

March 16, 2021

Financial Services Regulatory Authority of Ontario
25 Sheppard Avenue West, Suite 100
Toronto, ON
M2N 6S6

Dear Sir/Madame.

Consultation ID: 2020-018

FSRA's First Proposed Insurance Rule Released for Public Consultation – the Unfair or Deceptive Acts or Practices (UDAP) Rule

This submission is being provided by the Ontario Mutual Insurance Association on behalf of 37 farm mutual insurers located across Ontario.

Each of our mutual insurers is policyholder based. Mutuals are organized without share capital for the benefit of policyholders. Each policy issued is a participating policy providing voting rights to each policy holder.

Our members write farm, home, and automobile insurance with much of this business being located outside major urban centers. Mutuals are the primary source of insurance for most farms and for many agri-businesses across the province.

Our input will be concise and lean towards the implementation questions that will arise should this rule move forward.

As a general comment, we also wish to point out that mutuals are relatively small insurers operating on straightforward corporate and organizational lines. Our members' expectation is that any regulation or rule should allow for a standard of proportionality and should provide clarity for all stakeholders as opposed to complex and adversarial compliance processes and regimes.

A specific example where proportionality can become lost is in the increasing demands from regulators for detailed data and surveys of insurers on market conduct. We believe that in many instances regulators are searching for data "proxies" to draw inferences on an insurer's general market conduct profile. This data mining has not to date yielded any significant insight to benefit consumers but has created significant cost for insurers.

We believe that the principle of proportionality supports a competitive and diverse marketplace which optimizes a choice as well as maintaining vibrant local economies which drive long-term economic growth and availability of products to all residents of Ontario.

Our comments on proportionality are further underlined by the consolidation of the market and the dominance of larger insurers in market share.

We have attempted to organize own comments based on the targeted questions in the consultation document, however some of our responses may apply in several different areas.

Targeted Question # 1

Are there any parts of the proposed rule that are too general or require further detail, including for the purposes of clarity are closing possible gaps?

The stated purpose for this rule is to provide "clear and objective standards for determining misconduct" and "removing barriers to innovation in the area of customer incentives...."

The clear standard proposed is the "reasonable person" standard. This is often quoted as an objective standard by the Courts; however, experience has shown that this standard can be open to multiple interpretations. We believe however that it ultimately can be an equitable standard for all stakeholders if applied with consistency and with sufficient guidance as to what comprises a "reasonable person".

Again, as related to proportionality, we believe it will be critical to ensure that any adjudication or interpretation will acknowledge the fact that not all insurers will be created equal, and that proportionality will apply in assessing the "reasonableness" of insurers just as it would to consumers or other stakeholders.

We also have concerns that in assessing any UDAP allegation the expectation will be that insurers must document "good behaviour" on their part and that the lack of such documentation will allow an inference of "bad behaviour" or guilt. We believe that any UDAP allegation needs to stand on its own merits and proof and should not default to a "reverse onus".

The proposed rule will provide greater leeway for offering incentives if those incentives relate to reducing the insured risk. We believe this is a favorable provision if applied in a transparent manner. We have some concerns as to how FSRA will judge the use of large-scale incentive-based marketing schemes as it relates to not just short-term economic benefit to consumers but to long-term sustainability of a diverse market. We believe that predatory incentive schemes could provide short term consumer benefit but ultimately drive competitors from the market. We also believe that care should be taken in having guidelines or some understanding as to how incentives are actually tied to risk reduction as we believe many incentive/marketing schemes could be subjectively described to fall under risk reduction categories.

As related to these incentive programs, our greatest concern is that incentives will be used tactically in the short-term by dominant market players to create a price-based competition that eliminates some competitors thereby in the medium or longer-term actually reducing the overall competitive environment. We believe this would be a significant detriment to consumers. Market capacity in insurance can be extremely difficult to replace in a consolidated marketplace.

We also believe there needs to be clarity around how rebates of auto premium may fall inside or outside of permissible ranges.

