Financial Services Regulatory Authority of Ontario ("FSRA")

Notice of Changes and Request for Comment (the "Notice of Change")

Amendment 2 – Deferred Sales Charges – Deposits to Pre-June 1, 2023 Individual Variable Insurance Contracts (the "Second Proposed Amendment")

Rule 2020 – 002 Unfair or Deceptive Acts or Practices Rule (the "UDAP Rule")

Introduction

FSRA is proposing the Second Proposed Amendment to the UDAP Rule.

FSRA posted a previous version of the Second Proposed Amendment on its website for a 90-day consultation period that ended on February 23, 2023 (the "**Consultation Period**"). After analyzing the submissions received, FSRA is proposing material changes (the "**Material Changes**") to the Second Proposed Amendment.

FSRA is publishing this Notice of Change on its website.[1] FSRA is seeking stakeholder comments on the Material Changes within 30 days after publishing the revised Second Proposed Amendment on FSRA's website.

To make it easier to review the effects of the updated Second Proposed Amendment, please see attached:

- **Appendix A:** the updated Second Proposed Amendment;
- **Appendix B:** a blacklined copy of the UDAP Rule currently in force showing the changes proposed under the updated Second Proposed Amendment;
- **Appendix C:** a blacklined copy of the updated Second Proposed Amendment, showing the changes from the version previously consulted on; and
- **Appendix D:** a flow chart that shows how the changes will affect contracts that exist when the Second Proposed Amendment takes effect.

Background

In February 2022, the Canadian Council of Insurance Regulators and Canadian Insurance Services Regulatory Organizations (collectively the "**Insurance Regulators**") announced that, due to the high risk of poor consumer outcomes associated with deferred sales charges ("**DSC**" or "**DSCs**") in the sale of individual variable insurance contracts ("**IVIC**" or **IVICs**", also known as individual segregated fund contracts), insurers should refrain from engaging in new DSC sales, in line with the June 1, 2022 ban in the securities sector. The Insurance Regulators stated they expected insurers to transition to the cessation of such sales by June 1, 2023.

[1] This is required by s. 22(9) of the *Financial Services Regulatory Authority of Ontario Act, 2016* (the "**FSRA Act**").

FSRA has delivered a proposed amendment[2] to the UDAP Rule which will, if approved by the Minister of Finance, implement the Insurance Regulators' expectations in Ontario.

In addition, FSRA's view is that it is necessary to implement a Second Proposed Amendment to create additional customer protections with respect to DSCs. These protections would apply to IVICs that involve DSCs issued prior to June 1, 2023.

After considering submissions received during the Consultation Period, FSRA has determined that it is necessary to propose Material Changes to the version of the Second Proposed Amendment that FSRA published for comment during the Consultation Period (the "**Consulted-on Second Proposed Amendment**").

i. Summary of Written Comments Received

FSRA requested submissions from all interested parties in the Notice of Rule published on November 25, 2022. FSRA received 9 submissions from industry organizations, insurance agents and consumer advocates. A summary of these comments is available, and all comments were published on FSRA's website.

Stakeholders' comments on the Consulted-on Second Proposed Amendment included feedback on the following topics (not exhaustive):

- **Disclosure** – Several respondents discussed the proposed disclosure requirements in the Consulted-on Second Proposed Amendment. Both industry and consumer advocates raised concerns about whether consumers would be able to understand and act effectively on the information insurers would be required to provide after removing a DSC option that would otherwise apply to pre-authorized payments. Consumer advocates questioned whether disclosure alone would be sufficient to ensure consumers are treated fairly when an insurer replaces DSC with a new sales charge option in that situation.

- **Other Upfront Compensation** – Several respondents discussed other types of upfront compensation insurers pay agents. Two suggested FSRA should ban the advisor chargeback sales charge option, and one asked FSRA to ensure insurers do not replace DSC with advisor chargeback.

- **Retroactivity** – One stakeholder asked FSRA to clarify that the new requirements would not apply retroactively.

[2] Amendment 1 – Deferred Sales Charges – Issuing and Changing Individual Variable Insurance Contracts ("**Amendment 1**").

ii. Summary of Revised Second Proposed Amendment

FSRA is proposing revisions to the Second Proposed Amendment to clarify that conduct, including inaction or omission, which results in, or could reasonably be expected to result in, a failure to adhere to the following is an unfair or deceptive act or practice ("**UDAP**"):

- If an insurer has an IVIC that allows DSCs, and the insurer has the contractual right to remove that option and owners[3] will still be able to make deposits under another option, then the insurer will be required to remove the DSC option for future payments. See s. 12(2).
- Where an insurer removes DSCs from an IVIC under s. 12(2), special rules will apply if an owner and the insurer had previously agreed to make future payments to the contract on a DSC basis, such as under a pre-authorized payment agreement. See s. 12(3).
    - In this case, the insurer will need to provide written disclosure to the owner. The criteria and timing for the disclosure will depend on whether the insurer offers a new default sales charge option that is unequivocally better than DSC:
        - If the new default is unequivocally better for the owner, the insurer can send disclosure before or promptly after first applying the new sales charge option to a deposit under the contract. The disclosure must tell the owner what the new sales charge is, how it works, that there are other sales charge options (if true) and how to get information about any other available option. See s. 12(4).
        - If the new default is not unequivocally better for the owner, the insurer must provide different disclosure before applying the new sales charge option. This disclosure must be designed to help the owner choose a suitable sales charge option, and must include a list of options available, how they each work, and information about the fees associated with them. See s. 12(7)(i).
            - Before applying the new sales charge option, the insurer must either obtain the owner's consent, or must notify the owner that the default sales charge option will apply if the owner does not reply within a reasonable time, and wait until that time has elapsed. See s. 12(7)(ii)(a)-(b).
        - Note that the insurer can choose to send the disclosure as described in s. 12(7) even if it offers a new sales charge that is unequivocally better than DSC. This means that an insurer that has already proceeded with disclosure based on the previously Consulted-on Second Proposed Amendment will still be in compliance in that case.

[3] Note that the Second Proposed Amendment uses the word "insured" rather than "owner" but under Part V of the *Insurance Act*, which governs IVICs, the word "insured" means the person who owns the IVIC. Please refer to ss. 171(1) "insured," 199(1)(b), 199(2) and 200(3) of the *Insurance Act*.

    - The advisor chargeback sales charge option is <u>not</u> deemed to be unequivocally better than a DSC for this purpose. See ss. 12(5) and 12(6) for details of what "unequivocally better" means.

