Advocis The Financial Advisors Association of Canada

March 18, 2021

Financial Services Regulatory Authority of Ontario
5160 Yonge Street, 16th Floor
Toronto, ON M2N 6L9

SENT VIA ONLINE SUBMISSION SYSTEM

Dear Sirs/Mesdames,

Re: Financial Services Regulatory Authority of Ontario
Notice of Proposed Rule and Request for Comment
Proposed Rule [2020-002], Unfair or Deceptive Acts or Practices

On behalf of Advocis, The Financial Advisors Association of Canada, we are pleased to provide our comments in regards to the Financial Services Regulatory Authority of Ontario ("FSRA") Proposed Rule [2020-002], *Unfair or Deceptive Acts or Practices* (the "Proposed Rule").

1. ABOUT ADVOCIS

Advocis is the association of choice for financial advisors and planners. With more than 13,000 members across the country, Advocis is the definitive voice of the profession, advocating for professionalism and consumer protection. Our members are provincially licensed to sell life, health and accident and sickness insurance, as well as by provincial securities commissions as registrants for the sale of mutual funds or other securities. Members of Advocis are primarily owners and operators of their own small businesses, creating thousands of jobs across Canada. Advocis members provide advice in several key areas, including estate and retirement planning, wealth management, risk management, tax planning, employee benefits, and life, critical illness and disability insurance.

Professional financial advisors and planners are critical to the ongoing success of the economy, helping consumers to make sound financial decisions that ultimately lead to greater financial stability and independence. No one spends more time working with consumers on financial matters and helping them to reach their financial goals. Advocis works with decision-makers and the public, stressing the value of financial advice and striving for an environment in which all Canadians have access to the advice they need. In all that they do, our members are fundamentally driven by Advocis' motto, *non solis nobis* – not for ourselves alone.

2. INTRODUCTION

Advocis supports FSRA's efforts to redefine the unfair or deceptive acts or practices ("UDAP") rule in an outcomes-focused manner that transitions towards principles-based regulation. We recognize FSRA's work to make the supervision of conduct more transparent, dynamic and flexible and in general, we support reducing barriers to innovation in the manufacturing and delivery of insurance products.

However, the proposed changes to the existing prohibition on incentives and rebating raise important consumer protection concerns in the life and health insurance sector that merit further review. Due to the specific nature of life and health insurance products, including how they are purchased by consumers and their intended multi-year time horizons, we recommend that FSRA continues to prohibit the practice of rebating in these sectors or holds a separate consultation on rebating in life and health insurance for broader review and assessment of the inherent risks.

3. OUR COMMENTS

CONSUMER PROTECTION CONCERNS WITH PERMITTING REBATING IN HEALTH AND LIFE INSURANCE

In our view, rebating by both life insurance companies and life insurance agents (as well as the offering of inducements, generally) should be banned. The reasons for having such a ban were summarized by the Canadian Council of Insurance Regulators ("CCIR") in a 2004 consultation paper entitled "Issues Related to Inducement, Rebating and Tied Selling".[1] This paper outlined the following consumer and industry protection reasons for provincial anti-rebating and anti-inducement regulations:

- To protect consumers from making inappropriate purchasing decisions on the basis of the offered inducement or rebate.
- To ensure parity between different-sized insurers and intermediaries who compete for the same business (i.e., to foster competition based on risk pricing).
- Concerns that the cost of the incentives would be borne by all consumers in pricing of the product.
- Such rebates are not offered equally to all similar risks but arbitrarily to certain consumers.
- A need to ensure that premium rates that are charged result in adequate policy reserves (solvency concerns).

That said, we recognize that in some circumstances, rebating may facilitate innovation, competition and choice. We see no issue with insurers in the auto insurance and the property and casualty insurance sectors giving rebates to customers in the examples cited in the

[1] https://www.ccir-ccrra.org/RebatingandInducementsWorkingGroup

consultation document, including offering a consumer a rebate on their auto policy premium for good driving behaviour, or providing a consumer with a paid-for/subsidized plumbing inspection to help mitigate the risk of water damage-related losses.

Advocis recognizes that the Proposed Rule would also include restrictions on when insurers (and other entities) can offer rebates and other incentives. Specifically, we appreciate that section 7 of the Proposed Rule would replace the existing prohibition against incentives with a more permissive provision that would allow insurers to offer rebates and incentives to consumers unless the incentive: leads to a decision that is not in the consumer's interests; is otherwise prohibited by law; is not transparently communicated; or is discriminatory, anti-competitive or relies on prohibited factors. In our view, permitting some rebating may be effective for the property and casualty insurance sectors. However, we feel that due to the specific qualities of life and health insurance products, not all of the risks involved in permitting insurer rebating are fully mitigated.

Although the practice of rebating raises similar consumer protection concerns for all types of insurance, the specific nature and purpose of life insurance increases the risk of negative outcomes and makes the risks more difficult to mitigate. For example, property and casualty insurance is typically intended to protect a consumer and/or their property from specific risks, typically for one-year terms. At the end of a term, it is generally simple for a consumer to explore competitors and select another product, usually based on pricing.

