

March 18, 2021

Mr. Mark White, CEO
Financial Services Regulatory Authority of Ontario (FSRA)
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Toronto, Ontario
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<https://www.fsrao.ca/engagement-and-consultations/fsras-first-proposed-insurance-rule-released-public-consultation-unfair-or-deceptive-acts-or-practices-udap-rule#comment>

Dear Mr. White:

Re: CAFII Comments On FSRA's Proposed Rule [2020-002]: Unfair or Deceptive Acts or Practices

The Canadian Association of Financial Institutions in Insurance (CAFII) thanks FSRA for the opportunity to comment on the Authority's *Proposed Rule [2020-002]: Unfair or Deceptive Acts or Practices* (UDAP).

We congratulate FSRA on developing the new draft Rule, and for involving industry stakeholders -- including our Association -- in a preliminary consultation process to that end.

Our Association concurs with FSRA that it is necessary and opportune to replace the existing, on-the-books UDAP Regulation with a new FSRA UDAP Rule under the *Insurance Act*; and that this initiative will move Ontario forward towards a clearly understood insurance regulatory regime that is adaptable to changing circumstances and creates conditions under which misconduct can be better identified, curbed, and sanctioned to protect the public interest.

Our feedback comments on *Proposed Rule [2020-002]* are set out below.

INTRODUCTION

CAFII supports FSRA's intention to replace the Unfair or Deceptive Acts or Practices (UDAP) Regulation which it inherited from FSCO with a new FSRA Rule on the same subject.

We support FSRA's intention to take an outcomes/principles-based approach to its Proposed UDAP Rule, which we believe will produce better results for both consumers and the industry, by facilitating innovation and responsiveness to consumer needs. We are therefore very comfortable with FSRA's stated objective for the Proposed UDAP Rule, as follows:

Removing barriers to innovation in the area of customer incentives, including rebates and incentives provided that they:

- *do not lead to decisions that are against the interests of consumers;*
- *are not prohibited by law;*
- *are transparently communicated; and*

- are not unfairly discriminatory, anti-competitive or reliant on prohibited factors. (Page 2.)

CAFII encourages FSRA to ensure that its Proposed UDAP Rule is as consistent and harmonized as possible with existing guidelines, rules, and regulatory frameworks in other Canadian jurisdictions; and, as such, we support FSRA's statement that

The first stage of drafting is also intended to further alignment with particular Canadian Council of Insurance Regulators / Canadian Insurance Services Regulatory Organizations (CCIR / CISRO) Fair Treatment of Customers (FTC) Guidance standards as appropriate, including in relation to advice, product promotion, disclosures to policy holders and customers, compliance with laws, claims handling and settlements. (Page 2)

Further, we understand and appreciate the logic of the sequential steps which FSRA plans to take for aligning its Proposed UDAP Rule with existing FTC guidance, stated as follows:

FSRA considered further convergence with CCIR / CISRO FTC Guidance. FSRA determined that doing so should be reserved for stage two given the scope of rule-making authority established by the enabling legislation, as well as a lack of conceptual alignment between the existing regulation and other components of the guidance that could potentially lead to greater compliance costs and complexity in implementation of the stage one rule.

While the logic of this phased approach makes good sense, CAFII encourages FSRA, in stage two of the Proposed UDAP Rule development, to continue to put harmonization and alignment with existing guidelines, rules, and regulatory frameworks at the front and centre of its deliberations and decision-making.

STRONG SUPPORT FOR ONTARIO'S COMMITMENT TO ALLOW FSRA TO OPERATE AN INSURANCE REGULATORY SANDBOX

CAFII was pleased to learn recently of the Ontario government's new commitment to allow FSRA to operate an insurance regulatory sandbox, as confirmed by the following excerpt from the Proposed UDAP Rule consultation document:

FSRA's objective of removing specific barriers to innovation through the Proposed Rule is aligned with the Ontario government's commitment to provide the CEO of FSRA with "the power to operate an insurance regulatory sandbox to pilot initiatives that bring new consumer-focused products and services to market more quickly in response to changing consumer needs." (Page 3)

We believe that "regulatory sandboxes" are highly beneficial because they provide a safe, monitored space for testing innovative products, services, and distribution methods which existing rules may not allow, within sandbox boundaries that are subject to regulatory oversight; and thereby, they foster and support innovation while ensuring consumer protection.

