GAMA HONG KONG 20th Anniversary
General Agents and Managers Association of Hong Kong
香港人壽保險經理協會

保協
The Life Underwriters Association of Hong Kong
香港人壽保險從業員協會

Insurance Industry Regulatory & Development Concern Group (ICG)
壽險行業規管與發展關注組

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June 18, 2014

The Bills Committee on Insurance companies (Amendment) Bill 2014
The Legislative Council

By fax & email

Dear Sirs,

Views on the Bill

We speak on behalf of The Life Underwriters Association of Hong Kong (LUAHK) and the General Agents and Managers Association of Hong Kong (GAMAHK), the two representative bodies of the 40,000 plus life insurance agents in Hong Kong.

As the Bill is quite technical in many areas we are making a fairly detailed and technical submission, as attached.

In broad terms we wish to state:

1. We in general support the Bill, except in the problematic areas identified hereunder.

2. The number one concern we have is the use of the term "best interests" in the conduct requirements prescribed for an insurance intermediary, insurance agent included. The fact that an insurance agent is not the agent of the policyholder but the agent of the one or several insurance companies he represents makes the regulation inoperable.

   We agree and in fact have been advocating the agent needs to look after the interests of his customer, and are happy to follow the various other requirements in the conduct regulation (s89), but an unqualified requirement on the insurance agent to act in the "best interests" of the policyholder or potential policyholder will only bring doubts and uncertainties to the working relationship between the policyholder and the agent and will be a floodgate for litigation.

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We believe this concept has been borrowed wrongly from countries in Europe and Australia where there are virtually no insurance agents (market dominated by brokers) particularly single-company agents. In Hong Kong, the majority of the insurance intermediaries are agents, many of whom are single-company life insurance agents. International standards such as G20's High-level Principles on Financial Consumers' Protection in fact suggests regulation should be proportionate and appropriate to the customer-intermediary relationship in accordance with the actual market conditions, and the proposed regulation in our view is not.

Our suggestion is to take out the "best interest" duty or as an alternative restrict it to the observance of clear and sensible rules to be prescribed the fulfilment of which is considered sufficient compliance of the requirement.

Apart from regulations, rules, guidelines and codes are part and parcel of the conduct requirement mechanism. We suggest clarity in how these will be made, and openness and responsiveness to views and genuine needs of the market.

A case in point is how the Administration will meet the need to have an initial set of rules, guidelines, and codes for agents and brokers, that will comply with the Bill and not disrupt the market practice unnecessarily, when the IIA takes over from the SROs. The industry expects to be fully consulted by the Administration throughout the process, which ideally should have produced preliminary results by now while the Bill is being considered. This is to ensure the Bills Committee, the industry, as well as the public can have knowledge of the likely key features of the future rules, guidelines and code alongside the conduct requirements in the Bill.

3. We suggest the disciplinary process of the IIA be delegated to a committee with involvement of persons independent from the IIA, including a person from the insurance industry. This is for proper check and balance of power in the disciplinary process, as the IIA already has the sole authority for inspection and investigation. We also suggest a lighter maximum pecuniary penalty for misconduct.

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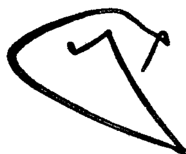
4. We suggest the Insurance Appeal Tribunal should have intimate knowledge of the insurance industry and be independent from the government and the IIA. We further suggest the removal of the possible award of cost to the appellant so as not to block an appeal on account of cost. We believe the Bill should protect not only the customers but also the legitimate rights of the practitioners.

5. We also suggest the removal of certain excessively harsh treatment of persons passively involved in the process.

6. We welcome the Administration's initiative in creating through the Bill new functions for the IIA relating to market development, promoting knowledge of insurance, and conducting researches. We hope the Administration and the IIA in the future will take concrete actions to help the industry to become even better and stronger, becoming an important insurance center in the world. To begin with, they can help to clear the image of insurance from a tarnished one of a business that needs very close and strict supervision to put its wrong-doings under check, to a shiny one of a useful, professional, creative and mighty industry that provides valuable financial protection to customers and excellent career and business opportunities to people.

Yours faithfully,
For and on behalf of
Insurance Industry Regulatory and Development Concern Group



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Y K Chan
Convener

Encl.

