

CCIR

Canadian
Council of
Insurance
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Conseil
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de la
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d'assurance

Final Report on Privilege Model and Whistle Blower Protection

A report prepared by the
Canadian Council of Insurance Regulators (CCIR)
Confidentiality of Information ("Privilege") Working Group

The opinions expressed do not reflect the official position of any
provincial, territorial or federal government or agency.

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Who We Are

The Canadian Council of Insurance Regulators (CCIR) is an inter-jurisdictional association of provincial, territorial and federal insurance regulators. The provincial and territorial regulators are responsible for market conduct regulation and legislative compliance of insurers authorized in their province or territory. Several also have responsibility for the prudential (solvency) regulation of insurers incorporated in their jurisdictions.

Executive Summary

As part of a regulatory move toward more risk-based regulation, regulators wish to make more use of critical self-assessments by insurers. These self-assessments are considered an important aspect of risk identification for regulators. Regulators have been told by insurers that the potential for litigants to access the results of insurer self-assessments of their operations is a disincentive to full and open disclosure in self-assessments. Discussions of how to remove this disincentive led to the establishment of the CCIR Privilege working group to consider statutory privilege as a means of doing so.

The working group examined the role of privilege and whistle blower protection within the risk-based system of regulation and consulted at length with various stakeholder groups to best reflect the balance of views in presenting a privilege model.

The CCIR endorsed the final Privilege Model attached to this report at its Spring 2008 Meeting. It will now be up to each jurisdiction to consider whether or not the model is appropriate to legislate into their insurance regime.

Whistle-blower protection was also looked at by the working group as a compliment to privilege for self-assessment documents as it would remove disincentives for whistle-blowers to reveal documents to regulators that insurers might not want so disclosed.

The working group recommends that jurisdictions without existing whistle blower protection should consider instituting it. However, the working group has no recommendation pertaining to expanding the current definitions of privilege protection to insurance intermediaries.

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Mandate of Working Group

The mandate of the working group was to hear all the views of stakeholders and reach as much consensus as possible to provide the best possible balance in establishing a privilege model for market conduct self-assessments.

Process

The CCIR Privilege working group developed a limited privilege model and whistle-blower protection measures in 2005. The working group was authorized by the CCIR to prepare a discussion paper and to obtain stakeholder comments on the privilege model for insurer self-assessments and on whistle-blower protection. The Discussion Paper on Privilege and Whistle-Blower Protection (Discussion Paper), which was released in December 2005¹ for comment, provided a model wording for the discussion of privilege and outlined aspects of whistle-blower protection for consideration.

The Discussion Paper was sent to stakeholder organizations falling within three categories: associations representing insurers and intermediaries; associations representing lawyers involved in litigation; and associations representing persons with severe injuries. These were considered the major groups affected by the initiatives under discussion. The existence of the Discussion Paper was publicized through posting on the CCIR website and through articles in the insurance press. Fourteen submissions were received. The submissions came primarily from the legal profession and the insurance industry, the latter representing the views of insurers and intermediaries.

In 2006 the working group held discussions with insurance industry and legal associations that raised a number of issues regarding the consultation document. Following these discussions, the working group made changes to the privilege model contained in the Discussion Paper. On January 31, 2007 the working group sent a letter to the fourteen stakeholders enclosing a copy of the revised privilege model and providing additional information about the whistle-blower protection under consideration. The working group met throughout 2007 to review the responses received and to amend the draft of the privilege model based on stakeholder commentary and recommendations.

The working group reconvened in December, 2007 to discuss the stakeholder feedback and agreed to conduct further consultations to share its rationale, present next steps and collect any additional thoughts from stakeholders regarding the model. The stakeholders were invited to provide further comments and suggestions to assist the working group.

The Privilege model found in the Appendix to this report was finalized and approved at the Spring 2008 CCIR meeting.

Privilege and Whistle Blower Rationale

Changes in the regulatory environment led to the focus on extending privilege. Financial regulators around the world are moving toward more risk-based regulation. In Canada, the

¹ available on the CCIR website at www.ccir-ccrra.org

Office of the Superintendent of Financial Institutions has adopted this approach for prudential regulation and the CCIR published its *Approach to Risk-based Market Conduct Regulation*. Introducing a risk-based system means introducing a method of regulation that achieves the desired level of consumer protection with better use of regulatory resources. It does this by providing more supervisory attention than previously to higher risk companies, and less scrutiny to those determined to be low risk companies. The most benefit to this selective attention comes from reducing the risk at the higher risk companies.