In that same vein, CAFII firmly believes that regulatory frameworks should foster an open marketplace where consumers are able to choose how and where to purchase their insurance protection.

CAFII members distribute Authorized Insurance Products – more specifically, credit protection insurance (CPI; also known as creditor’s group insurance), other types of life and health insurance, and travel insurance via financial institution branches, direct mail, contact centres, and the internet -- and we share regulators’ objective of ensuring that consumers are protected while they purchase insurance products through their channel of choice.

It’s our view that the future of life and health insurance will be marked by continued and accelerating innovation; and that regulation should embrace the role of all distribution channels in meeting the insurance needs of consumers.

In particular, consumers continue to demand greater access to insurance information, purchasing opportunities, servicing, and claims fulfillment through digital means; and we believe that the digital space will play an ever more important role in meeting the insurance needs of Canadians.

A number of financial services regulators – including the Financial Conduct Authority (FCA) in the UK; its counterparts in Australia and Singapore; and the Ontario Securities Commission (OSC LaunchPad) here at home – have established regulatory sandboxes, as projects designed to help companies test innovative products, services, and distribution methods with a limited number of users, for a limited period of time.

CAFII wholeheartedly supports FSRA’s planned insurance regulatory sandbox initiative; and, in that connection, we highlight our support for the UK FCA’s stated objectives for its own regulatory sandbox:

- *technology has the potential to improve not only how products and services are designed, but also how they are distributed;*
- *as a regulator, the FCA wants more firms to embrace innovation and it wants to work with innovators to build in consumer protection from the outset; and*
- *the FCA regulatory sandbox has been designed to reduce the time and potential costs of getting innovative ideas to market; and it will accelerate the testing and introduction of genuinely novel products, services, and distribution enhancements which will benefit consumers.*

ISSUE OF NOTEWORTHY CONCERN FOR CAFII MEMBERS

With respect to the Proposed Rule’s section on incentives, we note the following language (underlining added):

7 Incentives 7(1) Payment, rebate, consideration, allowance, gift or thing of value being offered or provided, directly or indirectly, (i) as an incentive or inducement for a person to take an action or make a decision that would encourage that person to buy a product which would not, considering the options generally available in the marketplace, be recommended as a suitable insurance product by a reasonable person licensed to sell such an insurance product ...

We want to draw to FSRA’s attention to the fact that the words “suitable insurance product” – which imply the provision of “advice” to consumers -- in this definition of Incentives are problematic for Authorized Insurance Products/credit protection insurance (CPI).

The issue of concern around “suitability” stems from the fact that while the federal *Bank Act* and section 5(1) of the federal *Insurance Business (Banks and Bank Holding Companies) Regulations* (IBBRs) permit banks and other federally regulated financial institutions (FRFIs) to offer advice regarding Authorized Insurance Products/CPI, the offering of that advice is significantly tempered by provincial/territorial regulatory and licensing requirements.

The nature of the advice that banks/FRFIs are permitted to provide around an Authorized Insurance Product/CPI is strictly limited to the Authorized Insurance Product itself and must not include suitability-related measures such as a needs-based financial/insurance assessment, Know Your Client tools, or holistic advice.

In the case of Authorized Insurance Products/CPI, because the consumer is purchasing/enrolling in optional insurance related to a single and specific borrowing need such as a mortgage or line of credit – and that scenario falls within the scope of activity permitted to occur through a non-advisory sales channel, i.e. the business must provide consumers with sufficient information, which meets provincial/territorial regulations and industry commitments and guidelines, to enable them to make an informed decision – Authorized Insurance Products/CPI are typically offered by non-licensed individuals in Ontario and throughout Canada. Non-licensed individuals are strictly prohibited from offering advice and recommending an insurance product as “suitable.”