- If an insurer has an IVIC that allows DSCs, but the insurer does not have the contractual right to remove that option, and leave owners another option under which they can make deposits, then the insurer will need to send written disclosure before applying a DSC to any deposits made after the Second Proposed Amendment takes effect. This disclosure must be reasonably designed to help the owner understand the options available and whether making a deposit on a DSC basis is suitable for them. See s. 12(8).

iii. <u>Material Changes</u>

In comparison to the Consulted-on Second Proposed Amendment, the proposed Material Changes significantly change the amount and timing of disclosure that is required in some circumstances for existing IVICs which have DSCs. These changes provide insurers with a second option regarding the timing, nature and amount of disclosure required where an insurer removes DSCs[4] and must give notice to owners who have pre-authorized DSC payments.

The new option will be available if insurers apply a sales charge option to the pre-authorized payment that is unequivocally better for an owner than DSC. In that case, the insurer will still be required to provide disclosure to the owner, but the disclosure will be focused on the new sales charge option, instead of describing all options available under the contract. In addition, the owner can receive it promptly after the insurer first applies the new sales charge option instead of before.

The new disclosure option is not available if the advisor chargeback option will apply to the pre-authorized deposits.

If an insurer decides to switch DSC payments to a default sales charge option that is not unequivocally better for the owner, the insurer must provide an owner with the detailed disclosure described in the Consulted-on Second Proposed Amendment. The owner must receive this disclosure before the insurer applies the new sales charge option to any deposit, and must be given a reasonable time to respond.

At a more detailed level, the Material Changes,

- define "advisor chargeback sales charge option" (for the purpose of assessing what disclosure is required, as described above) as any option under an IVIC:
    - where

[4] The obligation to remove the DSC option for future deposits only applies where the insurer has the legal right under an IVIC to make that change and still receive deposits from owners for these contracts, e.g., under a different sales charge option.

        - an insurer pays compensation to an agent when an owner invests money in a segregated fund in an IVIC; and
        - an agent that receives this compensation may need to repay all or part of it to an insurer, if the owner withdraws money from a segregated fund or changes the sales charge option associated with units in the segregated fund; or
    - that a reasonable insurer would consider to be an advisor chargeback sales charge option.

- provide that, with the exception of two scenarios described below, it is a UDAP for an insurer to apply a sales charge option other than DSC to a deposit to an IVIC if the insurer and owner had previously arranged that DSC would apply to the deposit.

- provide that the UDAP Rule does not prescribe that it is a UDAP for an insurer to apply a new sales charge option as described above if the new option is unequivocally better for an owner than a DSC and:
    - before or promptly after the insurer first applies the new sales charge option, the insured receives written disclosure from the insurer (the "**Superior Sales Charge Disclosure**"); and
    - the written disclosure:
        - informs the owner what new sales charge option the insurer is applying;
        - explains how the new sales charge option works;
        - informs the owner of the existence of other available sales charge options, if any; and
        - explains how the owner can obtain information about any other available sales charge options.

- state that a sales charge option is only unequivocally better for an owner for this purpose if:
    - the percentage amount of any initial sales charge is no greater than for the DSC;
    - the management expense ratio is no greater than for the DSC;
    - no other fee or charge associated with the sales charge option is less favourable to the owner than under the DSC option; and
    - the sales charge option applied does not involve any new conflict between the interests of the owner and the interests of the insurer or an agent to the detriment of the owner.

- clarify that the advisor chargeback option does not qualify as unequivocally better than DSC.

iv. Non-Material Changes

FSRA deleted all previous references to “June 1, 2023” in the Second Proposed Amendment’s UDAPs to clarify that the Second Proposed Amendment does not apply retroactively.

As well, the following requirements were explained in the Consulted-on Second Proposed Amendment and have not changed materially:

- the Second Proposed Amendment does not prescribe that it is a UDAP for an insurer to apply a sales charge option, instead of a DSC, to a pre-authorized payment if, before applying the new sales charge option, the insurer provides advance written disclosure to the owner that is reasonably designed to help an owner choose a suitable sales charge option.
    - The written disclosure must include:
        - a list of sales charge options an owner may choose among;
        - a description of how each sales charge option works;
        - the percentage amount of any initial sales charge under applicable sales charge options; and
        - a description of the relevant management expense ratio;

- it will be a UDAP for an insurer to accept a deposit on a DSC basis after the Second Proposed Amendment takes effect if the insurer has the contractual right to remove DSC as an option for further deposits and, instead, accept deposits under a different sales charge option; and

- in cases where the insurer cannot remove DSC as described in the previous bullet, it will be a UDAP for an insurer to accept a deposit on a DSC basis unless before that, the insured received written disclosure reasonably designed to help them understand the sales charge options available to them and whether making a DSC deposit is suitable for them.

Concise Statement of the Purpose of the Changes

i. Retroactive Effect Amendments

FSRA changed the Second Proposed Amendment by removing all references to “June 1, 2023.”

The purpose of this change is to clarify that if the Second Proposed Amendment comes into force it will not have retroactive effect. The requirements will only apply to transactions that happen after this amendment takes effect.

ii. Disclosure-Related Changes

FSRA changed the disclosure proposed in the Consulted-on Second Proposed Amendment to simplify disclosure to owners in cases where the insurer replaces DSC for pre-authorized payments with a sales charge option that is unequivocally better for owners.

This change will lead to all of the following benefits. It will:

- reduce the cost of insurer compliance since insurers:
  - would not need to provide owners with the more costly detailed disclosure;
  - would need to spend less time answering questions due to owner confusion with respect to the detailed disclosure; and
  - might be able to provide the simplified disclosure to owners as part of an annual or semi-annual statement after applying the unequivocally better sales charge option;
- reduce the time owners would need to spend reviewing disclosure where the insurer offers an unequivocally better option; owners would not need to review and choose among sales charge options that are less advantageous;
- increase the likelihood that owners will read and understand their disclosure;
- reduce the cost of agent compliance, because agents would need to spend less time answering questions due to owner confusion with respect to the detailed disclosure;
- encourage insurers to offer unequivocally better sales charge options to owners to obtain these reductions in cost and effort; and
- reduce the likelihood of owners being subject to the advisor chargeback sales charge option, since the advisor chargeback option is not unequivocally better than the DSC option so the simplified disclosure and associated reduced costs will not be available to insurers if they switch pre-authorized payments from DSC to advisor chargeback.