Targeted Question # 2

Are there any implementation considerations, such as transition issues or the coming into force date of the proposed rule, that interested parties would like to bring to FSRA's attention?

In moving from an existing rules-based regime to a principles-based regime we believe there will be considerable growing pains.

While a principles-based regime may be more effective and equitable over time, we believe that there are opportunities for significant misunderstandings in the short-term that create reputational risk for insurers and for FSRA as a regulator.

One of the stated purposes of moving to this rule is to encourage innovation for the benefit of consumers. Innovation in and of itself suggests new or untried practices and not only will the expected outcome of the innovation be speculative but there will be no past guidance in place to determine if in fact it may constitute a UDAP.

FSRA's consultation as related to a "regulatory sandbox" for auto may help to answer some of these concerns, however we believe that an important contributing factor to the success of moving to the UDAP rule would be for FSRA to provide upon request advance rulings as to whether a proposed activity is a UDAP or could in some circumstances be determined to be a UDAP.

We realize this poses a risk to a regulator who will also be operating in an untested environment; however, we believe that providing some degree of collaboration would significantly reduce the growing pains during implementation. Such advance rulings could also allow for potential submissions or input from other stakeholders which may help mitigate unexpected consequences of any given innovation.

In addition to the potential for an advance ruling process other significant example-based plain language guidance should be developed to assist everyone in moving into this environment on a good-faith basis.

Targeted Question # 3

Are there sections of the proposed rule that are redundant....?

It appears that Section 3 of the proposed rule (Non-Compliance With Law) is redundant. Part XVIII.1 of the *Insurance Act* already empowers the Chief Executive Officer or delegate to impose administrative penalties and other sections of the *Act* allow for the ordering of corrective action. These statutory sections would likely override a rule or regulation in the event of a dispute as to interpretation and use of identical wordings seems is redundant. This may create potential overlap with the existing administrative penalty regime.

Targeted Question # 4 - Are there any other issues or amendments to the proposed rule that FSRA should consider as it proceeds to its intended second stage of work in this area?

Section 1 (3) of the rule casts a wide net relating to the potential culpability of every director, officer, employee, or legal representative of an entity. We understand that the intent of this is to create organizational accountability and we believe this is important.

We do have concerns that this is too rigid an expectation and that the provision could be amended to include "had knowledge of the unfair or deceptive act or practice". The opening paragraph would then read as follows:

"if a person has committed an unfair or deceptive act or practice, then every director, officer, employee, or legal representative of that person shall be deemed to have committed an unfair or deceptive act or practice if that director, officer, employee or legal representative had knowledge of the unfair or deceptive act or practice and..."

We also believe it would be helpful for FSRA to provide some indication as to whether the current administrative penalty regime will still apply to UDAP's or if other penalties or enforcement tools will be coming into play.

Other Commentary

In reflecting on the reasoning for moving UDAP into a principles-based environment, we believe that it is based on sound intentions of balancing utmost good faith with innovation and fairness. While this may be well outside the scope of UDAPs we believe that the greatest single "iceberg" as related to consumer fairness is the issue of transparency in pricing and selection and how it is developed based on individual consumer profiles. In the last several years increasingly sophisticated rating schemes have been introduced which are "unexplainable" to consumers as related to specific parts of their individual consumer profile that drive pricing variances. While at an intellectual level these pricing models, which include complex algorithms that are often interpreted with the assistance of artificial intelligence, can be justified with quantitative data and modelling, it is essentially impossible to describe any of these as transparent in any way to the consumer.

This is exacerbated by the need for insurers to protect the intellectual property of these algorithms. FSRA has previously been clear that insurers will be responsible for being able to explain ratings and algorithms and we believe it will be inevitable that questions concerning the use of data and transparency will find its way into the UDAP universe. Proposed Federal and Provincial privacy legislation touching on analytics and AI may further complicate this issue.

We appreciate the opportunity to provide comment.

Regards,

A handwritten signature in blue ink, appearing to read "J L Taylor". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

John L. Taylor BBA, FCIP, FCLA, CHRL
President