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Jim Fox
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Financial Services Commission of Ontario
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VIA COURIER AND EMAIL: jim.fox@fSCO.gov.on.ca

Dear Mr. Fox:

Re: Modernizing Disciplinary Hearings for Insurance Agents and Adjusters

Advocis, the Financial Advisors Association of Canada, is pleased to respond to the Financial Services Commission of Ontario's ("FSCO") August 2013 consultation paper regarding the modernization of disciplinary hearings for insurance agents and adjusters in the province (the "Consultation Paper").

Advocis is the country's largest and oldest professional membership association of financial advisors and planners in Canada. Through its predecessor associations, Advocis proudly continues over a century of uninterrupted history of serving Canadian financial advisors and their clients. Our 12,000 members, including approximately 6,000 from Ontario, are licensed to sell life and health insurance, mutual funds and other securities, and are primarily owners and operators of their own small businesses who create thousands of jobs across Canada. Advocis members provide comprehensive financial planning and investment advice, retirement and estate planning, risk management, employee benefit plans, disability coverage, long-term care and critical illness insurance to millions of Canadian households and businesses.

As a voluntary organization, Advocis is committed to professionalism among financial advisors. Advocis members adhere to an established professional Code of Conduct, uphold standards of best practice, participate in ongoing continuing education programs, maintain professional liability insurance, and put their clients' interests first. Across Canada, no organization's members spend more time working one-on-one on financial matters with individual Canadians than do ours. Advocis advisors are committed to educating clients about financial issues that are directly relevant to them, their families and their future.

Overall, Advocis supports FSCO's initiative to modernize the disciplinary process for insurance agents and adjusters. We have always advocated for straightforward and effective regulation of the financial advisory industry, including in regards to disciplinary matters. We believe that the substitution of Advisory Boards ("ABs") with hearings before the Financial Services Tribunal ("FST") could benefit both industry and consumers. However, we have significant concerns about the subject-matter expertise of the FST's adjudicators and the cost implications of FST hearings relative to AB hearings, which we outline in greater detail below.

Replacing Advisory Boards with the Financial Services Tribunal

We recognize that the existing disciplinary system for agents and adjusters is outdated and needs to be modernized. For example, as FSCO notes in the Consultation Paper, in the existing system, the Superintendent is the ultimate decision maker but does not actually hear from parties or witnesses. Instead, the parties appear before the AB, and the AB produces a report of their findings of fact and makes recommendations to the Superintendent – which ultimately renders its own order, and it may differ from the AB's recommendation. Rather than this indirect two-step approach, we believe that disciplinary decisions should be made by adjudicators who hear from the parties directly, and we are pleased that a shift to the FST format would accomplish this.

Further, we have previously voiced our support for FSCO's implementation of Administrative Monetary Penalties ("AMP") as an additional enforcement tool to address instances of non-compliance in the insurance sector. As AMPs are appealed via the FST and licensing issues are initially reviewed by the AB, we agree with the Consultation Paper's statement regarding the costly and time-consuming nature of dual hearings and the potential for perverse outcomes should the AB and FST reach divergent conclusions.

Nonetheless, there are significant benefits of the AB system that we are concerned would be lost should the FST become the forum for reviewing insurance agent licensing matters:

(i) *Industry expertise of adjudicators*

Each three-member AB panel has a seat reserved for a representative of insurers, a representative of agents or adjusters, and a representative of the Superintendent, with the positions filled from a pre-vetted roster of experts. We believe that having industry representation on AB panels is critical to their ability to resolve disputes in a knowledgeable and equitable manner. From the perspective of Advocis' members, having an agent representative on the AB is reassuring, as our members can have confidence that at least once voice on the panel understands their day-to-day business and can analyze whether the impugned conduct truly warrants disciplinary action.

In contrast, while the FST usually has three adjudicators hearing a particular case, there may be as few as one. Further, there is no reserved seat for an adjudicator from the same insurance agent role, or even the same industry, as the accused. In fact, most of the current members of the FST roster are lawyers. One member, Professor Boivin, has experience teaching insurance law, but no member appears to have experience in the area of providing insurance advice to retail clients.

This is very disconcerting for our members: moving from the AB to the FST raises the spectre that a disciplinary action involving an insurance agent could be heard by a panel of adjudicators who have no knowledge of what it is like to be an agent in the industry. We believe that this is fundamentally unjust: in any disciplinary hearing, an accused should be judged by his or her peers. This is particularly the case when the outcome can bring about severe consequences for the accused, including loss of livelihood if a license is suspended or revoked. To not provide for peer review raises the possibility that the accused will suffer injustice due to the adjudicator simply not understanding the industry or the accused's actions within it. This problem is exacerbated if an FST panel consists of only one adjudicator, as it concentrates all decision making power within one person, who may not have the requisite industry knowledge to make an informed decision.

Therefore, before we can support a transition to the FST, we must insist that the rules governing the composition of FST panels be revised so that it is similar to that of ABs: when tackling disciplinary matters involving insurance agents, there should be three adjudicators on each FST panel. One seat should be reserved for an agent representative, another for an insurer representative, and the third reserved for the Superintendent's representative. The right to be judged by one's peers is a fundamental element of administrative fairness.