Reasons for the Changes

i. Retroactive Effect Amendments

FSRA removed “June 1, 2023” to eliminate any ambiguity that FSRA intends for the Second Proposed Amendment to have retroactive effect.

However, it is important to be clear that the amendment will apply to all transactions that occur after it takes effect, even if an insurer has provided disclosure to owners about those transactions before the amendment is finalized.

ii. Disclosure Related Changes

FSRA made the changes to simplify disclosure to owners in cases where the insurer replaces DSC for pre-authorized payments with a sales charge option that is

unequivocally better for owners in response to stakeholder feedback received during the Consultation Period. Stakeholder feedback raised a variety of concerns and questions with respect to the detailed disclosure proposed in the Consulted-on Second Proposed Amendment (the "**Previously Consulted-on Disclosure**").

Stakeholder submissions stated,

- disclosure alone is not enough to ensure customers are treated fairly;
- FSRA should consider other ways to increase the chances that owners will receive clearly better sales charge options than DSC;
- the Previously Consulted-on Disclosure is complex, confusing and, in some cases, excessive;
- if an insurer defaults pre-authorized deposits into a sales charge option that is clearly better than DSC, then the Previously Consulted-on Disclosure is unnecessary and likely to lead to owner confusion by requiring owners to review inferior sales charge options;
    - the Previously Consulted-on Disclosure would require owners to review a range of sales charge options where an insurer offers a new sales charge option to replace DSC on pre-authorized payments;
    - some of these options might not be an improvement; and
    - owners might not receive adequate information or advice to make appropriate choices;
- owners might ignore or fail to receive the Previously Consulted-on Disclosure;
- in particular, excessive disclosure tends to be ignored;
- FSRA should take action to help ensure DSC is not simply replaced with the advisor chargeback option.

The proposed Disclosure-Related Changes respond to stakeholder feedback by,

- reducing the likelihood of owner confusion, as under the Superior Sales Charge Disclosure owners would:
    - not need to decide from a range of inferior sales charge options;
    - be provided with a short and more easily understandable disclosure about the default sales charge option;
- promoting a way for owners to receive better sales charge options, as the insurer must default deposits into an unequivocally better sales charge option in order to take advantage of the simplified disclosure under the Superior Sales Charge Disclosure;
- reducing the likelihood and negative consequences of an owner not receiving or ignoring disclosure under the more detailed disclosure, as owners would receive notice before or after the insurer first applies the unequivocally better sales charge option under the Superior Sales Charge Disclosure;
- requiring more detailed disclosure with respect to the advisor chargeback sales charge option, when it replaces DSC on pre-authorized payments, than for sales charge options that are unequivocally better than DSC; and

- removing complicated disclosures associated with the more detailed disclosure, provided that the default sales charge option is unequivocally better for owners than DSC.

Second Proposed Amendment with Incorporated Changes

Please refer to Appendix A for the Second Proposed Amendment with the Material Changes.

Appendix A: Revised Second Proposed Amendment

FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO
RULE 2020 – 002
Unfair or Deceptive Acts or Practices

Amendment 2 – Deferred Sales Charges – Deposits to Pre-June 1, 2023 Individual Variable Insurance Contracts

1. Rule 2020 – 002 Unfair or Deceptive Acts or Practices (the "**UDAP Rule**") is amended by this Amendment 2 – Deferred Sales Charges – Deposits to Pre-June 1, 2023 Individual Variable Insurance Contracts (the "**Amendment**").

2. S. 1(1) of the UDAP Rule is amended,

   (a) By adding the following paragraph,

   (i.1) "Advisor chargeback sales charge option" means any option under an individual variable insurance contract,

      (a) in connection with which,

         (i) an insurer pays compensation to an agent when the insured invests money in a segregated fund in the individual variable insurance contract, and

         (ii) the agent that receives this payment may be required to repay all or part of this compensation to the insurer if, within a specified time, the insured withdraws money from the segregated fund or changes the sales charge option associated with the units in the segregated fund in which the insured invested, or

      (b) that a reasonable insurer would consider to be an advisor chargeback sales charge option,

3. The UDAP Rule is amended by adding the following sections:

12 Deferred Sales Charges – All Individual Variable Insurance Contracts

12(2) An insurer accepting a deposit to an individual variable insurance contract that may be subject to a deferred sales charge if the insurer has the right under the terms of the individual variable insurance contract to remove deferred sales charge as a sales charge option and instead accept deposits under a different sales charge option.

12(3) Except as described in s. 12(4) or s. 12(7) of this Rule, an insurer applying a sales charge option other than the deferred sales charge option to a deposit to an individual variable insurance contract where the insurer and insured had previously agreed the deferred sales charge option would apply to the deposit.

12(4) Section 12(3) of this Rule does not prescribe that it is an unfair or deceptive act or practice for an insurer to apply a sales charge option to a deposit that is unequivocally better for the insured than the deferred sales charge if, before or promptly after the insurer first applies the new sales charge option, the insured receives written disclosure from the insurer that,

(i) informs the insured what sales charge option the insurer is applying,

(ii) explains how the sales charge option in s. 12(4)(i) of this Rule works,

(iii) informs the insured of the existence of other available sales charge options, if any, and

(iv) explains how the insured can obtain information about any other available sales charge options.

12(5) For the purpose of s. 12(4) of this Rule, a sales charge option is unequivocally better for an insured than the deferred sales charge it replaces only if,

(i) the percentage amount of any initial sales charge is no greater than in connection with the deferred sales charge,

(ii) the management expense ratio is no greater than in connection with the deferred sales charge,

(iii) no other fee or charge associated with the sales charge option is less favourable to the insured than under the deferred sales charge option, and

(iv) the sales charge option applied does not involve any new conflict between the interests of the insured and the interests of the insurer or an agent to the detriment of the insured.

12(6) For the purpose of s. 12(5) of this Rule, the advisor chargeback sales charge option is not unequivocally better than the deferred sales charge.

12(7) Section 12(3) of this Rule does not prescribe that it is an unfair or deceptive act or practice for an insurer to apply a sales charge option to a deposit if, before the insurer applies the sales charge option,

(i) the insured receives written disclosure from the insurer reasonably designed to help the insured choose a suitable sales charge option, which at a minimum includes,

(a) a list of sales charge options the insured may choose among,

(b) a description of how each applicable sales charge option works,

(c) the percentage amount of any initial sales charge under each applicable sales charge option,

(d) a description of the relevant management expense ratios, including,

(i) any different charges for different guarantee options,

(ii) what the management expense ratios include, and

(iii) how the management expense ratios affect the insured's returns on their investments, and

(ii) either,

(a) the insured agrees to the new sales charge option applying to the deposit, or

(b) the insured is deemed to have agreed to the default sales charge option because a reasonable time elapses, during which the insured does not notify the insurer of the insured's choice of sales charge option, after the insurer

(i) provides the required disclosure,

(ii) notifies the insured of the default sales charge option, and

(iii) notifies the insured of the time until that default sales charge option will apply.

