

Agenda Item 6(f)
December 7/21 Board Meeting

CAFII's 2021 Annual Members and Associates Virtual Luncheon was held on 9 November, 2021 with a panel of three leading Canadian insurance lawyers: Jill McCutcheon, Torys; Stuart Carruthers, Stikeman Elliott; and Marc Duquette, Norton Rose Fulbright. While their comments were "off the record," they have agreed to the Association's request for permission to release to CAFII Member and Associates representatives only the high-level insights summary, without any specific attributions, that is set out below.

The Regulatory Environment is Getting more Onerous, and This will Likely Continue Going Forward

While Fair Treatment of Customers' (FTC) guidelines are meant to be principles-based, regulators are increasingly looking to add teeth to their expectations and are moving down the road of more prescriptive measures.

The CCIR/CISRO's release of a critical "observations" document around compliance with the FTC expectations set out in the 2018 CCIR/CISRO "Guidance: Conduct of Insurance Business and Fair Treatment of Customers" is an example of how regulators will expect more than just broad indications of compliance.

The AMF is becoming increasingly prescriptive, and it's now engaged in multiple initiatives (complaints handling and dispute resolution regulation; sound commercial practices guideline update/modernization) that will give it additional powers. The FCAC is increasing its enforcement powers, and is quite willing to impose significant fine. BCFSa and FSRA both now have rule-making powers. FCNB (New Brunswick) is also enhancing its regulatory powers.

Enforcement and sanctions/penalties activity is on the upswing, which is creating a quandary for even first-time offenders about whether to self-report discovered violations.

Recently, FTC expectations and related regulatory expectations documents have been released by CCIR/CISRO: Observations Report; FSRA: FTC expectations; CISRO: Draft Principles of Conduct for Intermediaries; FSRA: Unfair and Deceptive Acts or Practices (UDAP) Rule; AMF: Sound Commercial Practices Guideline update; and draft Complaints Handling and Dispute Resolution Regulation; and, in addition, a draft FCAC Appropriateness Guideline is expected imminently.

It was noted that while FSRA has excellent staff executives at the top level, it appears to be under-resourced at the general staff level, resulting in delays for routine matters such as issuing licenses.

Regulators are Increasingly Moving Away from Harmonization in Practice

While, in principle, regulators are all committed to harmonization, in practice CCIR and CISRO, as national coordinating bodies, have only moral suasion at their disposal with respect to encouraging harmonization.

With rule-making authority being granted to an increasing number of provincial regulators, what instead is happening is that provinces can't resist the temptation to be unique and move ahead with their own preferred, slightly differing approaches. In particular, rule-making powers in Quebec, Ontario, and BC are proving to be at odds with harmonization.

The AMF is taking its own unique approaches with little or no regard for inter-provincial harmonization. The FCNB has just released a consultation document around its proposed updated licensing regime (including the launch of Restricted Insurance Agent (RIA) licensing) in which it has numerous unique features that are different from those in the three Western Canada provinces with existing RIA licensing regimes.

Quebec will Continue to be A Challenging Regulatory Environment

The AMF appears to be doubling-down on its enforcement-focused regulatory approach. The AMF often acts as a “tester” of new regulatory tools for regulators across the country; and other jurisdictions will introduce them too if they prove to be effective in Quebec.

Other Quebec initiatives such as Bill 96, the province’s update to its French language charter, will also add to the complexity and cost of doing business in Quebec. The AMF is adding to its oversight, investigation, and compliance budgets and as it garners more resources, it will use them. The revised/updated Sound Commercial Practices Guideline enhances the focus on business culture, accountability, and supervision of intermediaries, and captures the handling of conflicts of interest, product design, suitability, and monitoring.

Insurers and distributors will now need to devote even more time, energy, and financial resources to AMF/Quebec compliance, to show that they are addressing the enhanced standards. An example of this is the AMF’s new complaints regime expectation that insurers must provide drafting assistance for consumers who wish to make a complaint and require such assistance.

FCAC Is An Increasingly Active Regulator

While the Regulations released in August 2021 in support of federal Bill C-86 stipulate that credit protection insurance (CPI) will no longer be treated as an “optional product,” it is still a product that is “offered”; and, as such, Section 627.06/07 of Bill C-86 (“appropriateness guideline”) likely still applies to CPI and travel insurance, both being Authorized Insurance Products that fall under federal oversight. That seems to imply the requirement for some type of needs analysis.

The FCAC is increasingly engaging in reviews of regulated entities, and not necessarily as the result of consumer complaints. And those entities’ self-reporting of discovered violations no longer ensures leniency. With the FCAC Commissioner’s recently strengthened powers, violations – regardless of the source and circumstances -- are increasingly resulting in “naming and shaming” and the levying of fines.

Prohibition Against Offering ‘Advice’ In Connection With Credit Protection Insurance

While CAFII has long argued that the intersection between the federal Bank Act and the Insurance Business (Banks and Bank Holding Companies (IBBRs), on the one hand, and provincial licensing requirements, on the other hand, prohibits the offering of advice, including a needs analysis, with respect to CPI, that argument does not have a solid grounding in law, but it does have a firm footing in practicality. Regardless of the legal niceties, non-licensed branch or call centre staff are in no position to provide customers with a needs analysis, nor is advice something that should be required for consumers to enrol in CPI or purchase travel insurance coverage.