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The Canadian Association of Financial Institutions in Insurance | L'association canadienne des institutions financières en assurance

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May 31, 2023

Mr. Mark White, CEO
Financial Services Regulatory Authority of Ontario
25 Sheppard Avenue West, Suite 100
Toronto, Ontario M2N 6S6
mark.white@fsrao.ca; and
https://www.fsrao.ca/engagement-and-consultations/consultation-proposed-guidance-administrative-monetary-penalties

RE: CAFII Feedback on FSRA's *Proposed Guidance: Administrative Monetary Penalties*

Dear Mr. White:

The Canadian Association of Financial Institutions in Insurance (CAFII) thanks the Financial Services Regulatory Authority (FSRA) of Ontario for the opportunity to comment on your consultation document *"Proposed Guidance: Administrative Monetary Penalties."*

We have divided our feedback into two sections: *High Level, Thematic Feedback Comments*; and *Feedback On Specific Sections and Components*.

High Level, Thematic Feedback Comments

As per our previous May 31, 2022 response submission to FSRA on its *"Use of Retained Revenues under Regulation "Money Retained Outside the Consolidated Fund" Guidance,"* it is CAFII's view that it is appropriate for FSRA to retain revenues from administrative monetary penalties (AMPs); and that FSRA's deployment of those retained revenues to fund research or educational initiatives which are intended to "enhance financial literacy, financial awareness, knowledge of rights and obligations or the informed decision-making of consumers…" is unquestionably in the public interest and therefore entirely appropriate. We would suggest that FSRA incorporate a reference to its intended use of retained revenues from AMPs into the *Proposed Guidance: Administrative Monetary Penalties.*

Our Association's view is that, overall, the *Proposed Guidance: Administrative Monetary Penalties* is a principles-based, even-handed document which strikes the right balance between the exercise of regulatory authority and the exercise of case-by-case discretion while adhering to the procedural fairness and due process precepts of administrative law. We find the Guidance to be well-written and well-reasoned.

That said, given the sensitivity associated with AMPs and the high importance of getting the approach to them right, CAFII encourages FSRA to consider the significance to a regulator of incentivizing the right behaviours among regulated entities, rather than focusing predominantly upon having the power to impose an AMP as a punitive sanction. We believe that it would be appropriate to include in the Proposed Guidance additional references to FSRA's exercise of discretion and its use of warnings, rather than AMPs, as a first option when a situation arises in which a regulated entity has failed to comply with regulatory expectations and is a first-time offender.

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In particular, if a first-time offender's contravention is recognized to have been unintentional, CAFII believes that a letter of warning or other similar measure should be FSRA's initial course of action. We acknowledge that there are references in the Proposed Guidance to the weighing of mitigating circumstances when assessing the evidence and deciding upon an appropriate course of action, but we believe that such considerations should be given greater weight in the Proposed Guidance.

In that same vein of wanting to incentivize the right behaviours, CAFII is strongly of the view that a breach which a regulated entity has proactively self-reported to FSRA -- and for which it has taken prompt, self-initiated corrective action, and made restitution to any harmed consumers to make them whole – should be regarded and treated differently by FSRA as compared to a breach which the regulator has identified itself, in terms of determining the appropriate course of remedial action.

In that connection, we would like to reiterate some salient input from our September 24, 2021 response submission on the Authority's *Proposed Approach Guidance Around Publishing Information Arising From Enforcement Proceedings and Investigations* – input which is also quite relevant to the current AMPs-related consultation -- as follows:

> *In principle, CAFII supports FSRA's intention to be transparent and publish information about the actions it has taken in response to an industry player's misbehaviour or lack of compliance with legislation and/or Regulations. We generally concur that transparency in enforcement actions increases public awareness of misconduct and of the sanctions taken to improve consumer protection and deter future misconduct in the regulated sectors; and that a consistent and clear approach to transparency of enforcement also helps to ensure that non-compliant regulated entities and individuals are treated equitably and know in advance when and how FSRA will inform the public that it is taking action for non- compliant activity.*
>
> *However, we are making this submission to draw out one particular concern. CAFII is concerned that implementation of FSRA's Proposed Approach Guidance, as currently worded, may lead to the publication of information arising from an enforcement proceeding or action taken against an industry player even when that business has proactively self-reported an issue to FSRA, taken prompt corrective action, and made restitution to any harmed customers to make them whole.*
>
> *CAFII members are strongly of the view that when it comes to industry players with a strong track record of regulatory compliance, a policy of publishing information arising from enforcement proceedings and investigations should not penalize nor create a disincentive for such companies to come forward proactively, self-report, and correct the situation when they discover a lapse in regulatory compliance.*
>
> *When such a lapse does occur and is discovered internally, CAFII members give careful and due consideration to self-reporting the matter to the relevant regulatory authority. Furthermore, such an incident is promptly self-corrected, with a focus on rectifying the situation for any affected customers.*

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In CAFII's view, to have a 'naming and shaming' publication result from responsible and proactive self- reporting of a regulatory compliance lapse seems inconsistent with the overarching intent of FSRA's Proposed Approach Guidance.

We therefore urge FSRA to give careful consideration to the scenario described above; to possible unintended consequences that might arise from "letter of the law" implementation of the Proposed Approach Guidance; and to the wisdom of giving itself flexibility and room for judgment to take into account case-by-case circumstances in applying the final Approach Guidance.