12(8) An insurer accepting a deposit to an individual variable insurance contract that may be subject to a deferred sales charge, unless the insured receives written disclosure from the insurer, before the insurer accepts the deposit,

that is reasonably designed to help the insured understand the sales charge options available to them and whether making a deposit on a deferred sales charge basis is suitable for that insured.

4. This Amendment will come into force,

   (i) 15 days after being approved by the Minister, or

   (ii) in accordance with s. 24(2)(b) of the *Financial Services Regulatory Authority of Ontario Act, 2016*, S.O. 2016, c. 37, Sched. 8, as applicable, if the Minister does not accept such subsections, reject such subsections or return such subsections to the Authority for further consideration.

Appendix B: UDAP Rule Blackline – Second Proposed Amendment

Unfair or Deceptive Acts or Practices

1 Interpretation

1(1) In this Rule,

(i) "Act" means the *Insurance Act*, R.S.O. 1990, c. I.8, as amended,

(i.1) "Advisor chargeback sales charge option" means any option under an individual variable insurance contract,

(a) in connection with which,

(i) an insurer pays compensation to an agent when the insured invests money in a segregated fund in the individual variable insurance contract, and

(ii) the agent that receives this payment may be required to repay all or part of this compensation to the insurer if, within a specified time, the insured withdraws money from the segregated fund or changes the sales charge option associated with the units in the segregated fund in which the insured invested, or

(b) that a reasonable insurer would consider to be an advisor chargeback sales charge option,

(ii) "Affiliated insurer" means an insurer that is considered to be affiliated with another insurer under s. 414(3) of the Act,

(iii) "Authorized representative" means a person who is authorized by another person to act on such person's behalf,

(iv) "Claimant" means a person who claims statutory accident benefits or who otherwise claims any benefit, compensation or payment under a contract of insurance,

(v) "Contract of insurance" means,

(a) for a contract of life insurance, has the meaning ascribed to such term in s. 171(1) of the Act,

(b) for a contract of accident and sickness insurance, has the meaning ascribed to such term in s. 290 of the Act, and

(c) for a contract of insurance not referred to in (a) or (b), has the meaning ascribed to "contract" in s. 1 of the Act,

(vi) “Credit information” means information about a person’s creditworthiness, including a person’s credit score, credit-based insurance score, credit rating and information about or derived in whole or in part from such individual’s occupation, previous places of residence, number of dependants, educational or professional qualifications, current or previous places of employment, estimated income, outstanding debt obligations, past debt payment history, cost of living obligations and assets,

(vii) “Declination grounds” means the grounds on which an insurer is authorized under the Act to decline to issue or to terminate or refuse to renew a contract of automobile insurance or to refuse to provide or continue a coverage or endorsement,

(vii.1) “Deferred sales charge”

(a) means,

(i) a fee or charge that the insured with respect to an individual variable insurance contract is required to pay under the individual variable insurance contract because the insured,

(1) makes a withdrawal from a segregated fund, or

(2) changes the sales charge option that applies to any investment in a segregated fund under the individual variable insurance contract,

and where the fee or charge is calculated based on a percentage of the amount that is withdrawn or affected by the change, and/or the original cost of the units redeemed or affected by the change, according to a predetermined calculation or schedule set out in the individual variable insurance contract,

(ii) a fee or charge that the insured with respect to an individual variable insurance contract is required to pay under the individual variable insurance contract because the insured does not make payments when required under the individual variable insurance contract, or

(iii) any fee or charge with respect to a segregated fund in an individual variable insurance contract that a reasonable insurer would consider to be a deferred sales charge,

(b) but does not include,

(i) a fee or charge the insured is only required to pay at the time they deposit funds to the individual variable insurance contract,

(ii) a fee or charge the insured is required to pay because the insured moves money among investment options within the individual variable insurance contract more often than the individual variable insurance contract permits without charge,

(iii) a short term trading fee the insured is required to pay if the insured withdraws money from the individual variable insurance contract, or moves money among investment options within the individual variable insurance contract, within 90 days of investing the money, or

(iv) a market value adjustment the insured is required to pay that is calculated based on changes in interest rates, but not based on compensation an agent received with respect to the investment,

(vii.2) "Individual variable insurance contract" means an individual contract of life insurance under which the insurer's liabilities vary in amount depending upon the market value of a specified group of assets in a segregated fund. Individual variable insurance contract includes a provision in an individual contract of life insurance under which policy dividends are deposited in a segregated fund,

(vii.3) "Person" has the meaning ascribed to such term in s. 438 of the Act,

(viii) "Prohibited factor" means,

(a) any reason or consideration that, under section 5 of Regulation 664 of the Revised Regulations of Ontario, 1990 (Automobile Insurance), made under the Act, insurers are prohibited from using in the manner described in that section,

(b) any fact or factor that, under section 16 of Regulation 664 of the Revised Regulations of Ontario, 1990 (Automobile Insurance), insurers are prohibited from using as elements of a risk classification system, or

(c) any other factor that the Authority determines is an estimate of, a surrogate for or analogous to a prohibited factor referred to in clause (a) or (b),

(ix) "Reasonable person" means a reasonable and prudent person in the same or similar circumstances as, and in the position of, and/or with the same licensing status of, the person in question, having regard to any applicable professional standards, best industry practices or codes of conduct, who has full knowledge of all and any relevant facts or circumstances,

(x) "Schedule" means the Statutory Accident Benefits Schedule — Effective September 1, 2010 and all previous Statutory Accident Benefit Schedules for which there are active claims,

(x.1) “Segregated fund” has the meaning ascribed to such term in s. 1(1) of O. Reg. 132/97: VARIABLE INSURANCE CONTRACTS,

(xi) “Substantially deficient” means that the delivery of goods or services fell below the standard required in the oral or written agreement to provide those goods or services to an extent or in such a manner that a significant part or the whole of the goods or services was unfit for the purposes intended from the perspective of a reasonable person who is in the position of the intended recipient of those goods or services,

(xii) “Unreasonable consideration” means an amount being paid or sought for goods or services provided to a claimant that a reasonable person, in the position of the provider of those goods or services, would not charge or seek, or would not expect a reasonable person who is in the position of the recipient of the goods or services, to accept.

