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Tim Miflin, Senior Manager
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Financial Services Regulatory Authority (FSRA)
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Via email: tim.miflin@fsrao.ca

Dear Mr. Miflin,

Thank you for the opportunity to comment on FSRA's Proposed Guidance: Life Insurance Agent and MGA Licencing Suitability (the Proposed Guidance).

Founded in 1847, Canada Life is a leading insurance, wealth management and benefits provider focused on improving the financial, physical and mental well-being of Canadians with more than 13 million customer relationships from coast to coast to coast. For more than 175 years, individuals, families and business owners across Canada have trusted us to provide sound guidance and deliver on the promises we've made. In 2022, we employed almost 12,000 Canadians, paying $3.3 billion in salaries, commissions and taxes. Our commitment to Ontario is substantial with more than $243 million in taxes paid in 2022 and more than 6,000 Ontarians directly employed that same year. In addition to being a leading life and health insurer, Canada Life counts among its subsidiaries, IPC Investment Corporation, IPC Securities Corporation, Quadrus Investment Services Ltd., LP Financial Planning Services Ltd., Canada Life Securities Ltd. and Canada Life Investment Management Ltd., making Canada Life one of the preeminent wealth providers in the country with close to 5,000 advisory relationships and approximately $48 billion assets under administration.

We will initially offer a view on the inclusion of Managing General Agents (MGAs) under the Proposed Guidance and the proposal that MGAs hold a licence. We will then address certain sections of the proposed guidance in turn. Finally, we register our strong objection to language in the Proposed Guidance suggesting FSRA may deem a principal agent relationship to exist between insurers and agents and MGAs and agents.

MGA Licencing

While the Proposed Guidance addresses all insurance agents, the explicit expectation that MGAs must be licenced is a significant and welcome development. Many MGAs currently hold a licence, but this is *de facto* not *de jure*. We see this stated expectation as recognition by FSRA that the modern insurance distribution landscape has evolved with MGAs now playing a key role. We agree it is appropriate MGAs be licenced and there be specific criteria applicable to MGAs to hold a licence. However, we are of the view that there is a more robust approach to MGA licencing than that proposed, an alternative approach that will better serve all actors, insurers, MGAs, regulators and most importantly, customers.

The Proposed Guidance deems entities that take part in certain activities an MGA and requires such entities be licenced in one of the existing categories of corporate or partnership licence. It then seeks to provide guidance as to the characteristics that will apply to this subset of MGA corporate or partnership agents, but presumably not other corporate or agency licencees who hold the same licence. In other words, there would be differential expectations on holders of the same licence depending on their activities.

We appreciate FSRA is attempting to address issues it has identified in the sector using the tools and legislation at its disposal. However, other provinces, notably New Brunswick and Saskatchewan, have created in legislation a distinct MGA licence category. We believe this is a preferable approach that would elevate the expectations in the Proposed Guidance to have the force of law. Under a licencing approach, any entity engaged in the prescribed activities would be required to hold an MGA licence or otherwise be offsides the *Insurance Act*, R.S.O. 1990, c. I.8 (the *Insurance Act*). Requirements to hold an MGA licence would be prescribed by regulation. These regulations could be based on the suitability requirements in the Proposed Guidance.

A separate MGA licence holds a number of advantages. It would avoid ambiguity as to the expectations of MGAs vs. those of "normal", non-MGA partnership and corporate licence holders. It would formalize the regulator's role in ongoing supervision of the MGA, something that under the current proposal would fall primarily to insurers, insurers that operate in a competitive marketplace. Perhaps most importantly, consumers expect financial intermediaries to be licenced and regulated by governments or government agencies. The most robust means to accomplish this is by way of an explicit licence with explicit requirements and responsibilities spelled out in law and regulation. We believe this approach is preferable to attempting to accomplish the same ends by way of a guidance document.