CAFII's thinking articulated in our September 24/21 submission above applies equally to the current consultation: we believe that a possible leaning towards the imposition of an AMP in most cases, largely because the power to do so exists, should be guarded against; and that an AMP should not be a part of the first course of remedial action in cases where the regulated entity is a first-time offender and the contravention has been relatively minor, nor in cases where the regulated entity has proactively self-reported the issue to FSRA, taken prompt corrective action, and made restitution to any harmed customers to make them whole.

We believe that there are legal grounds and precedent for FSRA to take the approach we are advocating with respect to situations where a regulated entity has self-reported an issue to the Authority and taken prompt corrective action. For example, there is the safe harbour provision found in Canada's Anti-Spam Legislation (CASL). Pursuant to section 48(1) of CASL, the court is prohibited from considering an application against a person for statutory damages under paragraph 51(1)(b) of CASL if the person has entered into an undertaking with the CRTC or been served with a notice of violation by the CRTC regarding the same conduct. A similar exemption applies for those persons liable under the extended liability (section 52) and vicarious liability (section 53) provisions in CASL, in cases where the corporation, employee, agent or mandatary, as the case may be, who committed the contravention has entered into an undertaking or been served with a notice of violation.

Feedback On Specific Sections and Components

In CAFII's view, there is a discernible inconsistency in the language used in two separate, but parallel sections of the Proposed Guidance. To be specific, in section A2, #7, the statement is made that in determining whether an AMP should be imposed, FSRA may, among other things, consider "FSRA's statutory mandate, priorities and strategic enforcement objectives" comes across as very broad and sweeping. And, in addition, the reference to "strategic enforcement objectives" in that sentence gives the reader an impression that FSRA could decide to pursue variable, AMP-driven 'clamp-down campaigns' over time. In contrast, we regard the parallel language used in Section B1 to be more precise and preferable, namely that "The Sector Statutes restrict FSRA to the Statutory Criteria and do not permit consideration of additional or alternative factors."

In a similar vein, in the "Rationale and background" section related to transparency, CAFII is confused as to why the perspectives of consumers and other stakeholders would be a consideration in determining whether or not to impose an AMP. The mention of consumers and other stakeholders in this context gives the reader the impression that FSRA would like to introduce public opinion into a decision that should be made solely in accordance with strict principles, in line with FSRA's statutory obligations.

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In the Section in B1 that reads "Non-monetary harm cannot be quantified, but can be considered on a spectrum of severity," CAFII recommends that FSRA include some additional commentary with respect to what types of tools or resources the Authority would consider using to assess non-monetary harm on that spectrum of severity, given that it cannot be readily quantified.

With respect to the section on "FSRA ensures that general AMPs are not punitive," we recommend the inclusion of additional language to clarify how FSRA will tackle its "ensuring" work in this area, including the role of the Financial Services Tribunal in these matters, and the appeal process available to a regulated entity which regards an AMP which FSRA has imposed upon it to be punitive.

CAFII notes that in the section titled "Determining the amount of a general AMP," a principle is set out that "A General AMP seeks to neutralize all economic benefits of a contravention, to the extent permitted within the statutory maximum." In CAFII's view, that section would be improved through alternate language that conveys more even-handedness, by avoiding use of the word "all" and instead using words such as ". . . neutralize those economic benefits derived from the contravention."

Conclusion

CAFII again thanks FSRA for the opportunity to provide key industry stakeholder feedback on the Authority's *"Proposed Guidance: Administrative Monetary Penalties."* We extend our Association's appreciation for FSRA's continued commitment to open and transparent communication and consultation. Should you require further information from CAFII or wish to meet with representatives from our Association on this submission or any other matter at any time, please contact Keith Martin, CAFII Co-Executive Director, at keith.martin@cafii.com or 647-460-7725.

Sincerely,

Rob Dobbins
Board Secretary and Chair, Executive Operations Committee

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About CAFII

CAFII is a not-for-profit industry Association dedicated to the development of an open and flexible insurance marketplace. Our Association was established in 1997 to create a voice for financial institutions involved in selling insurance through a variety of distribution channels. Our members provide insurance through client contact centres, agents and brokers, travel agents, direct mail, branches of financial institutions, and the internet.

CAFII believes that consumers are best served when they have meaningful choice in the purchase of insurance products and services. Our members offer credit protection, travel, life, health, and property and casualty insurance across Canada. In particular, credit protection insurance and travel insurance are the product lines of primary focus for CAFII as our members' common ground.

CAFII's diverse membership enables our Association to take a broad view of the regulatory regime governing the insurance marketplace. We work with government and regulators (primarily provincial/territorial) to develop a legislative and regulatory framework for the insurance sector which helps ensure that Canadian consumers have access to insurance products that suit their needs. Our aim is to ensure that appropriate standards are in place for the distribution and marketing of all insurance products and services.

CAFII's members include the insurance arms of Canada's major financial institutions – BMO Insurance; CIBC Insurance; Desjardins Insurance; National Bank Insurance; RBC Insurance; Scotia Insurance; and TD Insurance – along with major industry players Assurant; Canadian Tire Bank; Chubb Life Insurance Company of Canada; CUMIS Services Inc./The Co-operators; Manulife (The Manufacturers Life Insurance Company); Securian Canada; The Canada Life Assurance Company; and Valeyo.