1(2) In addition to s. 1(1) of this Rule, if a term or phrase used in this Rule is defined in the Act, that definition shall apply for the purposes of this Rule.

1(3) For greater clarity, in determining what amounts to a reasonable person who is an insurer, the reasonable person will be deemed to have a level of knowledge and expertise commensurate to that insurer’s nature, size, complexity, operations and risk profile.

1(4) If a person has committed an unfair or deceptive act or practice, then every director, officer, employee or authorized representative of that person shall be deemed to have committed an unfair or deceptive act or practice if that director, officer, employee or authorized representative,

(i) causes, authorizes, permits, acquiesces or participates in the commission of an unfair or deceptive act or practice by the person, or

(ii) fails to take all reasonable care in the circumstances to prevent the person from committing an unfair or deceptive act or practice.

1(5) References in this Rule to a form approved by the Chief Executive Officer are deemed to include the last form approved by the Superintendent for the purposes of the relevant provision prior to the day section 22 of Schedule 13 to the *Plan for Care and Opportunity Act (Budget Measures), 2018* came into force until the Chief Executive Officer approves a subsequent form for the purposes of this section.

2 Unfair or Deceptive Act or Practice

2(1) For the purposes of the definition of “unfair or deceptive act or practice” in section 438 of the Act, conduct, including inaction or omission, which results in, or could reasonably be expected to result in the outcomes, events or circumstances set out in s. 3 through s. 12 of this Rule is prescribed as an unfair or deceptive act or practice.

2(2) For the purposes of determining what conduct, including inaction or omission, could be reasonably expected to result in the outcomes, events or circumstances set out in s. 3 through s. 12 of this Rule,

(i) if the action or conduct, including inaction or omission is committed by,

(a) an agent, broker, adjuster, insurer or any director, officer, employee or authorized representative of an agent, broker, adjuster or insurer, or

(b) any person, or any director, officer, employee or authorized representative of that person, who provides goods or services to a claimant which are fully or partially expected to be paid for through the proceeds of insurance, including for greater clarity and without limitation, automotive repair, towing and storage services,

then an outcome, event or circumstance will be deemed to be reasonably expected if it would be expected by a reasonable person in that person's business or profession with full knowledge of all and any facts and circumstances that person knew about or, with reasonable diligence under the circumstances, ought to, have known, or

(ii) if the action or conduct, including inaction or omission, is committed by a person not listed in (i) then an outcome, event or circumstance will be deemed to be reasonably expected if it would be expected by a reasonable person in that person's position with knowledge of all and any relevant facts and circumstances that person knew about or ought to, with reasonable diligence under the circumstances, have known.

2(3) S. 2(1) of this Rule does not apply to conduct by a lawyer or paralegal with respect to activities that constitute practising law or providing legal services, as the case may be, as authorized under the *Law Society Act* which results in the outcomes listed in in s. 6 of this Rule.

3 Non-Compliance with Law

3(1) The commission of any act prohibited under the Act, or under any regulation or Authority rule made under the Act.

3(2) Any provision of the Act, or a regulation or Authority rule made under the Act, not being complied with resulting in the unfair treatment or unfair discrimination of a person.

3(3) Non-compliance with any requirement under the Act or a regulation or Authority rule made under the Act, by the subject of an examination or purported examination.

4 Unfair Discrimination

4(1) Any unlawful or unfair discrimination, including any contravention of the Ontario *Human Rights Code*, in the provision or administration of insurance, or goods or services related to insurance, including,

(i) between individuals of the same class and of the same expectation of life, in the amount or payment or return of premiums, or rates charged for contracts of life insurance or annuity contracts, or in the dividends or other benefits payable on such contracts or in the terms and conditions of such contracts, or

(ii) in any rate or schedule of rates between risks in Ontario of essentially the same physical hazards in the same territorial classification.

5 Unfair Claims Practices

5(1) Unreasonable or unfair resolution or delay in the adjudication, adjustment or settlement of any claim, including but not limited to,

(i) treating a claimant in an arbitrary, capricious or malicious manner,

(ii) not acting in good faith,

(iii) seeking a result which is inequitable or inconsistent with a claimant's rights under the contract,

(iv) imposing unreasonable or unfair costs or expenses on the (1) claims handling or dispute resolution processes, (2) goods or (3) services,

(v) communicating in an untimely manner or misrepresenting the rights of a claimant or obligations of an insurer under the contract, or

(vi) any adjuster or insurer not following fair, simple and accessible claims handling procedures or not providing a claimant timely, clear, comprehensive and accurate information about the status of its claim, the process for settling its claim or reasons for a decision made respecting its claim.

5(2) With respect to automobile insurance,

(i) non-compliance with the Schedule, including but not limited to,

(a) payment for goods or services not being made, or

(b) the cost of an assessment not being paid,

without reasonable cause, within the time period prescribed in the Schedule,

(ii) the making of a statement by or on behalf of an insurer for the purposes of adjusting or settling a claim if that insurer knows or ought to know that the statement misrepresents or unfairly presents the findings or conclusions of a person who conducted an examination under section 44 of the Schedule, or

(iii) a conflict of interest not being disclosed to a person who claims statutory accident benefits.

6 Fraudulent or Abusive Conduct Related to Goods and Services Provided to a Claimant

6(1) Consideration being paid or sought for goods or services in connection with a claim under a contract of insurance which were not provided to a claimant or were provided in a substantially deficient manner.

6(2) A referral fee being solicited, demanded, paid or accepted in connection with goods or services provided to a claimant.

6(3) Unreasonable consideration being paid or sought for goods or services provided to a claimant.

6(4) With respect to automobile insurance, a claimant signing or being asked to sign, before it has been fully completed, any form or any other document that is required to be in a form approved by the Chief Executive Officer or any form or document that is specified in a guideline applicable for the purposes of the Schedule.

6(5) Information being communicated about the business, billing practices or licensing status of a person who provides or offers to provide goods or services to a claimant which a reasonable person who is in the position of the intended recipient would consider false, misleading or deceptive.