With respect to Authorized Insurance Products/CPI, given the prohibition against holistic advice engendered by the combination of the federal *Bank Act* and *IBBRs* with provincial/territorial regulatory and licensing requirements, banks/FRFIs legally can only ascertain a consumer’s “eligibility” for coverage and to make a claim at the time that an Authorized Insurance Product/CPI is being offered as optional insurance. Banks/FRFIs therefore prioritize establishing certainty of the consumer’s “eligibility” for coverage and to make a claim under the group CPI master policy.

This situation makes Authorized Insurance Products/CPI a unique product set – a product set to which the concept of product suitability does not apply due to legal constraints; but a product set to which the more limited concept of “eligibility” for coverage and to make a claim does indeed apply as a Fair Treatment of Customers (FTC) consideration.

As a proposed solution to deal with the problematic application of the words “suitable insurance product” in the Proposed UDAP Rule’s subsection 7(1)(i) to Authorized Insurance Products/CPI, CAFII recommends that those words be precisely defined within the Rule – perhaps through an approach which uses a superscript number and corresponding footnoted definition below -- and that the definition expressly state that “suitable insurance product” does not apply to Authorized Insurance Products as defined by the federal *Bank Act* and the federal *Insurance Business (Banks and Bank Holding Companies) Regulations*.

In that connection, we also want to bring to your attention CAFII’s strong view that any provision in the Proposed UDAP Rule or any other Regulation which would hamper the ability of consumers to obtain Authorized Insurance Products/CPI would contribute to the significant problem of Canadians being under-insured or even totally uninsured with respect to life and health insurance.

In 2019, according to LIMRA, half of Canadian adults did not own any life insurance coverage. Canadians should therefore be encouraged to obtain more life and health insurance, and the regulatory environment should foster fair treatment of consumers without inhibiting the industry’s ability to offer such coverage to Canadians.

Life and health insurance coverage is already inherently challenging to offer due to the fact that contemplating one's own mortality or the risk of contracting a serious illness or becoming disabled is not something people readily want to do.

TECHNICAL/DRAFTING ERROR ISSUE; AND RELATED UNCERTAINTY

CAFII would like to point out that the Proposed UDAP Rule consultation document's definition of "contract of insurance" (found in Appendix A and Appendix B) appears to contain a drafting error, by referring to the wrong sections in the current Ontario *Insurance Act*. The correct sections of the *Act* to be referenced with respect to "contract of insurance" are s. 171 (found in Part V: Life Insurance) and s. 190 (found in Part VII: Accident and Sickness Insurance).

In that connection, it is not clear whether or not the Proposed UDAP Rule intends to capture creditor's group insurance.

One of the more significant changes made when the province's *Insurance Act* was amended several years ago was to introduce clarity that creditor's group insurance is indeed included under the *Act*. However, those amendments did not then flow through to parallel amendments in the existing UDAP Regulation; and that may explain why it appears that creditor's group insurance has been overlooked in the Proposed UDAP Rule.

RESPONSES TO TARGETED 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?

A principles-based approach is commendable because the avoidance of prescription enables a regulator to steer clear of imposing a compliance burden upon industry players and forcing them into an inefficient allocation of resources; but ironically, on the other hand, an overly high-level approach can lead to ambiguities and uncertainties. On balance, we feel that FSRA has struck the right balance in the Proposed UDAP Rule.

FSRA's consultations and ongoing dialogue with industry can provide greater clarity around regulatory expectations, and those measures constitute a better approach than trying to anticipate and respond to every possible eventuality. With the pace of change evident in business, technology, and society today, trying to anticipate every possible eventuality will be counter-productive and inefficient.

We also encourage enforcement of the Proposed UDAP Rule based solely upon data and objective evidence.

In a competitive environment, different industry players and channels will no doubt try to promote their own products and/or channels self-servingly, but at the end of the day consumer choice should be paramount.

