

May 31, 2023

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

Re: Consultation on Proposed Guidance for Administrative Monetary Penalties ID: 2023-004

Insurance Bureau of Canada (IBC) and its member property and casualty (P&C) insurers welcome the opportunity to comment on the Financial Services Regulatory Authority of Ontario's (FSRA) consultation on Proposed Guidance for Administrative Monetary Penalties (AMPs). While IBC agrees that AMPs can be an effective method to deter non-compliance through consequences that are consistent, fair and proportional, we have several recommendations to strengthen the proposed Guidance. The commentary contained in this submission contains industry's views and recommendations.

Determining Whether an AMP will be Imposed

Statutory Purposes

The proposed Guidance outlines that FSRA "exercises discretion when determining whether an AMP is an appropriate response to a contravention or failure to comply with a Sector Statute." IBC recommends that FSRA clearly indicate what constitutes a contravention, and outline the standards to which contraventions will be held. For example, it should be outlined whether an error that affects multiple people would be considered one contravention (the error), or several contraventions, based on the number of people affected (the effects). Likewise, FSRA should outline what constitutes "repeated contraventions."

FSRA notes that one of the factors that may be taken into account during the assessment of whether to impose an AMP is the prevalence of comparable contraventions or instances of non-compliance within the regulated sector, as well as the need for deterrence. IBC recommends that FSRA examine individual regulated entities in isolation, rather than the regulated sector as a collective. IBC believes that AMPs should be determined based on criteria that are within insurers' control. One company should not be penalized for actions of other less compliant regulated entities if it has demonstrated a pattern of adherence to regulations.

The proposed Guidance also suggests that "an entity's failure to comply with seemingly 'minor' or 'technical' provisions creates concerns that such person or entity lacks the minimum level of diligence and competence required in a regulatory regime." IBC does not agree with this inference, and recommends that FSRA differentiate between the various causes of minor violations. For instance, willful inappropriate actions taken by a regulated entity should not be handled in the same manner as minor technical violations caused by human error. FSRA should recognize that all organizations, including those of considerable scale, are prone to operational imperfections, particularly within a heavily regulated

environment. IBC further recommends that FSRA clarify how it defines terms such as ‘seemingly minor’ and ‘technical’.

Finally, the proposed Guidance does not specify when or how an investigation for an AMP would be triggered, and does not outline the internal mechanisms by which an AMP is evaluated, including timelines for the adjudication process. IBC recommends that FSRA clarify these items, and, to promote consistency, use a panel or hearing to determine the AMPs, rather than individuals.

Determining General AMP Amounts

In determining General AMP amounts, there are a few ambiguous areas of concern for industry. These are highlighted below, including IBC’s recommended changes, where applicable, for FSRA’s consideration:

- The proposed Guidance categorizes misconduct based on the level of intention involved, ranging from intentional disobedience to negligence. IBC finds this spectrum too broad, as it does not account for situations involving clearly unintentional errors or technological errors. IBC recommends that FSRA either remove this language or specify that such instances represent extreme cases of misconduct.
- The proposed Guidance does not contemplate scenarios where insurers act in good faith based on their interpretation of compliance obligations. An insurer’s interpretation of compliance obligations may unintentionally differ from FSRA’s perspective.
- FSRA notes that it may consider the extent of harm or potential harm to others as a result of contraventions or failure to comply, but does not include metrics for how it would determine what constitutes as ‘potential harm.’ IBC recommends that FSRA remove this terminology, as it is difficult to quantify.
- The proposed Guidance lacks clarity for how third-party engagement would affect the determination of AMP amounts. IBC recommends that FSRA explicitly outline its expectations in this regard.
- The proposed Guidance notes that mitigating circumstances would be taken into consideration for the assessment of a General AMP; however, there is no indication of when a regulated entity would be able to provide their input or defence. IBC recommends that FSRA clarify timelines for regulated entities to provide mitigating evidence.
- When evaluating evidence, IBC recommends that FSRA consider factors such as evidence that the regulated entity conducted internal investigations to remedy the contravention; the total number of employees within the regulated entity; whether it has an internal ombudsmen office; and whether the regulated entity is involved in positive community programs.

When determining General AMP amounts for the P&C industry, FSRA should consider factors such as the percentage of policies and total written premiums affected by the contravention, the promptness of identification and correction, and the financial harm incurred by consumers. For instance, an error impacting a large number of consumers but promptly refunded should be treated differently than a

smaller error spanning multiple policy terms. IBC believes that the factors contributing to the penalty determination must be consistently applied.

Ensuring that General AMPs are not Punitive

While the proposed Guidance indicates that the General AMP should not be punitive in nature, it does not take into account that an AMP may be punitive to an insurer, not only to the quantum, but also to the significant reputational damage that can result from a publicized AMP. If FSRA's goal is to increase public confidence, IBC recommends that FSRA not publicize investigations. For example, investigations that determine that a regulated entity did not commit an infraction could still influence consumer confidence in the company and industry. Additionally, FSRA indicates that there may be cases where a General AMP exceeds the economic benefit to incentivize compliance. IBC asks that FSRA clarify how the amount will be determined and to ensure that it is not contradictory with the non-punitive nature of AMPs, as outlined in the proposed Guidance.

Reducing AMP Amounts in Settlements

IBC agrees with the criteria proposed by FSRA to reduce AMP amounts. However, IBC recommends that FSRA also consider the historical records and behaviour of regulated entities in addition to the listed criteria. We also recommend that FSRA publish an outline of possible reduced AMP amounts if a regulated entity meets the requirements established in the proposed Guidance.

Additional Comments

In addition to the above, IBC would like to highlight the following:

- The proposed Guidance references promoting compliance with statutory requirements as one of the statutory purposes for which AMPs can be imposed. IBC believes that some factors may be contradictory to one another and it is not clear how they will work together. For instance, the general deterrence and prevalence of similar contraventions factors may be interpreted to mean a greater AMP should be imposed on a firm that contravened a statutory provision that other firms are also contravening. However, the consistency principle suggests that FSRA should not single out and harshly penalize one firm. IBC recommends that FSRA clarify how these factors would work in balance.
- During its investigations, IBC recommends that FSRA engage the Registered Insurance Brokers of Ontario (RIBO), as it may have knowledge of historic issues that were not escalated to FSRA.
- It is currently unclear whether AMPs would replace criminal prosecution. IBC recommends that FSRA clarify this.
- The proposed Guidance indicates that AMPs may be reduced if a regulated entity immediately self-reports to FSRA after a discovery of a contravention or non-compliance. Self-reporting an error should warrant the reduction of an AMP amount. As such, IBC recommends that FSRA reword this to note that AMPs will be reduced if regulated entities self-report contraventions to FSRA. This would also continue to encourage regulated entities to self-report.

- Lastly, IBC recommends that the effective date of the proposed Guidance include a transition period to allow regulated entities to embed an operational understanding of the AMP framework.

Conclusion

IBC believes that AMPs can be effective tools to foster and guarantee adherence to statutory requirements, and should ensure that consequences for any failure to comply are appropriate. IBC supports FSRA's mission to deter non-compliance and hopes you find our recommendations helpful to strengthen the proposed Guidance.

If you would like to discuss this further, please contact me.

Yours sincerely,

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

Kim Donaldson
Vice President, Ontario