Regulators encourage insurers to undertake self-assessment exercises as a way to support adoption and implementation of best corporate governance practices and to reduce the risk of non-compliance. Self-assessment exercises are an important component of the risk-based system. As such, while adequate policies and controls must be in place to achieve good corporate governance, it is essential that the senior management of the company evaluate the effectiveness of the policies and controls implemented. To complete the process, where the existing practices are deemed to be non-compliant or do not meet the good practices standards set by the company, appropriate changes are made and the results of the assessment are shared with the regulator.

The information provided by the self-assessment process together with complaints information and information available from regulator surveys assists regulators in sorting the companies into high and low risk categories.

However, if the information regarding insurer's self-assessment is readily available for public access (including parties involved in or contemplating legal action against an insurer), insurers are likely to be reluctant to undergo any self-assessment exercises of their operations.

The proposition to extend privilege to self-assessment documents and giving evidence related to such documents is intended to provide protection to insurers, thereby promoting open and critical self-assessments and the consumer protection improvements that can be gained from regulators' use of the results of such assessments.

Having considered the potential benefits of granting privilege for self-assessments, the working group also examined possible consequences privilege may have on insurance litigation process. Privilege is not intended to unfairly disadvantage any party involved in insurance litigation, plaintiffs in particular. Privilege is not intended to change the status quo of information available to plaintiffs but rather limit access to the insurer's own evaluative assessment of compliance. To date, as a result of insurers' reluctance to undertake the types of self-assessments that might provide information useful for plaintiffs little of this type of information has been available. Under the Privilege Framework, the facts about events and circumstances upon which self-assessments are made are not intended to be protected, and would continue to be available to plaintiffs. Furthermore, courts will continue to have the authority to assess the merit of privilege when the information against which it is claimed may be directly relevant to a particular case.

A whistle-blower disclosure is another source of information that assists regulators to identify potentially high-risk insurers. The information provided by a whistle-blower in certain cases might not only place a company in a high-risk category, but to indicate a need for a regulatory action. Fear of retaliation may serve as a deterrent for an individual to come forward as a whistle-blower and provide information about an insurer's unfair, deceptive or

financially unsound practices. Similar to privilege for self-assessments, some form of legal protection would promote the positive action of a whistle-blower. This can be referred to as whistle-blower protection. The rationale for whistle-blower protection is to assist regulators in their responsibility to protect the consumer and to do this by making it more likely that persons with information that could help the regulator will actually come forward.

Stakeholder Consultations

The CCIR Privilege working group has benefited from discussions with the insurance industry, legal associations and other stakeholders during the consultation process, which examined the conceptual aspects of both the privilege model and whistle blower protection. The purpose of the consultation process was to foster a dialogue between regulators and stakeholders on the establishment of a privilege model in Canada.

Issues Raised During Consultation

Part of the dialogue focused on how extending privilege to self-assessments serves the public interest. The concept of privilege and self-assessments is rooted within the Risk-based Market Conduct Regulation Model. It is defined as directing regulatory efforts to the most significant issues that either have the greatest potential for consumer harm or that could weaken public confidence if left unchecked. In a risk-based approach, regulators prioritize issues based on their potential impact (risk) to achievement of desired regulatory outcomes. Most regulatory agencies that have adopted risk-based techniques have done so because they judge that risk-based methods are the best way to meet their mandate to supervise financial markets in the way that best accomplishes the goals of legislation and regulation and ensures confidence in the financial services sector². A regulator's key role is to enforce laws put in place to protect consumers.

Recommendations were made by stakeholders to specify what the audit definition entails. It was suggested that a definition to list the type and scope of an audit document be developed to safeguard against the possibility of privilege being used to delay or avoid production of relevant documents during the course of litigation. The audit definition now in the framework is intended to be simple and to place substance over form. A concern was raised regarding the broad scope of the definition and the potential of it to cover documents that are collected in the ordinary course of business. However, the model remedied this concern by clearly stating that privilege will not apply to documents that were not prepared as a result of or in direct connection with an Insurance Self-Evaluative Audit. Additionally, the audit document description outlines what does and does not constitute an audit document.