The identification of problematic products, channels, acts or practices should therefore be based solely upon data and objective evidence such as complaints or clear conflicts of interest.

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?

We have not identified any immediate implementation or transition issues that are of concern, but we encourage FSRA to continue its open, transparent, and consultative approach, so that any unintended consequences, hiccups, or outcomes can be rapidly brought to its attention by the industry.

3. FSRA has drafted the Proposed Rule to ensure that the intent of existing consumer protection provisions is preserved where no substantive policy change is being proposed. FSRA has deliberately erred on the side of maintaining consumer protections even where they may be redundant given other aspects of the Proposed Rule. An example includes provisions related to non-compliance with the Statutory Accident Benefits Schedule in section 5 (Unfair Claims Practices) given the contents of section 3 (Non-Compliance with Law). Are there sections of the Proposed Rule that are redundant and can be removed without compromising consumer protection?

We believe that the best approach to deal with possible redundancies is to reject a "once and done" approach; and instead view the UDAP Rule, and more generally all of FSRA's Rules and Regulations, as iterative, living, and readily amendable documents. In that regard, CAFII supports the staged approach that FSRA has espoused because we believe it will allow for post-implementation adjustments based on the experience of both FSRA and the industry.

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?

CAFII has no other issues or amendments to the Proposed Rule to raise for FSRA's consideration at this time.

Conclusion

As part of our concluding remarks, CAFII would like to reiterate a constructive comment we offered in our November 18, 2019 submission on FSRA's *Draft 2020-21 Priorities and Budget*. We noted then that while FSRA has certain rule-making authority, the extent of that authority in the life and health insurance sector is limited. CAFII believes that FSRA's securing of greater rule-making authority for life and health insurance will give the Authority the nimbleness and flexibility required to respond to industry developments more quickly. We therefore encourage FSRA to work on obtaining additional rule-making authority for life and health insurance through the appropriate government channels.

Thank you again for the opportunity to provide input and feedback on FSRA's *Proposed Rule [2020-002]: Unfair or Deceptive Acts or Practices*. Should you require further information from CAFII or wish to meet with representatives from our Association on this or any other matter at any time, please contact Keith Martin, CAFII Co-Executive Director, at keith.martin@cafii.com or 647-460-7725.

CAFII and its members remain committed to supporting FSRA in its critically important mission and mandate; and we look forward to continuing our involvement as key stakeholder contributors to the Authority's ongoing success.

Sincerely,



Rob Dobbins
Board Secretary and Chair, Executive Operations Committee

About CAFII

CAFII is a not-for-profit industry Association dedicated to the development of an open and flexible insurance marketplace. Our Association was established in 1997 to create a voice for financial institutions involved in selling insurance through a variety of distribution channels. Our members provide insurance through client contact centres, agents and brokers, travel agents, direct mail, branches of financial institutions, and the internet.

CAFII believes consumers are best served when they have meaningful choice in the purchase of insurance products and services. Our members offer travel, life, health, property and casualty, and credit protection insurance across Canada. In particular, credit protection insurance and travel insurance are the product lines of primary focus for CAFII as our members' common ground.

CAFII's diverse membership enables our Association to take a broad view of the regulatory regime governing the insurance marketplace. We work with government and regulators (primarily provincial/territorial) to develop a legislative and regulatory framework for the insurance sector that helps ensure Canadian consumers get the insurance products that suit their needs. Our aim is to ensure appropriate standards are in place for the distribution and marketing of all insurance products and services.

CAFII's members include the insurance arms of Canada's major financial institutions – BMO Insurance; CIBC Insurance; Desjardins Insurance; National Bank Insurance; RBC Insurance; Scotiabank Financial; and TD Insurance – along with major industry players Assurant; Canada Life Assurance; Canadian Premier Life Insurance Company; CUMIS Services Incorporated; Manulife (The Manufacturers Life Insurance Company); Sun Life; and Valeyo.