

New Year, New UDAP

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January 18, 2022

On December 20, 2021, the Financial Services Regulatory Authority of Ontario (FSRA) submitted its proposed Unfair or Deceptive Acts or Practices rule (Proposed UDAP) to the Ministry of Finance for final approval. The Proposed UDAP is set to replace the current UDAP regulation outlined in Ontario Regulation 7/00 made under Ontario's *Insurance Act* (Current UDAP). The purpose of the Proposed UDAP is to strengthen the supervision of the insurance industry by more clearly defining outcomes that are unfair and/or harmful to consumers.

There are a number of differences between the Current UDAP and the Proposed UDAP. The following are most notable:

1. The Proposed UDAP defines a number of key terms that are not defined in the current regulation, including: "reasonable person," "substantially deficient," and "unreasonable consideration." To provide more clarity, the Proposed UDAP provides that, for an insurer, a reasonable person is one who has a level of knowledge and expertise equal to the insurer's nature, size, complexity, operations, and risk profile.
2. Unlike the Current UDAP that merely mentions certain instances where an action by an insurer, officer, employee or agent of an insurer would constitute an unfair or deceptive act or practice, section 1(4) of the Proposed UDAP outlines specific obligations of directors, officers, employees or authorized representatives of a person. Such individuals may be deemed to have committed an unfair or deceptive act or practice if they cause or permit a person to commit such an act or if they fail to take "all reasonable care" to prevent the unfair or deceptive act or practice from being committed.
3. Sections 2 to 6 of the Current UDAP list different kinds of actions that would constitute unfair or deceptive acts or practices but do not separate these actions by type or category. The Proposed UDAP provides a structural overhaul of this format, with section 2 defining broadly what constitutes an "unfair or deceptive act or practice". It includes conduct, including inaction or omission, that results in or could be reasonably expected to result in a number of outcomes, events or circumstances set out in sections 3 to 10 including:

- non-compliance with law
- unfair discrimination
- unfair claims practices
- fraudulent or abusive conduct

improper incentives
misrepresentation
prohibited auto insurance conduct

The various outcomes, events or circumstances correspond to specific types of conduct that satisfy the definition of unfair or deceptive act or practice in section 2. In doing this, FRSA's intention is to increase certainty regarding an individual's obligations under the Proposed UDAP.¹

The Proposed UDAP represents another important step towards a more principles-based regulation of insurance in Ontario, which provides some discretion on enforcement based on an insurer's size, complexity and the relevant circumstances at issue. If approved by the Ministry of Finance, the Proposed UDAP will take effect once consequential amendments made by the government are proclaimed into force.²

¹ <https://www.fsrao.ca/engagement-and-consultations/fsra-releases-its-revised-proposed-unfair-or-deceptive-acts-or-practices-udap-rule-public-consultation/summary-report>

² <https://www.fsrao.ca/industry/auto-insurance/fsra-releases-its-proposed-udap-rule-review-ahead-final-approval>