UDAP Rulemaking: Stage One Update

September 29, 2020 Meeting with L&H SAC Members



Financial Services Regulatory Authority of Ontario







- Outline **recommended approach** for defining unfair or deceptive acts or practices (UDAP) under the *Insurance Act* through a FSRA rule
- Seek input on FSRA's initial assessment of the existing UDAP regulation
- Review **next steps** including immediate opportunity for consensus feedback

Key Takeaways

- FSRA is undertaking a two stage process for transforming current UDAP regulation into a FSRA rule
- Stage One has started with a focus on removing barriers to innovation and shifting to principles-based provisions
- FSRA is seeking your input to finalize its recommended approach prior to proceeding with public consultation
- Stage One rule could be posted for public comment as soon as fall 2020 and FSRA is tentatively targeting Ministerial approval for spring 2021



UDAP Regulation: Background and Current State



FSRA 2020-21 Business Plan commits to exploring opportunities for UDAP rule making

- Section 439 of the Insurance Act prohibits "unfair or deceptive acts or practices" which is any activity or failure to act that is prescribed as an unfair or deceptive act or practice
 - Under the Act, the CEO of FSRA has powers to examine and investigate, in order to determine whether a person has been, or is, engaged in any unfair or deceptive act or practice
 - The Act also allows the CEO to administer various compliance measures, such as administrative penalties, to sanction unfair or deceptive acts or practices
- O. Reg. 7/00 (UDAP regulation) under the *Insurance Act* prescribes specific actions that are considered as unfair or deceptive, and may apply to insurers, brokers, intermediaries, adjusters, and goods/ service providers engaged in the insurance sector such as health service providers, vehicle repair shops, automobile storage facilities, and tow truck operators
- The UDAP regulation first came into effect in 2003, and since then it has been amended 15 times in an effort to expand/ clarify the definition of what constitutes an unfair or deceptive act or practice. Despite the amendments, the current regulation is difficult to enforce, and therefore has not always been effective in addressing consumer harm
- Stakeholders have stated that the regulation inhibits innovation, and have requested a review of it to allow for more flexibility; the current regulation has been deemed as overly prescriptive by stakeholders
- There is an opportunity to shift to a principles-based UDAP rule in order to align with FSRA's overall principles based regulatory approach

UDAP Regulation: Map of Current Structure



Provisions related to Definitions	General L	s related to JDAPs (no opplication)	UDAPs th insurers	s related to hat apply to s, agents, kers	UDAPs to committed behalf of with an e to ben	s related to hat can be ed by or on f a person expectation efit from e proceeds	Provisions related to UDAPs for actions related to claims handling/ settlements that occurred after March 2006 under the 1996 Statutory Accident Benefits Schedule	Provisions related to UDAPs for actions related to claims handling/ settlements that apply to the current Statutory Accident Benefits Schedule (O. Reg. 34/10)
Ļ				Ļ		Ļ	Ļ	Ļ
Section 0.1	Sect	ion 1	Sect	ion 2	Sect	ion 3	Section 5	Section 6
0.1(1)	1	8	(1)1	(1)7	(1)	(2)6	1	1
0.1(2)	2	9	(1)2	(1)8	(2)1	(2)7	2	2
	3	10	(1)3	(2)	(2)2	(2)8	3	
	4	11	(1)4	(3)	(2)3	(3)	4	
	5	12	(1)5	(4)	(2)4	(4)	5	
	6	13	(1)6		(2)5		6	
	7							

UDAP regulation can also be segmented by themes that appear in different sections, such as: i) automobile insurance specific provisions; ii) provisions related to Incentives/ rebates; iii) provisions related to general conduct; and iv) claim related provisions





UDAP Rule: Shift to Principles-Based Regulation

Benefits of shifting to a principles-based rule in place of a prescriptive regulation

Internalize principles

- Principles-based standards for Regulated Entities (REs) to achieve outcomes are outlined in the Rule.
- REs internalize principles into their business processes, instead of following technical compliance requirements, and align their policies and practices to achieve desired outcomes.
- Focus is on changing behavior within the REs, so that they are driven by principles and achieving outcomes that are in the public interest while they conduct business.