7 Incentives

7(1) Payment, rebate, consideration, allowance, gift or thing of value being offered or provided, directly or indirectly, to an insured or person applying for insurance,

(i) as an incentive or inducement for a person to take an action or make a decision relating to an insurance product which would not, considering the options generally available in the marketplace, be recommended as a suitable action or decision by a reasonable person licensed to sell such an insurance product,

(ii) which is otherwise prohibited by law,

(iii) in a manner which a reasonable person licensed to sell such a product would not consider to be clearly and transparently communicated to intended recipients or applied consistently,

(iv) in a manner which involves unfair discrimination or contributes to an anti-competitive practice, including but not limited to, tied selling or predatory pricing,

(v) as an incentive or inducement to purchase, renew or retain an insurance product, which provides coverages within the classes of life or accident and sickness insurance, or

(vi) if related to automobile insurance, which is based, in whole or in part, on, or is calculated by reference to, prohibited factors.

7(2) For greater clarity, s. 7(1)(i) to 7(1)(v) of this Rule also apply to any payment, rebate, consideration, allowance, gift or thing of value being offered or provided, directly or indirectly, as an incentive or inducement to purchase, renew or retain automobile insurance.

7(3) An agreement being made or offered to be made, directly or indirectly, for a premium to be paid that is different from the premium set out in the contract of insurance.

7(4) For the purposes of this section, clear and transparent communication includes but is not limited to providing an explanation of how the amount or value of any payment, rebate, consideration, allowance, gift or thing of value is calculated.

7(5) For the purposes of this section, a gift or thing of value will not be considered an incentive or inducement if that gift or thing of value is a good or service reasonably related to reducing the risk insured by the contract of insurance to which it is related.

8 Misrepresentation

8(1) A person receiving information, promotional materials, or advice in any form, including audio, visual, electronic, written and oral means, which a reasonable person in the position of such recipient would consider to be inappropriate, inaccurate or misleading, respecting,

(i) the terms, benefits or advantages of any contract of insurance issued or to be issued,

(ii) an insurance claim, the claims process or whether a policy provides coverage, or

(iii) any comparison of contracts of insurance.

8(2) A person being charged for any premium or fee other than as stipulated in a contract of insurance.

9 Prohibited Conduct in Automobile Insurance Quotations, Applications or Renewals

9(1) Unfair treatment by an agent, broker or insurer to a consumer with regard to any matter relating to quotations for automobile insurance, applications for automobile insurance, issuance of contracts of automobile insurance or renewals of existing contracts of automobile insurance, including but not limited to,

(i) variance of formal or informal processes and procedures which make it more difficult for certain persons to interact with an insurer, broker or agent for the purpose of discouraging or delaying such persons from applying for, renewing or obtaining automobile insurance,

(ii) using credit information or a prohibited factor,

(iii) asking or requiring a person to provide consent to the collection, use or disclosure of any credit information, other than for the sole purpose of considering whether to provide premium financing,

(iv) applying any other information in a manner that is subjective or arbitrary or that bears little or no relationship to the risk assumed or to be assumed by the insurer,

(v) misclassifying a person or vehicle under the risk classification system used by an insurer or that an insurer is required by law to use,

(vi) making the issuance or variation of a policy of automobile insurance conditional on an insured having or purchasing another insurance policy,

(vii) engaging in unfair discrimination,

(viii) treating a consumer in an arbitrary, capricious or malicious manner,

(ix) not acting in good faith or behaving in a way that causes consumers to have a reasonable apprehension of bias, or

(x) communicating in an untimely manner or misrepresenting the rights of a claimant or obligations of an insurer under the automobile insurance contract.

9(2) Credit information about a person being collected, used or disclosed in any manner in connection with automobile insurance, other than,

(i) for the limited purposes, if any, described in the form of application for insurance approved by the Chief Executive Officer under s. 227(1) of the Act, or

(ii) in accordance with the consent obtained in compliance with applicable privacy laws of the person to whom the information relates.

10 Affiliated Insurers

10(1) An agent, broker or insurer providing a quote or renewal for automobile insurance from an insurer, and not offering the lowest rate available from amongst that insurer and its affiliated insurers.

10(2) In this section “lowest rate available” is the lowest rate amongst an insurer and its affiliates which is reasonably available to be offered to an insured or potential insured, having regard to all of the circumstances, including but not limited to,

(i) each insurer’s declination grounds,

(ii) each insurer’s rates and risk classification systems,

(iii) each insurer’s method of distribution, or

(iv) whether the insurers only recently became affiliated.

11 Deferred Sales Charges – New Individual Variable Insurance Contracts

11(1) An insurer issuing an individual variable insurance contract on or after June 1, 2023, under which a person can make an investment that may be subject to a deferred sales charge.

11(2) For the purposes of s. 11(1) of this Rule, an insurer is not considered to “issue” an individual variable insurance contract where a person has an existing individual variable insurance contract with the insurer and the insurer issues a replacement individual variable insurance contract on substantially similar terms and conditions, except any changes required by applicable tax or pension laws, including issuing a contract in connection with,

(i) converting a registered retirement savings plan to a registered retirement income fund contract,

(ii) converting a locked-in retirement account to a life income fund contract, or

(iii) transferring ownership of the individual variable insurance contract.

11(3) A replacement individual variable insurance contract is not substantially similar for the purposes of s. 11(2) of this Rule unless the calculation of each deferred sales charge on investments under the replacement individual variable insurance contract reflects the time the money was invested on a deferred sales charge basis under a replaced individual variable insurance contract, if any, rather than reflecting a period starting from the date on which the replacement individual variable insurance contract is issued.

12 Deferred Sales Charges – All Individual Variable Insurance Contracts

12(1) An insurer amending an individual variable insurance contract, or exercising a right under an individual variable insurance contract, to add, withdraw or change a sales charge option on or after June 1, 2023, if, as a result,

(i) the individual variable insurance contract may permit or require an insured to pay a deferred sales charge, or

(ii) a reasonable person would believe a deferred sales charge under the individual variable insurance contract becomes less favourable to the insured, including any change that,

(a) increases the amount of the investment which is or may be subject to a deferred sales charge,

(b) increases the duration of a deferred sales charge,

(c) increases the amount payable in any given circumstances under a deferred sales charge, or

(d) extends the circumstances that trigger payment of a deferred sales charge.

12(2) An insurer accepting a deposit to an individual variable insurance contract that may be subject to a deferred sales charge if the insurer has the right under the terms of the individual variable insurance contract to remove deferred sales charge as a sales charge option and instead accept deposits under a different sales charge option.

