



March 18, 2021

Mr. Mark White
Chief Executive Officer
Financial Services Regulatory Authority of Ontario (FSRA)
5160 Yonge St, 16th floor
Toronto, ON M2N 6L9

Public Consultation Re: “Unfair or Deceptive Acts or Practices” Rule

Dear Mr. White,

On behalf of the Canadian life and health Insurance Industry, I am writing in support of your new Rule on the topic of “Unfair or Deceptive Acts or Practices”. It demonstrates FSRA’s focus on innovation and exemplifies principles-based regulation. This Rule underpins our shared expectation that consumers are treated fairly. As well, we would like to thank you for this opportunity to provide our feedback. Responses to the consultation questions are set out below and include some concerns and potential opportunities for clarification.

About CLHIA

The CLHIA is a voluntary association with member companies that account for 99 per cent of Canada's life and health insurance business. The life and health insurance industry is a significant economic and social contributor in Ontario. It protects about 10.9 million Ontario residents and makes almost \$45 billion a year in benefit payments to residents in Ontario (of which 90 per cent goes to living policyholders as annuity, disability, supplementary health or other benefits and the remaining 10 per cent goes to beneficiaries as death claims). In addition, the industry has nearly \$280 billion invested in Ontario's economy. A large majority of life and health insurance providers have licences to operate in Ontario, with seventy headquartered in the province.

Canadian Life and Health Insurance Association
79 Wellington St. West, Suite 2300
P.O. Box 99, TD South Tower
Toronto, Ontario M5K 1G8
416-777-2221 www.clhia.ca

Association canadienne des compagnies d'assurances de personnes
79, rue Wellington Ouest, bureau 2300
CP 99, TD South Tower
Toronto (Ontario) M5K 1G8
416-777-2221 www.accap.ca

Introduction

We understand that this Rule was originally drafted with a property and casualty (P&C) insurance focus and would caution against this approach going forward given the significant inherent differences between life and health insurance and P&C. There may be circumstances where separate Rules and expectations are necessary. With this mind we have provided the following responses to your questions.

1. Are there any parts of the proposed Rule that are too general or require further detail, including for the purposes of clarity or closing possible gaps?

Understanding the Reasonable Person Standard

We agree that the “Reasonable Person” standard of care supports outcomes-focused implementation. However, examples and guidance are needed to demonstrate how this standard will apply to different provisions. An example would be to clarify expectations for reasonable oversight by cross-referencing the Rule with relevant regulations or guidance. For example, this section could be cross referenced with O. Reg. 347/04 “*Agents*”, or OSFI E13 “Regulatory Compliance Management” (RCM). For insurers, this would indicate that the expected level of due diligence is a complete “Insurers’ Compliance System”.¹ Such systems take a risk-based approach to advisor oversight and demonstrate an approach to ongoing monitoring that would be considered reasonable.

For advisors, there should be supplemental examples and explanations of what is considered reasonable behaviour. Without greater clarification there is a risk that what is reasonable will be determined through regulatory rulings and litigation. In the meantime, there would be considerable uncertainty.

Defining Discrimination

In s. 1(1)(xi) the proposed Rule expands the definition of discrimination beyond what is included in the *Ontario Human Rights Code* to further include “any other discrimination which FSRA, in its published guidance, has identified as not being reasonable or bona fide in the provision or administration of insurance or goods or services related to insurance”. As well, this is notably a different type of discrimination from that in s. 4, and beyond how discrimination was previously described in O. Reg. 7/00. We would suggest deleting this addition to mirror the *Code*, as we are concerned it could have inadvertent impacts on actuarial analysis and underwriting. Further, in s. 1(2)(ii) of the proposed Rule, we suggest citing s. 25 in its entirety rather than the individual sections.

Additionally, we are seeking clarification with regard to whether s.4(i) “Unfair Discrimination” only applies to life insurance contracts, and if s. 4(ii) only applies to P&C insurance products. As well, we would note that s. 4(i) does not mention applicability to Accident and Sickness insurance distribution.

Defining “Contract of Insurance”

The current Regulation, O. Reg. 7/00, relied on how a “Contract of Insurance” was defined in the *Insurance Act*. In redefining this term, we believe that the Rule cites the incorrect sections. Reference should instead be made to s. 171 “Definitions” for Life Insurance, and s. 290 “Definitions” for Accident and Sickness insurance. The sections referenced pertain to requirements for the “insurer to issue [the]

¹ O. Reg. 347/04, s. 12.

policy, [and] furnish documents”. Further, “Group Insurance” is defined under s. 171. The approach taken in the proposed Rule may inadvertently omit references to certain kinds of insurance such as Creditor’s Group insurance. We suggest that FSRA rely on the *Act* or reference the definition sections described above.

