and Target will continue to comply with their obligations prior to the Acquisition and place clients with the insurer who best suits their needs**

In providing the Buyer and Target with confirmation that the lowest rate available for Ontario Auto will not need to be provided during the Special Circumstances Period, FSRA has presumed that any potential consumer harm will be mitigated because insurance brokers representing consumers with access to the Buyer's and Target's Ontario Auto will continue to comply with their obligations in the *Registered Insurance Brokers of Ontario Act* ("RIBO Act"), including the Registered Insurance Brokers of Ontario Code of Conduct ("RIBO Code of Conduct"). Insurance brokers who in the past had the ability to sell Ontario Auto to Consumers from the Buyer and the Target would be required in accordance with their fiduciary obligation to undertake an assessment to determine whether the particular needs of a client are better suited by purchasing insurance from the Buyer or Target, with consideration given to the available Ontario Auto premiums offered by the Buyer and Target. It is generally expected that such clients are already insured with the insurer who best suits their needs, which may not necessarily align with which insurer provides the lowest rate for Ontario Auto.

Scope of FSRA's comfort with respect to Insurance Brokers

FSRA's comfort with the Buyer and Target failing to provide the lowest rate available for Ontario Auto during the Special Circumstances Period does not impact in any manner whatsoever, the rights and obligations of brokers under the RIBO Act and RIBO Code of Conduct. Brokers must continue to act in the best interests of their clients, which includes evaluating whether a more

suitable Ontario Auto option remains available, with particular regard to the availability of lower Ontario Auto rates.

Effective date

This decision became effective on publication May 28, 2022.

About this guidance

This Guidance is consistent with [FSRA's Guidance Framework](#). As a Decision, it describes FSRA's rationale for a certain regulatory decision of precedential value for other parties not involved in the specific matter. Regulatory decisions described in Decision guidance are made based on FSRA's legal authority and are not informal responses to specific inquiries.