General Agents and Managers Association of Hong Kong
香港人壽保險經理協會

The Life Underwriters Association of Hong Kong
香港人壽保險從業員協會

INSURANCE INDUSTRY REGULATORY DEVELOPMENT CONCERN GROUP (ICG)'S VIEWS ON THE INSURANCE COMPANIES (AMENDMENT) BILL 2014 ("THE BILL")

June 18, 2014

Insurance Industry Regulatory Development Concern Group (ICG)'s Views on the Insurance Companies (Amendment) Bill 2014 ("the Bill")

We hereby set out our views on the Bill as follows :-

1. "Best Interest" duty for licensed insurance intermediaries

   1.1 s.89(a)(C2115 Part 2 Clause 84) states that "when carrying on a regulated activity, a licenced insurance intermediary -

      (a) Must act honestly, fairly, in the best interest of the policy holder concerned or the potential policy holder concerned, and with integrity;

   1.2 We consider the term "Best Interests" in the Bill inappropriate and unnecessary, and hence we request to have it taken out therein. Our reasons are as follows :

      1.2.1 (a) The Concept is Too Vague and Overstretched for Agents

      The concept of "Best Interests" is vague and, in the absence of any precise definition, overstretched for insurance agents, whose job is to sell the products of the several insurance companies (or just one insurance company in the case of most life insurance agents) they represent and service the policies sold.

      1.2.2 (b) Ample and Sufficient Protection Has Already Been Provided in the Bill

      As far as protection of clients' interests is concerned, s.89 already provided sufficient protection to clients, e.g., it is required that the licenced insurance intermediaries must have regard to the particular circumstances

of the policy holder or potential policy holder for ensuring the appropriateness of regulated activities to that client (s.89(d)), which is by itself a very clear duty that the best interests of that client is catered for. Further, s.89 also set out other broad principles of conduct requirements on licensed insurance intermediaries which further offer ample protection to policy holder or potential policy holder, such as acting honestly, fairly and with integrity (s.89(a)) exercising care skill and diligence of a prudent person (s.89(b)), disclosure of information necessary for them to be sufficiently informed for making material decision (s.89(e)), avoiding conflict of interests (s.89(f)) and disclosure of conflict of interest (s.89(g)). The term "Best Interests" which lacks any precise definition is therefore inappropriate and unnecessary.

1.2.3 (c) Floodgate of Claims

In light of the vague but yet wide concept of "Best Interest", there will certainly be a floodgate of claims and litigations arising from allegations against agents. Despite that agents are not acting as agents of policyholders (only brokers are) they are required by the Bill to act in the "Best Interest" of the policyholders. In a highly sophisticated yet litigious society like today's Hong Kong, such anomalies in law can indeed be taken as an invitation to sue, regardless of the real existence of mischief or misconduct;

1.3 Reference to G20's Principles on Consumers' Protection

1.3.1 In fact, even Principle 6 of G20 High-level Principles on Financial Consumers' Protection only state that authorized agents should have as an objective (as opposed to a requirement under the Bill to act in the best interest of their customers.

1.3.2 Principle 6 further clearly lay down how "Best Interest" as an objective is to be achieved, namely :-

(a) Financial services providers should assess the related financial capabilities, situation and needs of their customers before agreeing to provide them with product, advice or service;
(b) Staff should be properly trained and qualified; and
(c) Conflict of Interest should be managed or avoided

In fact, this is the essence of s.89(d), s89(e) and s.89(f) and (g) in the Bill. It clearly demonstrates that sufficient protection in respect of the objective of "Best Interest" has already been provided in the Bill.

1.3.3 Furthermore, Principle 1 of G20 which lay down the broad principle of Financial Customers' Protection states clearly that "Regulation should be proportionate to the characteristics, type and variety of the financial products and consumers, their rights and responsibilities ...." And "authorized agent should be appropriately (as opposed to strongly) regulated and/or supervised with account taken of relevant service and sector specific approaches" . The Bill is already more than sufficient (if not over acted) to serve the "proportionate" and "appropriate" approaches.

1.3.4 One more point worth nothing is that Principle 2 of G20 states that Oversight Bodies require "defined" enforcement framework and "clear" regulatory processes which definitely substantiate the avoidance of any vague duty.

1.4 Having said that if (a) the Government is able to set clear and sensible Rules in respect of "Best Interest" (b) provide that the compliance of those rules is a complete defence in any civil litigation against licensed insurance intermediary and (c) provide that the non-compliance of those rules does not by itself amounts to establishment of liability against licensed insurance intermediary in any civil proceedings, then the "Best Interest" duty can remain in the Bill.

2. Authority must publish draft rules

2.1 According to s.92(1) (C2123 Part 2 Clause 84), "the Authority may make rules requiring licensed insurance intermediaries to comply with the practices and standards, relating to the conduct of intermediaries in carrying on regulated activities, that are specified in the rules."

