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CONSULTATION PROCESS

Stakeholders are invited to provide written comments or suggestions regarding this consultation paper **on or before September 30, 2013.**

If you would like to submit your comments to the Financial Services Commission of Ontario (FSCO), please send an e-mail to jim.fox@fSCO.gov.on.ca and include "Consultation on Insurance Disciplinary Hearings" in your e-mail's subject line.

Please note that this is a public consultation process. All submissions that FSCO receives are subject to the access and privacy provisions of the Freedom of Information and Protection of Privacy Act. All comments that are received will be posted on FSCO's website at the end of the consultation period. If, for any reason, you do not want your submission to be made public, please clearly indicate this in your submission.

FSCO will contact you if clarification or further information about your comments is required.

Next Steps

The information that FSCO gathers through this consultation will help inform any government decision regarding the policy proposals.

If you have any questions about this consultation process, please contact:

Jim Fox
Senior Policy Analyst
Licensing and Market Conduct Division
Financial Services Commission of Ontario
5160 Yonge Street, Box 85
Toronto ON M2N 6L9

Tel. (416) 590-7277 or 1-800-668-0128 ext. 7277
E-mail: jim.fox@fSCO.gov.on.ca

ABOUT FSCO

FSCO is an integrated financial services regulator. FSCO is an agency of the Ministry of Finance established under the Financial Services Commission of Ontario Act, 1997 (FSCO Act). It regulates insurance, pension plans, credit unions and caisses populaires, mortgage brokering, loan and trust companies, and co-operative corporations in Ontario.

FSCO's legislative mandate is to provide regulatory services that protect the public interest, enhance public confidence in the sectors it regulates and make recommendations to the Ministry of Finance on matters affecting these sectors. As an organization, FSCO is committed to being a progressive and fair regulator, working with stakeholders to support a strong financial services industry.

Who We Regulate

As of February 28, 2013, FSCO regulated or registered:

- 343 insurance companies
- 46,756 insurance agents
- 4,385 corporate insurance agencies
- 1,501 insurance adjusters
- 1,143 mortgage brokerages
- 106 mortgage administrators
- 2,550 mortgage brokers
- 9,389 mortgage agents
- 7,641 pension plans
- 144 credit unions and caisses populaires
- 59 loan and trust corporations
- 1,758 co-operative corporations

Superintendent and Staff

The Superintendent of Financial Services administers and enforces the FSCO Act and also exercises the authority contained in the other 10 Acts that confer powers on or assign duties to the Superintendent.

All FSCO staff report to the Superintendent. The staff, who are public servants under the Public Service of Ontario Act, 2006, perform FSCO's day-to-day work.

ABOUT THE FINANCIAL SERVICES TRIBUNAL (FST)

The FST was established in 1997 under the FSCO Act. It is an independent adjudicative body of at least 9 and not more than 15 members appointed by the Lieutenant Governor in Council (LGIC). Currently, there are 12 members including the Chair and two Vice-Chairs. The FSCO Act requires the LGIC to appoint FST members who have experience and expertise in the sectors FSCO regulates, which includes the insurance sector, to the extent that is feasible. The FSCO Act also requires the Chair to take into consideration the need for experience and expertise in assigning members to a hearing panel to enable the panel to decide the issues.

The FST can determine all questions of fact or law in any proceeding before it. It has issued Rules of Practice and Procedure governing its hearing procedures. It also has the power to require witnesses to provide evidence at a hearing. At a hearing, the onus is on the Superintendent to prove his case against the person who is the subject of a Superintendent's proposal to make an order.

INTRODUCTION

This consultation paper proposes a new model for holding hearings and disciplining insurance agents and adjusters under Ontario's Insurance Act (Act). The current process set out in the Act for making disciplinary decisions about agents and adjusters is 90 years old. It is cumbersome and does not align with modern disciplinary and enforcement processes and standards. Nor does it align with the statutory processes for licensing and discipline matters in other sectors that FSCO regulates.

Under the current process, before the Superintendent refuses an application for a licence, suspends or takes away a licence, a person¹ can request a hearing before an Advisory Board (AB) appointed² by the

¹ For the purposes of this paper, a "person" includes individuals, as well as corporations, partnerships and sole proprietorships.

² If the person does not request a hearing, the Superintendent will make a decision based upon the information available to him.