Supervise to facilitate achievement of desired outcomes

- FSRA to actively engage with REs and public to evaluate whether principles are understood and internalized, and to assess whether desired outcomes are being achieved.
- Supervise to assess successful implementation of principles and the achievement of desired outcomes.
- Focus is on understanding why desired outcomes may not be taking place, not on penalizing the REs.

Support innovation and competition

• Principles provide greater flexibility and discretion with respect to enforcement, which allows the regulator more latitude to ensure that it can respond to changes in the market, facilitating innovation while also allowing it to respond to unanticipated consumer harm.

Principles-based regulation requires REs to internalize the desired outcome of regulation

Supervise mostly against outcomes, instead of actions

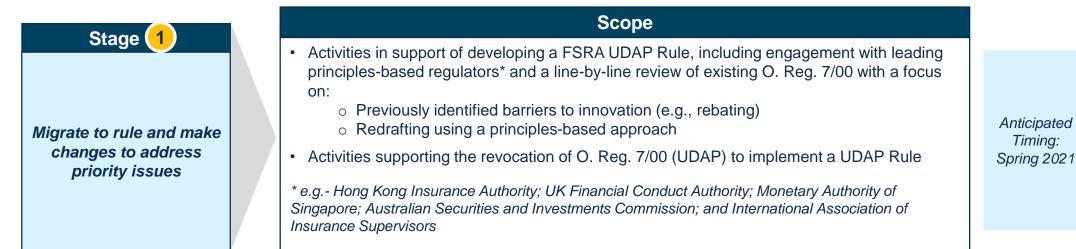
Serve the public interest by allowing competition, flexibility, and choice

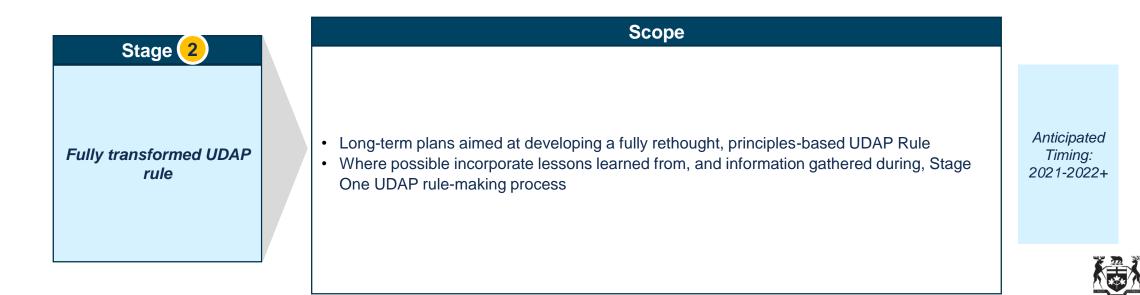


Recommended Approach: Staging and Scope



FSRA is pursuing a two-stage process for transitioning to a UDAP rule







Initial assessment is preliminary Recommended approach to Stage One UDAP Rule will be finalized after FSRA hears from you

