

August 11, 2021

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

RE: Proposed Rule [2020-002] Unfair or Deceptive Acts or Practices (UDAP): Notice of Changes and Request for Further Comment

Insurance Bureau of Canada and its member property and casualty insurers are pleased to provide comments on the changes proposed for a new UDAP rule.

At the outset, we want to confirm our support for the draft rule's effective use of principles-based language in recasting the existing UDAP regulation. We also appreciate the effort that has been made to clarify the consumer outcomes expected to flow from application of UDAP principles as well as the greater alignment with existing guidance on the fair treatment of insurance consumers. We agree that these changes provide a more reasonable and flexible approach for insurers to ensure, and FSRA to oversee, that customers are treated fairly throughout the insurance product life-cycle.

Our remaining commentary on the proposed rule is addressed below.

Incentives

We support the removal of the outright ban on insurers' responsible use of marketing incentives¹. During the pandemic, insurers' ability to offer rebates and other considerations to customers became a welcome response to extraordinary circumstances for consumers and insurers. As in most consumer markets, we believe that the everyday use of incentives can play an important role in stimulating healthy, consumer-friendly competition in the insurance marketplace.

In order to realize the full potential benefits of marketing incentives, insurers should be able to introduce them as determined to be needed for the company's competitive marketing purposes and without prior filing. As long as an insurer's incentives program is consistent with FSRA's guidance for the fair treatment of consumers², it should be viewed as appropriate.

¹ Which the draft explicitly defines as including "payment".

² For example, the incentive programme is not unfairly discriminatory, does not increase the risk of sales that are inappropriate to customers' needs, and it is offered with accurate, clear and non-misleading information.

Prohibited Conduct

Quotations, Applications, or Renewals

S.9(1)(i) would add to the take-all-comers rule by defining as a UDAP the “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”. Given the broad application of the underlying take-all-comers rule, we believe that this addition to UDAP will also apply broadly, resulting in unintended consequences, such as prohibiting insurers from asking for more underwriting-related information on complex risk profiles or using fraud detection tools at the point of sale. This would run counter to the emphasis that this government places on fighting fraud, evident in the Ministry of Finance’s recent fraud and abuse consultation.

Because of the take-all-comers rule’s susceptibility to unintended consequences, any enhancement of it requires careful study and stakeholder consultation. As the current consultation is largely about re-writing the existing UDAP provisions to focus on outcomes and removing select barriers to innovation, it is not, in our view, the appropriate forum for that dialogue. We recommend removing s.9(1)(i) from the proposed UDAP rule until FSRA can hold a full study and consultation on the take-all-comers rule’s public policy objectives and manner of achieving those objectives.

Claims Handling Delays

In a similar manner that the expansion of the take-all-comers rule will lead to unintended consequences, s.5(1)(v) and (vi) outline that any delay in claims communication will be considered as a UDAP. This inclusion in the UDAP rule will also make it more difficult for insurers to fight claims that appear to be fraudulent. We recommend clarifying that any delay in claims handling does not, itself, constitute a UDAP.

Affiliated Insurers

As FSRA is aware, the current regulatory requirement to offer “the lowest rate available from amongst an insurer and its affiliated insurers” has been identified as a potential impediment to innovation. As one of the key objectives of the UDAP review is to remove and/or mitigate its negative effects on innovation and improve the consumer experience in the insurance marketplace, we are expecting this topic will be fully addressed during the second phase of the UDAP review.

Signing Blank Forms Before Delivery of Goods or Services

According to s.2(1) of the proposed rule, lawyers and paralegals are to be exempted from regulatory repercussions resulting from participating or advising on the fraudulent or abusive conduct described in s.6, including s.6(4). We understand and accept that the rationale for this arises from the Law Society of Ontario (LSO) holding responsibility for regulating conduct in the legal profession.

Yet, the SABS is correct to define s.6(4) acts as fraudulent and misleading acts. In our experience, these are too often undertaken in the insurer-paid medical and rehabilitation environment. Regardless of whether these acts are initiated by a lawyer or any other individual engaged in medical rehabilitation activities, they cannot be carried out without the compliance of claimants.

We recommend inclusion in the new rule of the identification of s.6(4) acts as UDAP behaviours for which claimants will be held individually accountable and which provision will be enforced by FSRA.

Coming Into Force Clause

The proposed rule states that it will come into force “on the date that the amendments set out in Schedule 5 of the *Protecting the People of Ontario Act, 2021* (PPOA) come into force”. On this language, we have several questions related to transitioning to the new rule, including:

- Does the government have a target timetable for the effective date of the *PPOA* and, if so, can it be shared with the industry?
- Can the government confirm that, as previously requested, insurers and affected stakeholders will be provided a six-month transition period starting from publication of the final rule?

General Feedback

- The draft rules contains many references to UDAPs that are ‘not limited to’. This wording suggests that other types of practices not specifically mentioned may be considered UDAP, which may extend the scope of the regulation and introduce increased uncertainty on what is allowed or not.
- While not explicitly outlined, our interpretation is that the draft rule does not apply to reinsurance contracts. We would like clarity that this is the case.
- S.(1)(xii) outlines that discrimination is anything that contravenes the *Ontario Human Rights Code*. However, the removal of the additional language that unfair discrimination could also mean anything in FSRA’s published guidance could create ambiguity for insurers. The possibility that FSRA could consider unfair discrimination to be from an unpublished source makes the meaning and intent of ‘unfair discrimination’ less clear to insurers. For consistency, we recommend that FSRA follow the definition of discrimination as set out in the *Ontario Human Rights Code*.
- Sections (1)(4)(i) and (ii) outline that if an employee or authorized insurer representative commits a UDAP, every employee or authorized representative involved at any point of the process that led to a UDAP can be held personally liable. Employees or authorized representatives work on particular projects based on their individual expertise, not necessarily their regulatory knowledge. It is unreasonable to expect every individual employee or authorized representative to understand all aspects of the proposed rule. If an

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insurer is found to have committed a UDAP, it is ultimately the insurer, not the individual employees that should take responsibility. We recommend that this section be removed.

In closing, we reiterate our appreciation for the opportunity to contribute our views on the work to date towards transforming the outdated UDAP regulation into a modern, principles-based rule. We look forward to participating in the second stage of the review, where we are hopeful that further progress will be achieved on the twin goals of protecting consumers from deceptive and unfair business practices and promoting the environment for innovation and competition.

Yours sincerely,

A handwritten signature in black ink, appearing to read "K. Donaldson", with a long horizontal flourish extending to the right.

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