2.2 s.130 (C2199 Part Clause 84) provides as follows :-

"(1) If the Authority propose to make rules under a provision of this Ordinance, it must publish a draft of the proposed rules….., for inviting representations on the proposed rules by the public."

2.3 However, s130(5) further provides that "Subsection (1)……do not apply if the Authority considers, in the circumstances of the case, that –

(a) it is inappropriate or unnecessary that those subsections should apply or

(b) the delay involved in complying with those subsections would not be –

 (i) in the interest of policy holders or potential policy holders; or

 (ii) in the public interest."

2.4. While it is welcome that rules which have to be complied with by licensed insurance intermediaries relating to their conduct in carrying out regulated activities (which is the essence of their duty) will be subject to representation of the public before those rules are finalized, this "public representation" requirement is however subject to the subjective decision of the Authority based upon a very loose and vague concept, i.e. if the Authority considers, that it is inappropriate or unnecessary;

2.5 The Bill did not define or state under what circumstance it will be "inappropriate or unnecessary" to seek public representation. Furthermore the word "unnecessary" confers a relatively low standard for the Authority to fulfill in triggering the operation of this subsection, rendering the whole "public representation" a form rather than a substance.

2.6 Furthermore the exercise of this subsection or "exception of seeking public representation" is based only upon the subjective opinion of the Authority itself (bearing in mind the Authority is already the one who make the Rules) and is

without any sanction.

2.7 Therefore it is suggested to take out the subjective element ie. "the Authority considers" and the loose and vague concept ie. the whole s.130(5)(a) (ie. inappropriate or unnecessary exception) from section 130(5).

3. Rules on conduct requirement

3.1 s.92(2)(k) provides that "Authority may make rules to prohibit the receipt by a licensed insurance intermediary of any property or services from another licensed insurance intermediary in consideration of directing business to that other licensed insurance intermediary, except in specified circumstances and under specified conditions".

3.2 Please clarify what are those "specified circumstances" and "specified conditions", and whether this provisions aims to eliminate the practice of an intermediary giving referral fees to another intermediary out of the remuneration made from the business referred. This interferes with the freedom of trade but does not add value to the customer, as in reality the customer pays the same premium and the intermediary who deals with the customer gets the same commission from the insurance company which issues the policy irrespective of whether this business is referred by another intermediary.

4. Disciplinary Action

4.1. s.80(1) (C2095 Part 2 Clause 84) provides that "the Authority may exercise any of the powers specified in subsection(4) (disciplinary power) in respect of a person if –

(a) the person is……guilty of misconduct when the person is a regulated person (ie. including licenced insurance intermediary);

(c) the Authority is of the opinion that-

(i)…..the person is not a fit and proper person."

4.2 s.4F (C1713 Part 2 Clause 13) provides that "Subject to subsection (2), the Authority may delegate any of its functions to –

(a) a member of the Authority

(b) a committee established under s4D or

(c) an employee of the Authority,….."

4.3 s.4D(1) provides that "The Authority may establish one or more committees to assist it in a matter with which the Authority is concerned"

4.4 s4D(2) provides that "The Authority (a) may appoint a person to be a member of a committee, whether or not the person is a member of the Authority;"

4.5 Therefore under the present Bill, the Authority may (and can) delegate the exercise of its disciplinary power pursuant to s.4F to either

(a) a member of the Authority;

(b) a committee established under s4D or

(c) an employee of the Authority

4.6 It is not disputed that the proper exercise of such important disciplinary power (which will have substantial consequence to both the person concerned and the whole insurance industry) is vital. It is quite worrying if the Authority will exercise the power through the Authority's employees solely, as they already have the power to inspect and investigate. Therefore it is proposed that the Bill shall contain clear provisions that –

a) a disciplinary committee be established to exercise the disciplinary power of the Authority;

b) the disciplinary committee shall comprise of apart from members and employees of the Authority members (i) who have knowledge of and experience in insurance industry and (ii) who are independent persons coming from various relevant profession such as accountant, lawyer, actuary, person having experience in and knowledge of consumer protection;

c) at least 50% of the members of the disciplinary committee shall be persons who satisfy the qualifications in b) (i) or b) (ii) above and at least one member satisfies b) (i), and the disciplinary committee shall be chaired by a person who satisfies b) (ii).

5. Pecuniary Penalty

5.1 s.80(4)(e)(C2103 Part 2 Clause 84) provides that "the person to pay a pecuniary penalty not exceeding the amount which is the greater of "-

(i) HK$10,000,000 or

(ii) 3 times of the amount of profit gained or loss avoided…..