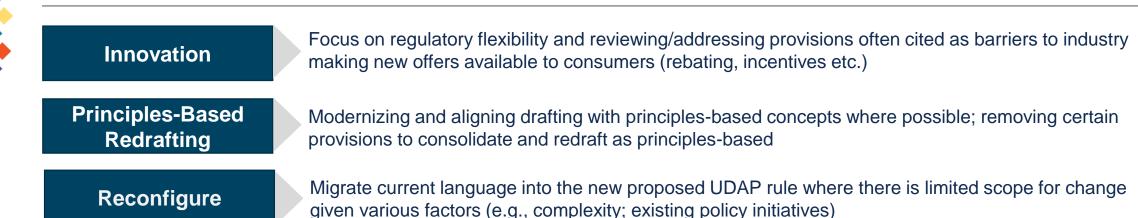
nitial Assessment Inputs

	Previous Stakeholder Input	 Review of stakeholder submissions (insurance companies, trade associations, etc.) that provided input on relevant UDAP sections and/or requested a review of the regulation to allow for more flexibility 	
endu	Analysis	 Line-by-line review of the UDAP regulation undertaken based on Stage One scope and timing 	
	Alignment with Certain CCIR FTC Guidance	 Comparative analysis of CCIR/CISRO FTC Guidance to identify certain principles that can be adopted into the Stage One rule (principles-based rules redrafting will be aligned with portions of the FTC Guidance where possible, but not solely based on it) 	



Overview of Initial Assessment





UDAP Map: Initial Assessment by Provision

Section 0.1	Sect	ion 1	Sect	ion 2	Sect	ion 3	Section 5	Section 6
(1)	1	8	(1)1	(1)7	(1)	(2)6	1	1
(2)	2	9	(1)2	(1)8	(2)1	(2)7	2	2
	3	10	(1)3	(2)	(2)2	(2)8	3	
	4	11	(1)4	(3)	(2)3	(3)	4	
	5	12	(1)5	(4)	(2)4	(4)	5	
	6	13	(1)6		(2)5		6	
	7							





See Appendix 1 for details of proposed changes through Stage One rule-making process

Overview: Removing Barriers to Innovation



Timeline / Method



Discretionary Authority

- Innovative models developed to address evolving market needs may include components that are considered to be UDAPs
- CEO currently does not have discretion to give entities exemptions for such UDAPs; this creates a potential barrier to innovation

Greater flexibility available to meet evolving consumer needs; more transparent decision making

Desired Outcome

Industry's confidence in the regulator to remove barriers to innovation, and to react flexibly to market developments

Evaluation Metrics

Spring 2022 (approx. one year post rule implementation) Method: Industry survey to determine confidence

Customer Incentives

- Insurers are currently not able to offer incentives (i.e. rebates/ inducements) for customers
- This prohibition hinders companies' ability to offer innovative, pro-consumer benefits to their customers, and impedes overall competition
- This initiative is not presently aimed at conduct related concerns resulting from the CCIR work on incentives.

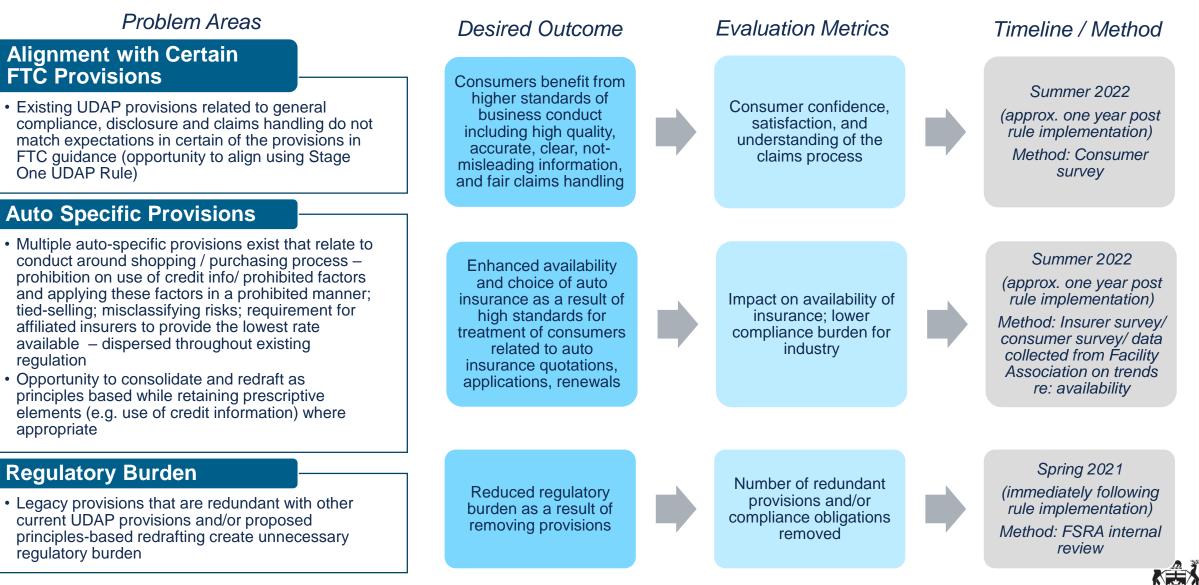
Greater value and benefit to consumers in the form of incentives; increased options for innovative incentive programs offered by companies Percentage of policies benefited through new incentive programs; complaints received about unfair treatments through rebating programs Summer 2022 (approx. one year post rule implementation) Method: Insurer survey/ Consumer survey/ Focus Group Discussion



