CANADIAN COUNCIL OF INSURANCE REGULATORS

DISCUSSION PAPER

ON

PRIVILEGE AND WHISTLE-BLOWER PROTECTION

DECEMBER 2005

The Canadian Council of Insurance Regulators (CCIR) is issuing this discussion paper on privilege and whistle-blower protection, two aspects of risk-based regulation. The privilege is for documents related to self-assessments. CCIR welcomes the comments, suggestions and ideas from stakeholders regarding the matters considered in this paper. This paper can be found on the CCIR's web site at www.ccir-ccrra.org.

A working group of the CCIR is undertaking this work to determine whether recommendations should be made to provide for privilege and whistle-blower protection. If recommendations are made by the working group and adopted by CCIR, each province and territory would decide whether to implement them. It has been determined that the implementation of privilege and whistle-blower protection would require legislation.

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We look forward to receiving your submissions by February 28, 2006. Electronic copies of submissions would be preferred. Please note that CCIR intends to make the submissions received publicly available. The submissions will be posted to the CCIR web site at the end of the submission period. If you indicate that you do not want your submission or specific parts of your submission made public, we will treat the submission, or the designated parts, as confidential to the limited extent permitted by law.

Please note the contents of this paper should not be construed as the official position of any provincial, territorial or federal government or agency.

1. INTRODUCTION

The Canadian Council of Insurance Regulators (CCIR) is seeking stakeholder views on a limited privilege and whistle-blower protection. Privilege means that documents created in the process of an insurer risk self-assessment would not be required to be produced in civil litigation. The whistle-blower protection is to protect persons who volunteer information about an insurer, insurance agent, insurance broker or insurance adjuster engaged in wrongdoing or who inform the regulator of a person or entity that should be licensed but is not.

Statutory privilege is being considered as a means to promote compliance with market conduct standards by supporting self-assessments. Regulators consider that the monitoring by a company of its own operations (self-assessment) reduces the risk of non-compliance by the company. Regulators may also require companies to complete and submit mandatory self-assessments.

This paper will first focus on privilege and then on whistle-blower protection.

2. RISK-BASED REGULATION AND SELF-ASSESSMENTS

2.1 General

Regulators have been looking at methods to undertake risk-based regulation. A risk-based system of regulation can achieve the desired level of consumer protection with fewer regulatory resources than the traditional system. A risk-based system does this by providing more supervisory attention to higher risk companies and less to low risk companies. In a risk-based system of insurance regulation, regulators also encourage insurers to voluntarily introduce good governance practices that reduce insurers' risk of non-compliance.

2.2 Good Governance – Insurer Use of Self-Assessment Information

For good corporate governance to reduce the risk of non-compliance, insurers must establish policies and procedures that support compliance or best practices. However, this is not sufficient. Regulators also expect that directors and officers will know whether these policies and procedures are actually being followed and results achieved. Self-assessment exercises, voluntarily undertaken, for internal operational purposes, constitute an effective method of responding to this governance need. Where practices are not in compliance, do not meet company-set standards or do not achieve the expected results, appropriate changes should be made.

2.3 Regulator Use of Voluntarily Collected Self-Assessment Information

Regulators can use the information from self-assessments, complaints information and information from regulator surveys to determine which companies represent a higher risk of non-compliance so that regulatory resources will be deployed accordingly.

2.4 Regulator-Mandated Self-Assessments

Regulators have begun using mandatory self-assessments for market conduct examinations. Self-assessments with appropriate checks could minimize the regulatory resources used in examinations of insurance companies. On a national scale, mandatory self-assessment was used in one recent CCIR project.

2.5 Need for Privilege

Regulators came to realize from insurer representatives' comments that the completion of voluntary or mandatory self-assessments could be negatively affected by the potential for self-assessment information to be used in civil actions against insurers. Representative Canadian insurers have confirmed that behavior is affected by considerations of litigation, particularly in regard to making decisions on whether and how to do voluntary self-assessments. Regulators do not want the litigation process to adversely affect public protection through a risk-based regulatory system. Privilege is intended to promote the effective and economical use of self-assessments as part of a risk-based system of regulation.