5.2 the sum of HK$10,000,000 is too high taking particularly into account the existence of the "3 times" penalty which already offers sufficient determent effect.

5.3 It is proposed that the sum of HK$10,000,000 be reduced to HK$5,000,000.

6. Composition of Insurance Appeals Tribunal ("Tribunal")

6.1 According to the Bill, the composition and of the Tribunal are as follows :

6.1.1 s5(3) of Schedule 10 (C2285 Part 2 Clause 94), state that "…..of any sitting of the Tribunal

(a) the chairperson and 2 ordinary members must be present;

(b) the chairperson must preside; and

(c) every question before the Tribunal must be determined by the majority of votes cast by the chairperson and the ordinary members."

6.1.2 s.3(2) of Schedule 10 provides that "the Chairperson must be (a) a former Justice of Appeal or (b) former Judge or (c) person eligible for appointment as a Judge of High Court…..".

6.1.3 s.2(1) of Schedule 10 provides that "…..the Chief Executive must appoint persons to a panel comprising the number of members that the Chief Executive considers appropriate";

s.2(2) of Schedule 10 provides that "A panel member-

(a) must not be a public officer….; and

(b) must not be a member of the Authority."

6.1.4 s.4(1) of Schedule 10 provides that "For determining a review, the Secretary (for Financial Services and the Treasury) on the recommendation of the Chairperson must appoint 2 panel members as ordinary members in relation to the review.

6.1.5 s.98(1) (C2133 Part 2 Clause 84) provides that "An affected person may, …..apply to the Tribunal for a review of a specified decision (of the Authority)…..".

6.1.6 The Tribunal which reviews the decision of the Authority plays a very important part in the whole insurance industry. Therefore its composition and in particular, whether with sufficient members who has knowledge of and experience in insurance industry to deal with the review which all relate to "insurance matter" is of vital importance to the well being of the industry.

6.1.7 However, under present Bill, there is no mention of how panel members are to be selected, nor its criteria. Furthermore there is no mention of the proportion of members who have knowledge of and experience in insurance industry as opposite to those who have not.

6.1.8 We therefore propose that the Bill should define the criteria of panel

member and the proportion of members having knowledge of and experience in insurance industry so as to maintain the proper running of the insurance industry.

6.1.9 Furthermore to maintain independence, apart from members with insurance background, the panel members should only comprise "independent person" (who is non-government official) from various relevant professions such as accountant, lawyers, actuary, person having experience in and knowledge of consumer protection.

7. Costs

7.1 s.104(1)(C2145 Part 2 clause 84) provides that "the Tribunal (Insurance Appeal Tribunal) may, in relation to a review, by order award to (b) a party to the review, a sum that it consider appropriate in respect of the costs reasonably incurred by the person or party in relation to the review and the application for review."

7.2 Under s.104(1), a party (i.e. the licenced insurance intermediary) who reviews a disciplinary decision against him and fails in the review may be order to pay costs of the review, such Costs order is not only a double penalty or burden on him who already has to shoulder the disciplinary decision, but also a barrier for the party to pursue his legitimate right to review.

7.3 It is proposed that no costs order be made against the affected person of the disciplinary decision who apply for the review.

8. “Person knowingly involved in the failure” under s.64ZZK(2)(b)

8.1 s.64ZZK(2)(b)(C2047 Part 2 Clause 71) provides that “the Court…..may punish any other person knowingly involved in the failure (of a person who fails to comply with a requirement imposed by the inspector or investigator) as if that other person had been guilty of contempt of court.”

8.2 As the words “involved in” also have the meaning of passive involvement (as opposed to just active involvement), it is unreasonable that a person who have not taken any active step to be punished, without first requiring certain criteria to place him under a positive duty to “stay away” from the said failure.

8.3 It is therefore proposed that the words “involved in” be replaced by the words “participate in”.

9. “allow a person to fail to comply with a specified requirement” under s.64ZZL(5)

9.1 s.64ZZL(5)(C2051 Part 2 Clause 71) provides that “A person commits an offence if the person, with intent to defraud –

(a) cause or allows another person to fail to comply with a specified requirement.”

9.2 Similar to the rationale under 8.2 above, the word “allow” may have the meaning of “having knowledge of a state of affairs but yet doing nothing”

which is also a form of passive involvement.

9.3 Therefore, it is proposed that the word “allows” be deleted in s.64ZZL(5)(a) and (b).

The aforesaid set out the major concern of ICG on the draft Bill and ICG would like to have further face to face discussions with the Bills Committee to enhance communication and understanding.