12(3) Except as described in s. 12(4) or s. 12(7) of this Rule, an insurer applying a sales charge option other than the deferred sales charge option to a deposit to an individual variable insurance contract where the insurer and insured had previously agreed the deferred sales charge option would apply to the deposit.

12(4) Section 12(3) of this Rule does not prescribe that it is an unfair or deceptive act or practice for an insurer to apply a sales charge option to a deposit that is unequivocally better for the insured than the deferred sales charge if, before or promptly after the insurer first applies the new sales charge option, the insured receives written disclosure from the insurer that,

(i) informs the insured what sales charge option the insurer is applying,

(ii) explains how the sales charge option in s. 12(4)(i) of this Rule works,

(iii) informs the insured of the existence of other available sales charge options, if any, and

(iv) explains how the insured can obtain information about any other available sales charge options.

12(5) For the purpose of s. 12(4) of this Rule, a sales charge option is unequivocally better for an insured than the deferred sales charge it replaces only if,

(i) the percentage amount of any initial sales charge is no greater than in connection with the deferred sales charge,

(ii) the management expense ratio is no greater than in connection with the deferred sales charge,

(iii) no other fee or charge associated with the sales charge option is less favourable to the insured than under the deferred sales charge option, and

(iv) the sales charge option applied does not involve any new conflict between the interests of the insured and the interests of the insurer or an agent to the detriment of the insured.

12(6) For the purpose of s. 12(5) of this Rule, the advisor chargeback sales charge option is not unequivocally better than the deferred sales charge.

12(7) Section 12(3) of this Rule does not prescribe that it is an unfair or deceptive act or practice for an insurer to apply a sales charge option to a deposit if, before the insurer applies the sales charge option,

(i) the insured receives written disclosure from the insurer reasonably designed to help the insured choose a suitable sales charge option, which at a minimum includes,

(a) a list of sales charge options the insured may choose among,

(b) a description of how each applicable sales charge option works,

(c) the percentage amount of any initial sales charge under each applicable sales charge option,

(d) a description of the relevant management expense ratios, including,

(i) any different charges for different guarantee options,

(ii) what the management expense ratios include, and

(iii) how the management expense ratios affect the insured's returns on their investments, and

(ii) either,

(a) the insured agrees to the new sales charge option applying to the deposit, or

(b) the insured is deemed to have agreed to the default sales charge option because a reasonable time elapses, during which the insured does not notify the insurer of the insured's choice of sales charge option, after the insurer

(i) provides the required disclosure,

(ii) notifies the insured of the default sales charge option, and

(iii) notifies the insured of the time until that default sales charge option will apply.

12(8) An insurer accepting a deposit to an individual variable insurance contract that may be subject to a deferred sales charge, unless the insured receives written disclosure from the insurer, before the insurer accepts the deposit, that is reasonably designed to help the insured understand the sales charge options available to them and whether making a deposit on a deferred sales charge basis is suitable for that insured.

13 Coming into Force

13(1) This Rule will come into force on the later of the date that section 1 of Schedule 5 of the *Protecting the People of Ontario Act (Budget Measures), 2021* comes into force and 15 days after the Rule is approved by the Minister.

Appendix C: Second Proposed Amendment Blacklined vs. First Consultation Draft

FINANCIAL SERVICES REGULATORY AUTHORITY OF ONTARIO
RULE 2020 – 002
Unfair or Deceptive Acts or Practices

Amendment 2 – Deferred Sales Charges – Deposits to Pre-June 1, 2023 Individual Variable Insurance Contracts

1. Rule 2020 – 002 Unfair or Deceptive Acts or Practices (the "**UDAP Rule**") is amended by this Amendment 2 – Deferred Sales Charges – Deposits to Pre-June 1, 2023 Individual Variable Insurance Contracts (the "**Amendment**").

2. S. 1(1) of the UDAP Rule is amended,

(a) By adding the following paragraph,

(i.1) "Advisor chargeback sales charge option" means any option under an individual variable insurance contract,

(a) in connection with which,

(i) an insurer pays compensation to an agent when the insured invests money in a segregated fund in the individual variable insurance contract, and

(ii) the agent that receives this payment may be required to repay all or part of this compensation to the insurer if, within a specified time, the insured withdraws money from the segregated fund or changes the sales charge option associated with the units in the segregated fund in which the insured invested, or

(b) that a reasonable insurer would consider to be an advisor chargeback sales charge option,

~~2.~~3. The UDAP Rule is amended by adding the following sections:

12 Deferred Sales Charges – All Individual Variable Insurance Contracts

12(2) An insurer accepting a deposit to an individual variable insurance contract ~~on or after June 1, 2023,~~ that may be subject to a deferred sales charge if the insurer has the right under the terms of the individual variable insurance contract to remove deferred sales charge as a sales charge option and instead accept deposits under a different sales charge option.

12(3) Except as described in s. 12(4) or s. 12(7) of this Rule, an insurer applying a sales charge option other than the deferred sales charge option to a deposit to an individual variable insurance contract where the insurer and insured had previously agreed the deferred sales charge option would apply to the deposit.

12(4) Section 12(3) of this Rule does not prescribe that it is an unfair or deceptive act or practice for an insurer to apply a sales charge option to a deposit that is unequivocally better for the insured than the deferred sales charge if, before or promptly after the insurer first applies the new sales charge option, the insured receives written disclosure from the insurer that,

(i) informs the insured what sales charge option the insurer is applying,

(ii) explains how the sales charge option in s. 12(4)(i) of this Rule works,

(iii) informs the insured of the existence of other available sales charge options, if any, and

(iv) explains how the insured can obtain information about any other available sales charge options.

12(5) For the purpose of s. 12(4) of this Rule, a sales charge option is unequivocally better for an insured than the deferred sales charge it replaces only if,

(i) the percentage amount of any initial sales charge is no greater than in connection with the deferred sales charge,

(ii) the management expense ratio is no greater than in connection with the deferred sales charge,

(iii) no other fee or charge associated with the sales charge option is less favourable to the insured than under the deferred sales charge option, and

(iv) the sales charge option applied does not involve any new conflict between the interests of the insured and the interests of the insurer or an agent to the detriment of the insured.

12(6) For the purpose of s. 12(5) of this Rule, the advisor chargeback sales charge option is not unequivocally better than the deferred sales charge.

