



Canadian Life & Health
Insurance Association
Association canadienne des
compagnies d'assurances
de personnes

May 31, 2023

Submitted to: Elissa Sinha, Director, Litigation & Enforcement and Deputy General Counsel,
Financial Services Regulatory Authority of Ontario

Re: Consultation on proposed guidance—Administrative Monetary Penalties

Dear Ms. Sinha,

The Canadian Life and Health Insurance Association (CLHIA) appreciates the opportunity to provide feedback to the Financial Services Regulator Authority of Ontario (FSRA) on its proposed Guidance on Administrative Monetary Penalties (AMPs) (“the Guidance”).

About the CLHIA

The CLHIA is a voluntary association whose member companies account for 99 per cent of the life and health insurance business in Canada. These insurers are significant contributors to Ontario and its economy. They provide financial security to about 11 million Ontarians made over \$50 billion in benefit payments in 2021 (of which 90 per cent went to living policyholders as annuity, disability, supplementary health, or other benefits with the remaining 10 per cent went to life insurance beneficiaries). In addition, life and health insurers have more than \$382 billion invested in Ontario's economy.

General Comments

CLHIA members agree that the Guidance is generally clear and principles based. The industry finds the distinction between General AMPs and Summary AMPs outlined in the Purpose section helpful. CLHIA members value harmonization of regulatory requirements, therefore we appreciate that the Guidance combines the regulatory scope of multiple Acts, which will promote a consistent approach among different FSRA-regulated financial industries. Overall, the Guidance does offer some helpful clarity on how FSRA will exercise its discretion, but the industry also feels that the Guidance could more clearly communicate that AMPs are not the main tool used to enforce compliance.

The importance of proportionality, reasonableness and fairness

The life and health insurance industry supports the application of AMPs proportionally to administrative issues. Further we believe that AMPs should be imposed consistently and fairly. The industry would appreciate if the notions of proportionality, reasonableness and fairness could be highlighted more clearly throughout the Guidance.

It could be highlighted more clearly that the regulator does have the discretion to act outside of the scope or prescribed AMP. For example, when no harm has occurred, or the harm has been fully mitigated, the AMP could be adjusted.

While the increased transparency from the regulator regarding how it exercises its discretion when imposing AMPs is welcomed, there does seem to be a somewhat prescriptive feel to some of the interpretative statements.

AMPs as the last resort in supervision

The industry strongly feels that AMPs should not be the primary tool for supervision. Identification of perceived issues, notification and requests for remedial actions should always be considered first. Unless there is evidence of severe negligence, AMPs should be one of the last supervisory tools used by regulators.

The principle of gradation of sanctions should be an integral part of the Guidance and AMPs should only be considered in situations where a stakeholder has neglected to implement a remedial action(s) or was severely negligent in the application of legislative requirements. The industry appreciates that the Guidance makes it clear that unless the amount is prescribed in the Sector Statute, it would be commensurate with the level of non-compliance (i.e. small or no AMP issued).

Guidance should include a safe harbour provision

CLHIA members recommend that FSRA add a provision to the guidance which sets out that an AMP should not be imposed on a person or entity if they establish that they exercised due diligence to prevent the contravention or failure to comply. One example of this type of provision can be found in the Canadian Radio-television and Telecommunications Commission rules pertaining to AMPs that enforce Canada's Anti-Spam Legislation.¹

Specific Comments

Purpose and Scope

We would be supportive of FSRA adding language to the Purpose and Scope section which makes it clearer that this guidance is a summary of Sector Statutes pertaining to AMPs and FSRA's existing approach to interpreting them. We would further support adding language which makes it clear that this document is not meant to be a sole or determinative legal standard relied upon by a tribunal or court.

Section A.2

This section identifies seven factors FSRA will consider when determining if an AMP will be imposed. "The extent to which the person tried to mitigate" (mentioned in B.1) should be added

¹ An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act (S.C. 2010, c. 23), Administrative Monetary Penalties, Rules and Violations, 33 (1): <https://laws-lois.justice.gc.ca/eng/acts/E-1.6/page-4.html#h-177334>

to these explicit considerations. By adding the extent to which a person tried to mitigate as a consideration it would reinforce alternative enforcement options before issuing an AMP in less malicious situations. This aligns with the CLHIA's overarching recommendation that a safe harbour provision be included in the Guidance.

Section A.3

This section states that "The Sector Statutes permit FSRA to impose a General AMP for every instance of contravention..." It is unclear whether this means every breach of the rules attracts a maximum fine of \$100,000 to \$200,000. How does FSRA make the distinction between a single General AMP and numerous Summary AMPs? It is noted that patterns of misconduct may attract a single General AMP, but how is that distinction made?

Section B.1

Generally, it's not clear how FSRA will ensure consistency and uniform application in determining the AMP amount. Clarity on how this would be achieved would be welcomed. There's quite a range for some of the penalty amounts which could result in a lot of variance. It's also unclear whether certain factors are weighed more significantly when determining the ultimate figure (for instance, level of intent vs extent of the harm).

Section B.1.1

This section includes concepts related to intention. There is an element of subjectivity in weighing intention which causes the industry some concern. The industry recommends that intention be substituted for a further breach after the initial finding.

FSRA states evidence relating to prior knowledge of consequences, professional experience as a licensee, which consumers were affected, and patterns of misconduct are taken into account while determining intentionality. How does FSRA intend to approach the issue of which consumers were affected?

Section B.1.2

The provision around "potential harm" is quite vague and assessing potential harm could be quite subjective. The industry would prefer that the Guidance apply to actual harm only.

Conclusion

Thank you for the opportunity to provide the industry's feedback on the proposed guidance on AMPs. We would be pleased to discuss any questions you may have or to provide additional information if it would be helpful.

Sincerely,



Lyne Duhaime, Senior Vice-President, Market Conduct Policy and Regulation