As well, there are references to “oral and written agreements” in the definition of s. 1(1)(x) “Substantially Deficient”. In the *Act* a contract of insurance is formed based on the delivery of a series of documents, after which any contractual change must be in writing. Introducing oral agreements in this Rule may conflict with the legislation or create confusion for consumers. As a result, we suggest removing this reference.

Unfair Claims Practices

In s.5(1) we would note that the language used is likely specific to P&C insurance. Life insurers do not “adjust” or “settle claims”. To avoid confusion, it would be better to describe the assessment process as an “adjudication”.

Sales Incentives

We appreciate that FSRA has made innovation a priority. However, in our view, this section would benefit from greater clarification and a better understanding of how it may impact the distribution of life and health insurance products. In order to fully consider various factors, and potential consequences, we would recommend that this matter be reviewed in greater detail with all stakeholders before proceeding. In this regard, we believe that this section should be pursued on a separate track.

2. Are there any implementation considerations, such as transition issues or the coming into force date of the Proposed Rule, that interested parties would like to bring to FSRA’s attention?

Many of the requirements are captured by existing industry standards and practices. That said, a reasonable amount of time would be required to update internal insurer policies where necessary, and to provide training to advisors.

3. Are there sections of the Proposed Rule that are redundant and can be removed without compromising consumer protection?

Definition of “person” under s. 438 of the *Insurance Act*

Section 1(3), and s. 2(2)(i)(a), of the proposed Rule expands the definition of a “person” who can be held responsible for unfair or deceptive practices under s. 438. It now includes employees, directors, and the legal representatives of the insurer. As written, the Rule imputes liability on persons who have not directly engaged in the unfair or deceptive conduct. We do not understand what risk would not be captured at a corporate level and should be placed on individuals. It is also uncertain if the scope of 67, under s. 121 of the *Act*, “Authorities of Lieutenant Governor General in Counsel”, contemplates making a change to the definition in the *Act*. As such, we suggest using the definition from the *Act*.

Misrepresentations

Section 8(1) references the words “inappropriate” and “inaccurate” with respect to certain types of communications or actions. The word “inappropriate” is vague and lends itself to subjectivity. The word “inaccurate” also raises concerns that an error made in good faith would be deemed to be unfair or deceptive. We suggest that the word “misleading” sufficiently captures the type of deceptive acts that are meant to be the subject of this rule.

Group Products and Case-by-Case Pricing

Section 2(1), which defines unfair or deceptive practices, has omitted the following qualification that was previously included in section 3(1) of the O. Reg. 007: “if it is committed by or on behalf of a person with the expectation that a benefit will be received that is funded, directly or indirectly, out of the proceeds of insurance.” It has been added to subsection 2(2)(i)(b) but omitting this from the introductory section 2(1) may have unintended consequences. For example, with group insurance products, it is common for there to be fees or other negotiated terms between insurers, larger service providers, or other vendors. These terms are not funded out of the proceeds of insurance. The repositioning of this sentence may result in disruption to common group sales practices. We would ask that FSRA revert to the original language from O. Reg 007.

There are certain circumstances where case-by-case pricing allows for insurers to meet a consumer’s unique needs. Section 4, “Unfair Discrimination”, promotes consistency, which makes sense for many individual life insurance sales. However, this would also limit an insurer’s ability to provide pricing on a case-by-case basis for certain high value policies or group products. We are similarly concerned about how s.7(1)(iii) pertains to sales incentives. Therefore, where the Rule speaks to consistency, there should also be a caveat to allow for case-by-case pricing.

Reinsurance

Reinsurance contracts are priced in a different manner from individual life products, based on the unique differences between reinsurance and retail insurance. However, the public policy objective is to protect consumers, and is likely not intended to apply to life insurance contracts where the policyholder is itself a licenced insurer. We would respectfully request that an exclusion be added to the proposed UDAP Rule that would carve out reinsurance.

4. Are there any other issues or amendments to the Proposed Rule that FSRA should consider as it proceeds to its intended second stage of work in this area?

Harmonization

If the FSRA intends to incorporate FTC principles into its requirements by updating the UDAP Rule, we would encourage harmonization with CCIR/CISRO’s “Conduct of Insurance Business and Fair Treatment of Customers”. Doing so would minimize regulatory burden and ultimately enhance consumer understandability.

Thank you again for the opportunity to provide you with this feedback. If further information on the issues we have raised in our submission would be helpful, we would be pleased to meet with you or your staff. We look forward to continued collaboration and engagement on this Rule.

Sincerely,

A handwritten signature in blue ink, consisting of a stylized 'L' followed by a 'D' and a period.

Lyne Duhaime
Senior Vice President, Market Conduct Policy and Regulation