~~12(3)~~12(7) Section 12(3) of this Rule does not prescribe that it is an unfair or deceptive act or practice for an insurer to apply a sales charge option to a deposit if, before the insurer applies the sales charge option, ~~An insurer accepting a deposit to an individual variable insurance contract on or after June 1, 2023 and applying a sales charge option to the deposit other than a deferred sales charge option, if the insurer and insured had agreed that a deferred sales charge would apply to the deposit, but the insurer has withdrawn the deferred sales charge option for future deposits, unless and before the insurer applies the new sales charge option,~~

(i) the insured receives written disclosure from the insurer reasonably designed to help the insured choose a suitable sales charge option, ~~and~~ which at a minimum includes,

(a) a list of sales charge options the insured may choose among,

(b) a description of how each applicable sales charge option works,

(c) the percentage amount of any initial sales charge under each applicable sales charge option,

(d) a description of the relevant management expense ratios, including,

(i) any different charges for different guarantee options,

(ii) what the management expense ratios include, and

(iii) how the management expense ratios affect the insured's returns on their investments, and

(ii) either,

(a) the insured agrees to the new sales charge option applying to the deposit, or

(b) the insured is deemed to have agreed to the default sales charge option because a reasonable time elapses, during which the insured does not notify the insurer of the insured's choice of sales charge option, after the insurer

(i) provides the required disclosure,

(ii) notifies the insured of the default sales charge option, and

(iii) notifies the insured of the time until that default sales charge option will apply.

~~12(4)~~12(8) An insurer accepting a deposit to an individual variable insurance contract ~~on or after June 1, 2023,~~ that may be subject to a deferred sales charge, unless the insured receives written disclosure from the insurer, before the insurer accepts the deposit, that is reasonably designed to help the insured understand the sales charge options available to them and whether making a deposit on a deferred sales charge basis is suitable for that insured.

~~3.~~4. This Amendment will come into force ~~on the later of~~,

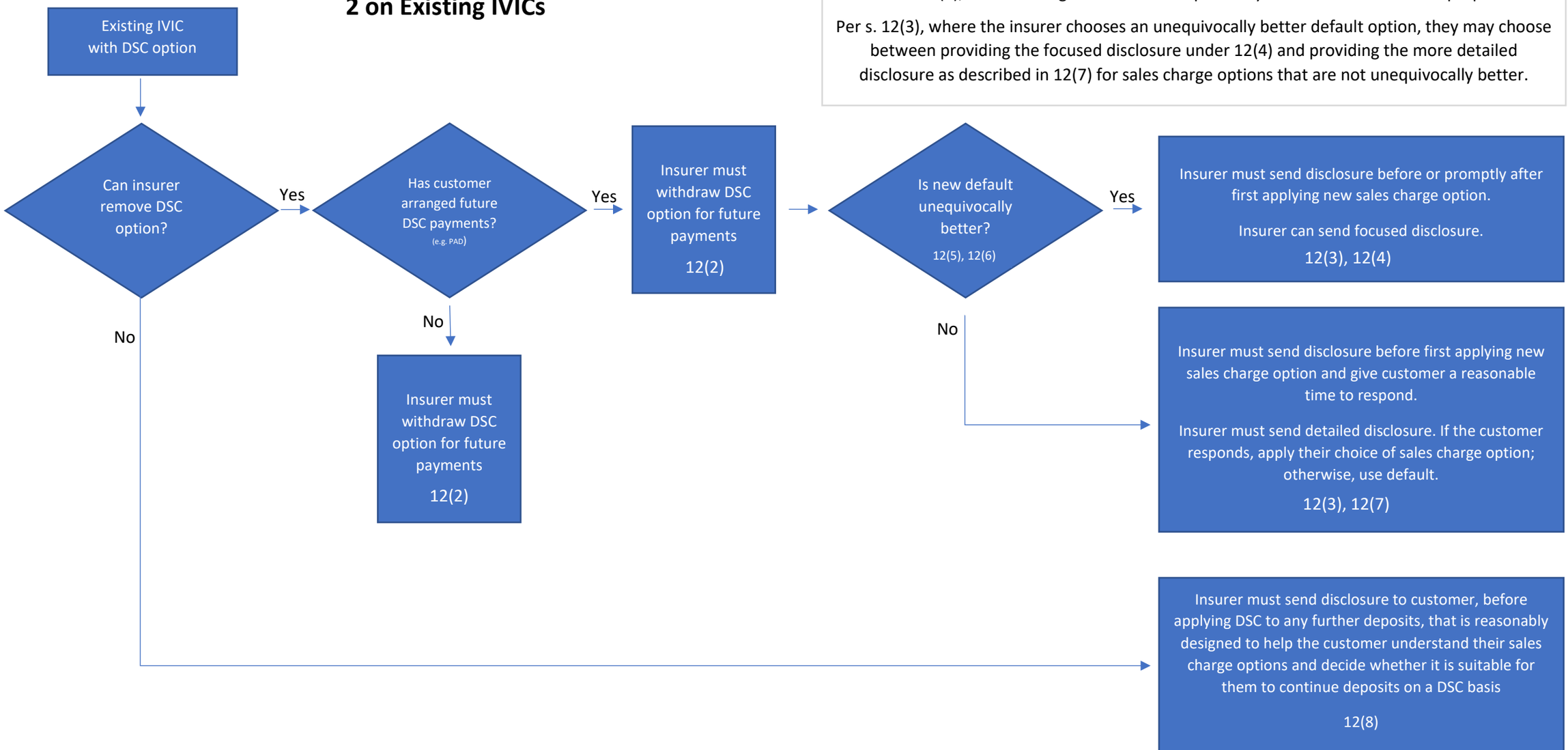
(i) 15 days after being approved by the Minister, or

(ii) in accordance with s. 24(2)(b) of the *Financial Services Regulatory Authority of Ontario Act, 2016*, S.O. 2016, c. 37, Sched. 8, as applicable, if the Minister does not accept such subsections, reject such subsections or return such subsections to the Authority for further consideration ~~the date that Amendment 1 – Deferred Sales Charges – Issuing and Changing Individual Variable Insurance Contracts comes into force~~.

Appendix D: Flow Chart – Effects of Second Proposed Amendment

Appendix D

Effects of UDAP Rule Amendment 2 on Existing IVICs



See s. 12(5) for more information about what "unequivocally better" means.

Per s. 12(6), advisor chargeback is not unequivocally better than DSC for this purpose.

Per s. 12(3), where the insurer chooses an unequivocally better default option, they may choose between providing the focused disclosure under 12(4) and providing the more detailed disclosure as described in 12(7) for sales charge options that are not unequivocally better.