In the United States, six states have introduced privilege to protect insurance self-assessment information arising from voluntary self-assessments. (Mandatory self-assessments have not been introduced as a normal part of the regulatory system in the United States.) At least two Canadian jurisdictions, Ontario and Saskatchewan, have privilege that protects against access to information generated by those at a hospital or other health facility who assess the quality of care and services at their own institution (See Appendix I).

3. PRIVILEGE MODEL

The privilege model being considered is contained in Appendix II. Certain aspects of the model are described below.

3.1 Documents Affected

The privilege would apply to documents generated as a result of an evaluation, assessment, audit, inspection or investigation conducted by 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, statutes, regulations and regulatory guidelines.

Documents resulting from review exercises undertaken in regard to industry, company or professional standards, would also be privileged. As noted earlier, a risk-based system of regulation is intended to encourage good governance that promotes both compliance and the adoption of best practices. If self-assessments are undertaken in regard to company standards that are based on best practices, this will promote compliance with legislated requirements because best practices generally exceed regulatory requirements.

If documents are generated by outside consultants retained to undertake an assessment on behalf of the insurer, such documents would also be privileged.

3.2 Documents in Possession of Regulator and in Possession of Insurer

Privilege is being considered for insurer self-assessment documents whether in the possession of the insurer or the regulator. Unless the documents are protected by privilege in the possession of both, a person seeking the documents would be able to go to the entity holding the documents without privilege protection and seek access through a court order.

There are two ways that can be used to seek information in the possession of a regulator: through an access to information request under freedom of information and protection of privacy legislation or by seeking a court order for production.

In regard to an access request under freedom of information and protection of privacy legislation, the privilege under consideration is not intended to over-ride the right that a person has currently to obtain information through a freedom of information request. However, across the country there is already significant protection for self-assessment information in the event of such a request. Regardless of the jurisdiction, if production of a document in the possession of a regulator is sought by way of a court order, a court can order its production after finding that the document is relevant to the court case and meets certain other criteria. Privilege is intended to address this situation. If self-assessment information is sought by way of a court order, the statutory privilege under consideration would be taken into account by the judge.

3.3 Effect of Release of Information

In regard to a privileged document, the legislation should be clear that the release of the information to another person, including a person acting on behalf of the insurance company with respect to the self-assessment or to a regulator, whether voluntarily or pursuant to law, does not waive the privilege.

3.4 Type of Proceedings for Which Documents Privileged

The privilege would preclude the discovery and admission of self-assessment information in administrative proceedings, except administrative proceedings initiated by a regulator, and in civil proceedings. The privilege would not apply in criminal or penal proceedings.

3.5 Regulators' Release of Privileged Information

Regulators would not be fettered by privilege if regulators wished to release self-assessment information. Jurisdictions will have legislation which addresses the release of documents under government control, for example the legislation referred to above relating to freedom of information and protection of privacy.

3.6 Impact on Regulators' Investigation and Enforcement Obligations

The privilege model that is being considered is not intended to impede, in any way, a regulator's ability to use information, privileged as a result of this proposal, to investigate or take action against an insurer.

3.7 Impact on Parties to Litigation

There should be no significant impact on the information available to parties in comparison with the information available today. This is because there is little self-evaluative information available today. The increased regulatory use of self-assessments in the future, along with privilege, will create much more of self-evaluative information, which, as noted, is not available today. The factual information upon which the self-assessment conclusions are based would still be available.

4. DESCRIPTION OF WHISTLE-BLOWER PROTECTION

4.1 The Whistle-Blower

A whistle-blower is a person who has pertinent information about the wrong-doing of a person or business and who discloses that information to a regulator or government body that can take action on it.