Superintendent. The AB panel consists of a Chair (a representative of the Superintendent), a representative of insurers, and a representative of insurance agents or adjusters (depending on the case). FSCO maintains a roster of AB representatives who may be appointed to a panel. Even though the AB panel hears the evidence presented by FSCO and the person or the person's representative, the AB panel does not make any decisions about discipline. The AB panel can only make findings of fact and non-binding recommendations to the Superintendent.

The AB hearing process does not provide the decision-maker with the opportunity to hear the evidence. Although the Superintendent does not hear the evidence directly, he is the decision-maker. The Superintendent must consider the factual findings of the AB's report³, and take into consideration its recommendations to make a decision and issue an order. He does not have the benefit of hearing oral evidence or assessing the character and credibility of witnesses. He accepts the findings of fact made by the AB panel.

This complicates the decision-making process, since it requires an AB report with recommendations, the Superintendent's review of the recommendations and report, and the issuance of a decision with reasons and an order.

The AB model is not used in other regulatory hearing processes at FSCO. Hearings are generally held by the FST.

Administrative Monetary Penalties (AMPs) were introduced under the Act on January 1, 2013. The Superintendent may now impose AMPs against insurance agents and adjusters who contravene or fail to comply with requirements under the Act, separately or in combination with licence suspensions or revocations. Hearings relating to AMPs are held by the FST (i.e., after receiving the Superintendent's Notice of Proposal to impose an AMP, a person may request a hearing and decision by the FST). The FST has the legal authority to hear AMP matters and discipline matters under the Act⁴.

Currently, persons facing disciplinary actions involving both licensing and AMPs must go through two separate hearing processes: one for the AMP (at the FST) and one for the licensing/discipline matter (AB and Superintendent). This can be costly and time-consuming for the affected person. There is also the potential of uncertainty and inconsistency, since the person must participate in two different processes and wait until both matters have been dealt with. It's also possible that the FST and the Superintendent could arrive at different conclusions on the same set of facts.

For these reasons, it makes sense that all disciplinary decisions (i.e., licence suspensions, revocations, denials, and AMPs) for insurance agents and adjusters should be subject to the same process.

³ The Superintendent must consider and accept the facts set out in the AB report, and must be satisfied that due process has been followed. He may disagree with the recommendations of the AB panel and substitute his own opinion. This happens infrequently and only when the Superintendent is of the view that the penalty recommended by the panel is not appropriately supported by the report.

⁴ The FST also hears appeals from insurance agent and adjuster licensing decisions of the Superintendent made after an AB hearing. If the Superintendent's decision is appealed, the FST may confirm, change or substitute its decision for that of the Superintendent.

REQUIRED CHANGES TO THE ACT

The desired model set out in this paper requires changes to the Act to:

- Remove the requirement for the Superintendent to appoint AB panels that conduct hearings about disciplinary matters.
- Replace the AB process with the FST as the body that holds hearings. The FST would have the authority, following a hearing, to direct the Superintendent to carry out his proposal, with or without changes. It would also have the authority to substitute its opinion for that of the Superintendent and impose such conditions as it considers appropriate, for all disciplinary matters.
- Give the person and the Superintendent the right of appeal for licensing decisions from the FST to the Divisional Court.

The responses that FSCO gathers from this consultation will help inform the government's decision to modernize the disciplinary process for insurance agents and adjusters.

MODEL OVERVIEW

Under the desired model, all insurance agent and adjuster disciplinary decisions would follow the FST model. The FST model has fewer steps than the AB model. In summary form, it would involve these steps:

1. FSCO staff would complete an investigation, assess the facts and recommend to the Superintendent disciplinary action, if warranted. The Superintendent would then issue a Notice of Proposal (NOP) to the person. The NOP would set out the allegations and a description of the evidence, the proposed disciplinary action(s), and advise the person how to request a hearing before the FST.
2. If a person requested a hearing by the FST, the FST chair would appoint a panel to hear the case. At the hearing, FSCO would present the evidence to prove the Superintendent's case. The person or their representative would have the right to present their own defence. The actual hearing would not be significantly different than the current AB hearing process.
3. Following the hearing, the FST could direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent and impose conditions it feels are appropriate.
4. The person or Superintendent would be able to appeal the FST decision to the Divisional Court.
5. If the person did not request a hearing within the time period specified in the NOP, the Superintendent could issue an order carrying out the proposal stated in the NOP.