In regards to waiving privilege, a stakeholder had expressed the view that any waiver should be a complete waiver by the insurer. However, there is a concept of partial waiver of privilege. The court has the ability to edit documents or control the distribution, copying and/or viewing of documents in order to avoid complete waiver of privilege. It should be noted that privilege is maintained if the documents are provided to a person who reasonably requires access to it. Therefore, in that particular circumstance there is no waiver of privilege.

² "Approach to Risk-Based Market Conduct Regulation", A report prepared by the Canadian Council of Insurance Regulators (CCIR) Risk-Based Market Conduct Regulation Committee

The consultation process addressed a question related to insurance intermediaries and whether they should fall within the scope of privilege protection. It was concluded that in the event that an intermediary is carrying out a self-assessment for an insurer, the privilege protection should be extended to them as they are acting on behalf of an insurer with respect to the Insurance Compliance Self-Evaluative Audit. However, expanding this project to intermediaries at this stage would not be feasible prior to establishing it at the insurer level. Broadening the scope of the model to intermediaries at this point is a complex task, however, it may be considered in the future due to the legal relationship between insurers and their agents.

Another issue involved extending whistle blower protection to agents. It was concluded that this would necessarily restrict the ability of insurers and their agents to contract. In addition, a change of this nature would have to address additional issues such as non-renewal of contracts and contract terms, including commissions and disciplinary provisions.

Discussions regarding whistle blower protection related to the scope and the penalties for acting in bad faith. In regards to whistle blowers acting in bad faith, it was decided to leave this issue to the discretion of a regulator. It is up to the regulator to assess each piece of information brought forward by a whistle blower to determine its credibility and take action as appropriate. For example, the Ontario Insurance Act³ in certain situations allows the regulator to take action against persons who misinform or misrepresent without requiring proof of malicious intent. The working group recommends that other jurisdictions adopt similar legislation.

³ Section 447 (2) (a) Ontario Insurance Act

APPENDIX

PRIVILEGE MODEL

"Insurance Compliance Self-Evaluative Audit" means an evaluation, review, assessment, audit, inspection or investigation conducted by or on behalf of an insurance company either voluntarily or at the request of a regulatory authority for the purpose of identifying or preventing non-compliance with, or promoting compliance with or adherence to, laws, regulations, guidelines, or industry, company or professional standards.

"Insurance Compliance Self-Evaluative Audit Document" means a document with recommendations or evaluative or analytical information prepared by, or on behalf of, an insurance company as a result of or directly in connection with an Insurance Compliance Self-Evaluative Audit and includes the findings and any response to the findings of an Insurance Compliance Self-Evaluative Audit.

An Insurance Compliance Self-Evaluative Audit Document is privileged information and is not discoverable, or admissible as evidence in any civil or administrative proceeding. No person or entity shall be required to give or produce evidence relating to an Insurance Compliance Self-Evaluative Audit or an Insurance Compliance Self-Evaluative Audit Document in any civil or administrative proceeding. This privilege does not apply to a proceeding commenced against the insurance company by a regulatory authority to which an Insurance Compliance Self-Evaluative Audit Document has been disclosed.

Disclosure of an Insurance Compliance Self-Evaluative Audit Document to a person reasonably requiring access to results, including to a person acting on behalf of an insurance company with respect to the Insurance Compliance Self-Evaluative Audit, to the external auditor of the insurance company, to the board of directors of the insurance company or a committee thereof or to a regulatory authority, whether voluntarily or pursuant to law, shall not constitute a waiver of the privilege with respect to any other person, regulatory authority, or other entity. The insurance company that prepared or caused to be prepared the Insurance Compliance Self-Evaluative Audit Document may expressly waive privilege for all or part of the Insurance Compliance Self-Evaluative Audit Document.

The privilege shall not apply

- (1) if the privilege is asserted for a fraudulent purpose
 - (2) in a proceeding in which a person who was involved in the preparation of the Insurance Compliance Self-Evaluative Audit is a party seeking admission of the Insurance Compliance Self-Evaluative Audit Document in a dispute related to the person's participation in the preparation of the Insurance Compliance Self-Evaluative Audit.
 - (3) to information in an Insurance Compliance Self-Evaluative Audit Document where such information is from any document not prepared as a result of or in connection with an Insurance Self-Evaluative Audit.
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