<u>Scope</u>

"In this Guidance, the term MGA refers to a corporate or partnership life insurance agency that deals with the public and engages in, or is required by contract to perform, any of the following activities on behalf of or in support of an insurer:"

We highlight the words, "that deals with the public". It is our view that the reference to dealing with the public is not necessary and somewhat ambiguous. We note similar definitions in Saskatchewan and New Brunswick do not include a public facing element. It is also not obvious that MGAs deal with the public, they deal primarily with agents and insurers. Indeed, it is quite normal that the ultimate insurance consumer is not aware an MGA is involved in their transaction. Therefore, we suggest deleting the words, "deals with the public and" from the definition.

The Proposed Guidance states at footnote 2, "In this Guidance, Managing General Agencies ("MGAs") are licensed agents, whether licensed as a corporate agency or partnership agent, that perform activities for insurers as described herein. MGAs are subject to this Guidance, even if they operate under other labels, such as "National Accounts." We agree that it is the activities that are important not what an entity may hold itself out as and that national accounts are properly in scope.

<u>Interpretation</u>

In the commentary on accessing an applicant's suitability and in Appendix A, we contrast objective factors such as criminal charges, breaches of regulations and bankruptcy filings, with subjective factors such as, "failing to diligently perform" and "any other behaviour." These subjective factors will allow FSRA to exercise broad discretion. Discretion at the regulator level may be appropriate and founded in legislation. However, to the extent insurers will be expected to monitor suitability on an ongoing basis against these subjective factors, there will likely be differing interpretations. This suggests: 1) more specific and objective guidance would be helpful, 2) while insurers acknowledge their responsibility to contract with only suitable intermediaries, regulators are better placed to be the arbiters of these subjective matters on an ongoing basis.

In terms of FSRA's assessment of suitability being guided by its statutory mandate, we agree and would highlight the promotion of public confidence in the sector. In our view, this is best accomplished by the regulator playing the leading role in oversight and in the case of MGAs, through an MGA-specific licencing model.

Suitability - Additional considerations for Managing General Agencies

As mentioned above, many elements of the Proposed Guidance are very subjective, for instance, "has the expertise and resources to operate as an MGA in a trustworthy and competent manner, and that it conducts all such activities in (a) diligent, trustworthy and competent manner", and "adequate compliance functions." In terms of expertise and resources, further guidance could be provided regarding education credentials or time in the industry. Requirements for registrants and designated persons that hold key positions in the securities sector provide examples of how this can be accomplished. We note that it will be difficult for insurers to gather and verify this information as they will have to reply on disclosure from the MGAs/individuals in question. There is no equivalent in insurance to the Canadian Securities Administrator's National Registration Database. As for resources, does this suggest a minimum capital requirement or some other quantifiable metric that can be easily assessed?

We agree that the number of employees connected to the MGA should not determine the necessary scope and sophistication of the compliance function. At first instance, it could be thought larger MGAs require more control and compliance resources. But as the Proposed Guidance rightly suggests, smaller MGAs, depending on their business model, may present more risk to consumers than larger MGAs with a more traditional approach.

The Proposed Guidance does not mention a need for MGAs to hold errors and omissions or cyber insurance. We feel these protections should be in place and therefore addressed as part of the final guidance. It could be considered that these elements fall under "resources to operate..", but clarity would be preferable.

Insurer supervision of MGAs

There is no doubt that under statute and regulation as currently drafted, notwithstanding FSRA's responsibility to grant and renew licences, insurers retain a responsibility for monitoring the suitability of their contracted agents including MGAs throughout the life of a contract. It is also a fact that insurers have a duty to report to FSRA if they have reasonable grounds to believe an agent (including an MGA) is not suitable. From a policy perspective this is sensible. On a more practical level, the reality will be challenging given the subjective nature of much of the Proposed Guidance and the competitive realities of the sector. In the absence of very clear and specific guidance as to what satisfies concepts such as "adequate" and "diligent, trustworthy and competent", different interpretations will be made by different insurers. Differential interpretations will occur in the absence of mischief and in good faith. The fact is, some insurers may be reluctant to act as a kind of whistleblower, especially if the agent/MGA in question can continue doing business with other insurers unless and until FSRA takes licencing action. This points once again to what we see as the proper and central role of the regulator in oversight. Consumers and public confidence would be better served by more direct supervision of agents, especially of MGAs by way of an MGA licencing model with FSRA as the ultimate decision-maker on suitability not only at licencing and renewal, but also on an ongoing basis.