ADVANTAGES OF THE RECOMMENDED PROCESS

- *Aligns more easily with modern principles of fairness.* Under the desired model, there would only be one regulatory proceeding. One body would have the authority to hear and decide all insurance agent and adjuster cases, and take into account all possible sanctions under the Act.
- *Results in a more streamlined process.* The recommended process would eliminate additional steps for a hearing, including the need for a report and recommendations by an AB, and would be a more efficient process.
- *Eliminates additional costs, saves time and avoids inconsistency.* Applying the FST process to all discipline matters would help eliminate additional costs and save time for persons facing both licensing sanctions and AMPs. In addition, it would avoid potential for uncertainty and inconsistency in decisions.
- *Creates consistency.* The proposed model would harmonize the process for persons who may be licensed in more than one sector that FSCO regulates (e.g., mortgage brokering and insurance).

OTHER PROPOSED AMENDMENTS

In addition to these changes, FSCO also proposes housekeeping/clarification changes and other changes that would avoid the loss of jurisdiction once a disciplinary process has begun. This would include giving the Superintendent explicit authority to:

- issue interim orders to suspend licences where there was a risk of harm to the public, if there was any delay;
- continue disciplinary matters despite the fact that a licence may have expired, or been suspended or surrendered; and
- consider applications by agents and adjusters seeking permission to surrender their licences.

INTERIM ORDERS

Giving the Superintendent explicit authority to issue interim orders to suspend an insurance agent or adjuster licence will ensure that the public is protected, while providing a fair and open process for the affected person to request a hearing. With this authority, the Superintendent could issue both a NOP⁵ to revoke or suspend a licence, along with an interim order to suspend the person's licence, if the public interest would be adversely affected by a delay in the suspension or revocation of the licence. This is a public protection measure and is consistent with good regulatory supervision. It is also consistent with the statutory interim order powers the Superintendent has in other regulated sectors.

The obligation would be on the Superintendent to determine that the public was at risk by any delay in the licence suspension such that an interim order was required. In such a case, the Superintendent would immediately suspend the person's licence, provide his reasons why the interim order is necessary and issue a NOP. However, this action would only be taken in those exceptional situations where the

⁵ The NOP can also include the levying of an AMP.

Superintendent had reasons to believe that the public would be adversely affected, if the person continued to be licensed during the notice of hearing period.

If the person requested a hearing, the Superintendent could extend the interim order until the hearing was completed and the FST issued its decision. During the interim suspension period, the person would not be allowed to carry on the business of an insurance agent or adjuster. If the person did not request a hearing, the interim order would remain in effect until the Superintendent issued an order that reflected the proposed sanction in the NOP.

CONTINUING JURISDICTION

The Superintendent's authority to continue disciplinary action after issuing a NOP to suspend or revoke a licence is not clearly stated in the Act. This could give rise to uncertainty about the Superintendent's jurisdiction in the event of the intervening expiry of a licence or loss of insurer sponsorship. This proposal would ensure that after the Superintendent issues a NOP, the Superintendent and FST would continue to have the power to make an order to suspend or revoke a licence, even if:

- the licence expired and the person did not renew the licence;
- the person is allowed to surrender his/her licence; or
- the licence is suspended (e.g., due to the loss of the person's sponsorship by an insurance company). (In situations where an insurer relinquishes its sponsorship, the agent's licence is automatically suspended under the Act until the agent secures a new sponsor).

SURRENDERING A LICENCE

This proposed change would mean that an agent or adjuster wanting to surrender a licence would need to seek the Superintendent's approval. Currently, there is no specific process or requirement for surrendering a licence under the Act.

In making a decision to approve the surrender, the Superintendent would need to consider a number of factors, such as:

- Whether there were any current disciplinary actions against the person.
- Whether there were any outstanding complaints or investigations against the person.
- The steps taken by the person to notify clients.
- What arrangements had been made to ensure services continued to be provided to existing clients.

The Superintendent could allow the surrender, impose conditions on the surrender, or refuse the surrender if he believed (on reasonable grounds) that it would not be in the public interest. This proposal is consistent with the Superintendent's statutory licence surrender powers in other regulated sectors.

If the Superintendent had issued a NOP in conjunction with a disciplinary matter, the person's request for the surrender of a licence would not resolve or eliminate the allegations against the agent or adjuster in the NOP, or avoid the NOP or hearing process.

QUESTIONS

Stakeholders are invited to provide written comments or suggestions regarding the questions below:

1. Would the substitution of the AB with the FST provide a more fair and streamlined disciplinary process for insurance agents and adjusters?
2. Does the proposal to clarify the Superintendent's authority to issue interim orders achieve an appropriate balance between protecting consumers, and providing agents and adjusters access to justice?
3. Are there any other factors that the Superintendent should consider when approving licence surrender requests from agents and adjusters?