(ii) Costs

We are concerned that FST hearings could be significantly more costly than AB hearings for our members. One of the advantages of the AB system is its emphasis on resolving disputes in a timely and efficient manner. During our discussions with FSCO staff on this matter, it was confirmed to us that most disputes do not reach a full AB hearing, with many parties settling their disputes before reaching the hearing stage.

We understand that the FST, like the AB, allows for considerable flexibility and mandates that its rules should be interpreted broadly to produce the quickest, most just and least expensive determination of the issues before it. However, the very nature of the FST as a specialized tribunal that is independent of FSCO suggests a greater degree of formality than ABs. Further, the fact that FST adjudicators are primarily lawyers (as discussed above) suggests that legal arguments, rather than business-based arguments, may be perceived by parties as more persuasive, as the adjudicators may naturally have a greater appreciation and understanding of the former.

Therefore, insurance agents appearing before the FST are more likely to feel compelled to retain a lawyer to represent them. This is a significant departure from AB hearings, where many insurance agents feel comfortable representing themselves and explaining the business rationale behind their actions. We feel that this concern could be mitigated somewhat if our recommendation regarding the reservation of seats for agent and insurer representatives is adopted, as this would give adjudicators with industry experience a majority position on the panel.

Another major concern with the FST is its explicit ability to impose on one party to the proceedings some or all of the costs of the tribunal and/or other party. We believe that parties should not be faced with undue barriers to exercising their appeal rights, especially when the consequences can be a complete loss of livelihood. However, if an agent wished to appeal a Superintendent's order, that agent may hesitate to do so because of the possibility of punitive costs being awarded against him.

The FST's rules state that costs may be ordered where the party has engaged in conduct that is "unreasonable, frivolous or vexatious" (in the case of counter-party costs) or which "constitutes an abuse of the FST's process" (in the case of the FST's own costs), suggesting that a very high threshold must be breached before the FST will order such costs. We urge the FST to use this option sparingly, as to not deter parties from exercising their rights of appeal. We also recommend that the FST provide written reasons in each instance that it awards costs, explaining clearly why it feels that such a punitive measure is necessary.

Interim Orders

The Consultation Paper asks if the proposal to issue interim orders achieves an appropriate balance between protecting consumers and providing agents and adjusters access to justice.

In our opinion, the use of interim orders must be exceedingly rare, particularly when those orders would suspend the license of the agent or put conditions on the agent's ability to work. Our members are professional advisors and their insurance license is often key to their livelihood. Limiting their ability to work and earn income clearly creates serious repercussions, and the significance of this harm must be considered in light of the fact that an interim order is issued before the agent has the ability to appear before an adjudicator and present evidence and arguments.

Therefore, the threshold for issuing interim orders should be extremely high. While the Consultation Paper states that interim orders would be used only in "exceptional situations where the Superintendent had reasons to believe that the public would be adversely affected", we would like FSCO to go further and articulate principles and guidelines where it believes interim orders would be appropriate.

Then, upon the Superintendent's issuance of an interim order to a licensee, the Superintendent should provide written reasons for the order that are specific to that agent and which clearly connect those reasons to the principles. The agent should also have the right to challenge interim orders at the FST on an expedited basis, with the onus on the Superintendent to justify why the order should remain in place while the agent's hearing is pending.

Surrendering a License

We are in general agreement that an agent should require the Superintendent's approval before surrendering a license so that the surrender cannot simply be a means to avoid the FST's jurisdiction and evade disciplinary sanction. However, most requests to surrender should be near-automatic: similar to interim orders, refusals to accept the surrender of a license should be rare as doing so interferes with the individual's ability to control their own professional lives. This interference is particularly intrusive as the Consultation Paper envisions that a proceeding initiated by a Notice of Proceeding ("NOP") before the loss or surrender of a license survives that event, anyway.

Therefore, we submit that a decision by the Superintendent to refuse a surrender must be accompanied by written reasons that explain why the public interest would be harmed if the surrender were accepted. The refusal decision should be time-limited with an expiry date, such as 15 days, beyond which time the agent could surrender the license without further approval needed. This scenario would provide the Superintendent with a defined and limited amount of time to bring about a formal NOP, incentivizing the Superintendent to build its case to launch a formal proceeding in a timely manner, and therefore not leaving the agent in indefinite limbo.

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Advocis appreciates this opportunity to provide our comments to the Consultation Paper, and we look forward to working with FSCO as it modernizes the disciplinary process. Should you have any questions, please do not hesitate to contact the undersigned, or Ed Skwarek, Vice President, Regulatory and Public Affairs at 416-342-9837 or eskwarek@advocis.ca.

Sincerely,

A handwritten signature in black ink, appearing to be 'G. Pollock', with a long horizontal flourish extending to the right.

Greg Pollock, M.Ed., LL.M., C.Dir., CFP
President and CEO

A handwritten signature in black ink, appearing to be 'Harley Lockhart', written in a cursive style.

Harley Lockhart, CLU, CH.F.C.
Chair, National Board of Directors