We welcome the statement, "reasonable reliance by a regulated entity on the credible functions and activities of another regulated entity which was contractually obligated to perform such function or activity on behalf of the first regulated entity, will be considered as a mitigant when determining the appropriate sanctions against the first regulated entity for any non-compliance." While not relieving insurers of their ultimate responsibility, this statement acknowledges commercial reality that sees functions delegated to sophisticated MGAs by way of detailed contracts.

Life Agents may be held to be a principal – Agent Relationship

We have grave concerns with the inclusion in the Proposed Guidance of language related to agency law and the principal agent relationship between insurers and agents and MGAs and agents. It is proposed that in certain

situations FSRA will consider life agents to be agents of insurers and MGAs. Canada Life is strongly of the view that this should not be included in the final guidance. A finding that a principal-agent relationship exists is a determination properly left to the courts or the legislature.

We do not disagree with the assertion that MGAs and insurers may, by operation of agency law, be held responsible as principals for the conduct of life agents. This is a simple statement of the law. These decisions are very fact-specific, and as a common law principle, interpreted and applied by courts. This is factual and not contentious.

We do not believe that FSRA has the legislative mandate to make legal determinations of agency law and that to do so is beyond the scope of FSRA's and the Financial Services Tribunal (FST) subject matter expertise. There is no indication from reported decisions of the FST that the CEO of FSRA or the FST routinely make determinations on the existence of a principal-agent relationship in the course of exercising their mandate under the *Insurance Act,* nor have we been able to find any appeal level or judicial review cases involving FSRA or the FST reliance on, or application of, the principles of agency law in carrying out their statutory mandate under the *Insurance Act*.

Administrative law requires that regulatory authority must be evident from: (1) the express provisions of the relevant statutes or (2) by necessary implication from such statutes (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* 2006 SCC 4.). There is no express provision in the *Insurance Act* imposing liability on insurers for the conduct of life agents based on an agency relationship. Indeed, there is an express provision exempting life agents from such liability (see below). Therefore, FSRA would have to demonstrate that applying principles of agency is a necessary implication of fulfilling the purpose of the legislation. The lack of precedent suggests this is not the case.

We note s. 394(1) of the *Insurance Act*, as an example of a statutory provision deeming an insurance agent or broker to be an agent of an insurer. However, what is most pertinent is s. 394(2) which states that this section does not apply to life insurance. This is evidence of the fact the legislature turned its mind to circumstances in which life agents should be deemed agents of an insurer. In seeking to make these determinations, FSRA would be substituting its judgement for that of the legislature.

It is our expectation that FSRA and the FST would likely find themselves subject to regular judicial review if they proceed to interpret and apply common law agency principles. Depending on the sections of the *Insurance Act* in question, deference would not apply, and correctness would be the standard of review. Consumers would not be well-served by the ambiguity and delays that would result.

In summary on this point, we are strongly of the view that finding a life agent an agent of an insurer or MGA is properly left to the courts or the legislature. If FSRA were to proceed in this direction, we expect it would open itself up to protracted litigation and judicial review thereby eroding public confidence in the regulatory regime.

Thank you for the opportunity to provide feedback on the Proposed Guidance. Notwithstanding our stated preference for an MGA licencing model and serious concerns with the inclusion of agent and principal language in the licencing suitability guideline, the fact FSRA is seeking to address oversight and suitability in the modern insurance context is appropriate. We look forward to being part of the ongoing dialogue and working with regulators to build a strong and resilient sector that meets the financial security needs of Ontarians.

Yours,

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