While a consumer may switch property and casualty insurers every year without experiencing a detrimental impact, life insurance is typically purchased as part of a long-term wealth and risk management strategy and is designed to create a stable, long-term plan for the insured's beneficiaries. It is selected with the assistance of a qualified advisor who provides advice and recommendations based on the consumer's specific needs and circumstances, including longer-term financial goals, as well as which products the consumer qualifies for at purchase and will qualify for over the term of the product. Any rebate could incent consumers away from products that are better aligned with their specific individual needs, and it could lead to consumers purchasing products that benefit them in the short-term, but do not necessarily serve their interests in the long-term. This is possible regardless of the reason that the rebate is being offered or how transparently it is communicated.

Some of our members also offer advice on group health insurance for employers. Due to the specific features of how these plans are purchased and funded, a rebate offered in one year could impact the premiums of the succeeding year and the overall solvency of the benefits plan. Specifically, a rebate could imbalance the payout ratio in year one of a plan, resulting in an increase in premiums in year two. This could drive employers to seek the next illusory "lower price" from a competitor. This is not sustainable because it is not based on actuarial foundations of premiums-to-payouts; the rebate is a marketing strategy to attract new clients. For the soundness of the sector, it is not desirable to intentionally underfund plans from the outset with an expectation that renewal premiums will jump. "Competition" on this basis is not a good outcome for plan members.

Also, while we understand that there is a restriction on rebates that are "anti-competitive," this term is not fully defined. We are concerned that if insurers can rebate directly through channels (e.g. direct, or through a call centre – with the justification being that it is a lower-cost channel with less overhead) then it could put independent advisors at a disadvantage. Given the essential role that independent life insurance advisors play in providing financial advice, we feel that it is more appropriate for the regulator to play an active role in ensuring that insurers do not engage in anti-competitive behaviour that would reduce or eliminate the role of advisors, rather than delegating the responsibility to the insurers to ensure that rebates are not offered in an anti-competitive manner.

Life and health insurance products have unique features and risks that should be evaluated with caution in the context of incentives and rebating. In summary, while rebating may be warranted for property and casualty insurance, we feel that it is inappropriate to expand rebating to the life and health insurance sector at this time.

INCREASED PRESSURE TO EXPAND REBATING TO PERMIT REBATES BY INSURANCE ADVISORS

We appreciate that under the proposed changes, insurance agents would still be prohibited from offering rebates and incentives under the prohibitions on inducements in the Agents regulation under the *Insurance Act*. In our view, this restriction remains appropriate and may address some of the concerns around protecting consumers from making inappropriate purchasing decisions or the arbitrary offering of rebates to certain customers.

However, we have some concern that the proposed changes may represent the "thin edge of the wedge" and could lead to pressure to expand the practice of rebating to insurance advisors, which is currently permitted in Alberta and British Columbia. If the Proposed Rule proceeds as drafted, we would expect pressure to arise from the unequal availability of rebates across distribution channels, encouraging advisors to compete on (fleeting) price discounts, not financial planning and after-sales service.

Advocis has seen how the ability to rebate can result in very unfair outcomes: members in jurisdictions that permit rebating report to us that they have been engaged by clients to perform extensive needs analyses and prepare recommendations, only to see those clients abruptly terminate the relationship and purchase the recommended policies through advisors that offer a rebate. This of course results in the advisor who performed the analysis receiving no compensation for his or her efforts. In the long run, this type of outcome is not healthy for the residents of Ontario, as fewer advisors will be willing to provide the detailed insurance analysis that is required by many consumers.

The presence of rebates in life and health insurance creates an unlevel playing field amongst consumers, advisors and insurers alike. We encourage FSRA to make a clear statement that any expansion of rebating will not include permitting individual advisors to rebate.

4. CONCLUSION

We thank FSRA for the opportunity to provide our comments on the Proposed Rule. Overall, we are supportive of FSRA's efforts to provide outcomes-based definitions of UDAP that are consistent with FSRA's objects and support transition to principles-based regulation.

However, we have significant concerns with the plan to permit rebating in the life and health insurance sector. We are concerned that the proposed restrictions would not adequately address consumer protection concerns and would create an unlevel playing field for independent advisors. As stated, we understand that there are compelling reasons to consider expanding the availability of rebates, as they can increase innovation, competition and choice. While we feel that these goals may be attainable for some types of insurance products as currently drafted, we believe that the specific features and distribution methods of life and health insurance products require additional clarification and consultation.

We continue to support FSRA's work to obtain better outcomes for consumers, and we hope that our submissions have highlighted some potential areas for further review and consultation. Should you have any questions, please do not hesitate to contact the undersigned, or James Ryu, Vice President, Legal and Regulatory Affairs at jryu@advocis.ca.

Sincerely,

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President and CEO	Chair, National Board of Directors