See Appendix 1 for details of proposed changes through Stage One rule-making process

Overview: Principles-Based Redrafting





Overview: Reconfigure



ltem	Analysis
<i>Transition Provision: FSCO Forms</i> s. 0.1(2)	 Although some key FSCO (Superintendent) forms will have migrated to new FSRA versions, others will still be in use at projected time of implementation of a new UDAP rule
Unfair discrimination in rates s. 1.2-3	 Unclear if this provision acts as a barrier to innovation; principles-based redrafting may introduce complexity given scope of application (opportunity for consideration in Stage Two)
Inappropriate Collection and Use of Credit Information s. 2(1)7 Related Definitions s. 0.1(1)	 Unclear if this provision acts as a barrier to innovation; principles-based redrafting may introduce complexity given scope of application (opportunity for consideration in Stage Two particularly given alignment with broader IAIS ICP principle regarding protection of consumer personal information)
Abusive billing practices, referral payments, and encouraging signing of blank forms s. 3(2)1-5, 7	 Intent of these provisions is to address misconduct primarily of unlicensed persons with whom FSRA does not have a regulatory relationship Principles-based redrafting not appropriate given inability to modify behavior flexibly through supervisory tools typically used for licensed entities Reconfiguration could include adding outcomes to supplement activities-based provisions





Next Steps



Milestone / Activity	Dates
Written feedback on initial assessment	October 7, 2020
Rule posted for public comment	Fall 2020
Public comment period closed	Winter 2020-21
Potential approval of Rule by Minister	Spring 2021
Initiate planning for Stage Two UDAP rule	Summer 2021







Appendix 1: Stage One UDAP Rule – Potential Changes





Innovation

	Item	Potential Change	Analysis	
•	Discretionary Authority s. 1	 Grant CEO discretion to authorize conduct otherwise considered a UDAP where it wouldn't be prejudicial to the public interest 	 Would provide regulator with exemptive powers for flexible / nimble reaction to market developments Exercise of authority with precedential value likely to require Decision guidance 	
	<i>Rebating</i> s. 1.7; 2(1)1-3, 2(3)- (4)	 Remove existing provisions Replace with provision making it a UDAP to offer incentives (e.g. a rebate or an inducement) to insure unless the incentive: is designed in a way that pays due regard to the interests of consumers and minimizes risk of sales which are not appropriate to a consumer's needs clearly and transparently communicated to consumers by the insurer, including explanation of how any incentive, such as a rebate or an inducement is calculated applies consistently and is not unfairly discriminatory not an anti-competitive practice such as tied selling or predatory pricing. 	 Government made a change to rebating provisions in the UDAP regulation in April 2020 aimed at facilitating rebating for purposes of providing financial relief to auto insurance policyholders during the COVID-19 pandemic Potential change aligned with guidance issued by FSRA after government regulation change that outlined principles for acceptable rebating (Auto Insurance – Consumer Relief during a Declared Emergency under the Emergency Management and Civil Protection Act) Related provisions in s. 17 of O. Reg 347/04 related to life agent conduct are not in scope for FSRA's Stage One approach 	