4.2 Type of Protection - Immunity

Whistle-blower protection would protect whistle-blowers against retaliation by way of civil action for making the disclosure. This is immunity from liability to pay damages.

There are other types of retaliation. A whistle-blower might lose his or her employment if employed by the wrongdoer. An agent or broker might lose his or her contract with an insurer if disclosing information about an insurer wrongdoer. Although these latter types of retaliation can cause financial harm to the whistle-blower, regulators are not considering more than the provision of immunity. This is the type of protection that is typically available in statutes that include some protection for whistle-blowers.

4.3 Restriction on Protection

The whistle-blower would not have protection against a law suit if the information provided was not provided in good faith.

4.4 Privilege In Addition to Immunity

The core of whistle-blower protection is to provide immunity to the whistle-blower so that the whistle-blower cannot be held liable in a civil action arising out of disclosure to the regulator. However, access to documents provided by the whistle-blower might help to identify that person, if not already identified. Once identified, retaliation in the form of firing from employment could occur. There is also the possibility of harassment by being required to attend court and withstand extensive and hostile questioning. To prevent the disclosure of identity or the legal harassment, privilege is being considered for the communication provided to the regulator.

4.5 Type of Material Provided by Whistle-Blower

The immunity being considered is in regard to any oral statement or written material provided. The material could be about any entity or person against whom the insurance regulator can impose sanctions or could be any information relevant to the obligations of the regulator.

5. REASON FOR WHISTLE-BLOWER PROTECTION

5.1 Risk-Based Regulation

Whistle-blower protection is useful to a risk-based regulatory system. A whistle-blower is one source of information that can help determine whether an insurer is high-risk. The information provided by this person can not only show that a company is a high-risk company but also that regulatory action should be taken.

5.2 Promoting Receipt of Information

Individuals can fear to come forward to provide information about an insurer's unfair or deceptive or financially unsound practices because of the possibility of retaliation. As in the case of self-assessments, some form of legal protection can promote delivery of this information. Whistle-blower protection is meant to assist regulators in their responsibility to protect the consumer and to do this by protecting those individuals who have information for the regulator. It is being considered as a complement to privilege for insurer self-assessments. Some jurisdictions already have some level of whistle-blower protection. The particular references are contained in Appendix III.

APPENDIX I - EXAMPLE PRIVILEGE – HEALTH CARE

Ontario

Privilege is provided by:

Section 5 of the *Quality of Care Information Protection Act*

Saskatchewan

Privilege is provided by:

Section 35.1 of the *Saskatchewan Evidence Act*
Section 58 of the *Regional Health Services Act*

APPENDIX II – DISCUSSION MODEL WORDING FOR PRIVILEGE

"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, statutes, regulations, guidelines, or industry, company or professional standards.

"Insurance Compliance Self-Evaluative Audit Document" means a document prepared by, or on behalf of, an insurance company or a regulatory authority as a result of or in connection with an Insurance Compliance Self-Evaluative Audit and includes the findings of an Insurance Compliance Self-Evaluative Audit and any response thereto.

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 any 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 any person under any circumstances, 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.

APPENDIX III – EXISTING WHISTLE-BLOWER LEGISLATION

Jurisdiction	Legislation Reference
Alberta	No whistle-blower legislation
British Columbia	s. 243, Financial Institutions Act
Manitoba	s. 375(2), Manitoba Insurance Act
New Brunswick	s.7(2), Insurance Act
Newfoundland and Labrador	s. 40, Insurance Adjusters, Agents and Brokers Act. s. 90 Insurance Companies Act
Northwest Territories	No whistle-blower legislation
Nova Scotia	No whistle-blower legislation
Nunavut	No whistle-blower legislation
Ontario	s. 116 and s. 446, Insurance Act
Quebec	s.16, Insurance Act
Prince Edward Island	s. 350(2), Insurance Act
Saskatchewan	s. 475.51(1), s. 475.6(2), Saskatchewan Insurance Act
Yukon	s. 42, Insurance Act