Principles-Based Redrafting: FTC



ltem	Potential Change	Analysis
<i>Disclosure</i> s. 1.4-6, 3(2)6	 Redraft to make the following a UDAP: Failure to provide adequate, high quality, accurate and non-misleading information, product promotional materials, and/or advice to a customer, policyholder, or claimant that can affect their fair treatment or ability to make informed decisions 	 Aligns with certain provisions of FTC guidance (e.g. advice; product promotion, disclosure to policyholder/ customer) Related provisions in s. 17 of O. Reg 347/04 related to life agent conduct are not in scope for FSRA's Stage One approach
	Redraft to make the following a UDAP:	
	 Conduct that does not meet the standard of examining and settling claims fairly and/or treating claimants fairly 	
	Indicators of fair treatment include:	
Claims	 maintaining written documentation on claims handling procedures; 	 Aligns with certain provisions of FTC
<i>Handling</i> s. 1.9, 5, 6	 informing claimants about the status of their claim, processes for claims settlement and where appropriate claims-determinative factors; 	guidance (e.g. diligent examination and fair settlement)
	 subject to legal requirements, following balanced and impartial dispute resolution procedures; 	
	- establishing and using internal mechanisms to review claims disputes; and	
	- taking measures to ensure that services and service quality provided by a Preferred Provider Network is equal to or greater than what is commonplace in the industry.	
Non-	Dedroft to make the following a LIDAD:	 Aligns with certain provisions of FTC
compliance with the law	Redraft to make the following a UDAP:	guidance (e.g. conduct of business –
s. 1.1	Material non-compliance with the statutory scheme, including any regulations or rules	compliance with laws)

Principles-Based Redrafting: Auto



ltem	Potential Change	Analysis
Ltem Use of prohibited factors, including credit information s. 2(1)4-6 Tied selling	 Potential Change Redraft to make the following a UDAP: Unfair treatment of a consumer with regard to any matter relating to quotations for automobile insurance, applications for automobile insurance. Indicators of unfair treatment include: unreasonable delay in servicing a consumer; inequitable variance of processes and procedures when servicing a class of consumers; 	 Potential change allows for consolidation of multiple
s. 1.10 <i>Misclassifying of risk</i> s. 1.11	 using credit information or a prohibited factor; applying any other information in a prohibited manner; while having regard for mitigating circumstances such as innovative pricing models or differing means of distribution, not offering the lowest price among affiliated insurers 	 existing auto-specific provisions into one redrafted provision focused on unfair treatment Further information from regulated entities on specific challenges posed by current affiliated insurers requirement will be helpful in determining its place in the new rule
Affiliated Insurers s. 2(1)8, s. 2(2)	 making servicing a consumer conditional on their having or purchasing another insurance policy; making servicing a consumer conditional in any way on consent or obtaining the consent of another person to collection, use or disclosure of any credit information; or misclassifying a risk according to the insurer's risk classification system or that required by law. 	



Principles-Based Redrafting: Redundant and Other





ltem	Potential Change	Analysis	
Extra contractual charges with commission s. 1.8	• Remove	 Dependent on potential consumer harm being adequately addressed by new provision regarding disclosure 	
Material deviation from FSRA-approved forms s. 1.12	• Remove	Duplicative of Insurance Act provision to use forms approved by the regulator	
Non-compliance with examination under oath requirements s. 1.13	• Remove	 Dependent on retention / redrafting of provision regarding non-compliance with the law 	
Application s. 1, 2(1)	 No limit on application of most parts of UDAP Rule (rather than limiting certain provisions to certain types of persons in the business of insurance) Retain scoping applicable to s. 3, which is focused primarily on misconduct by unlicensed persons 	 Principles-based redrafting not appropriate for s. 3 given inability to modify behavior flexibly through supervisory tools typically used for licensed entities 	

