

Client Alert

Corporate Commercial

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Explanatory Note on “Regulated Activity” under the Insurance Ordinance

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The Insurance Authority (“IA”) has recently issued an Explanatory Note on the construction of the definition of “Regulated Activity” under the Insurance Ordinance. As is normal with these kind of explanatory notes, it is stated not to have the force of law and not to constitute legal advice. It does, however, reflect the IA’s views on the matters covered and should therefore be treated with respect.

To reiterate the definition, it is contained in Schedule 1A to the Insurance Ordinance which reads as follows:-

- (a) negotiating or arranging a contract of insurance;
- (b) inviting or inducing, or attempting to invite or induce, a person to enter into a contract of insurance;
- (c) inviting or inducing, or attempting to invite or induce, a person to make a material decision;
- (d) giving regulated advice.

For the purposes of (c) and (d) above, a “material decision” refers to a decision made, and “regulated advice” refers to an opinion given, in relation to any of the following matters:-

- (a) the making of an application or proposal for a contract of insurance;
- (b) the issuance, continuance or renewal of a contract of insurance;
- (c) the cancellation, termination, surrender or assignment of a contract of insurance;
- (d) the exercise of a right under a contract of insurance;
- (e) the change in any term or condition of a contract of insurance;
- (f) the making or settlement of an insurance claim.

The salient points of the Explanatory Note are as follows:-

- In determining whether any course of action relates to a Regulated Activity, in general the IA applies an objective test taking into account the full factual context and totality of the interactions which the person concerned has with policy holders or potential policy holders and the extent to which the activities carried on by the persons concerned involve the need to protect policy holders or potential policy holders.
- **“Negotiating or arranging a contract of insurance”** would include:-
 - (a) the process of attempting to agree or agreeing the terms and conditions of a contract of insurance between the insurer and potential policy holder through discussions and communications of offers and acceptances;
 - (b) activities that would bring a contract of insurance into effect together with the issuance of the policy;

- (c) where a person actively assists a potential policy holder to complete an application for insurance or where premium is collected by the person for onward remittance to the insurer;
- (d) but would not include persons who only perform clerical or administrative tasks as part of the process of bringing a contract of insurance into being if the person concerned acts on behalf of an authorised insurer or authorised insurance intermediary.
- **“Inviting or inducing or attempting to invite or induce a person to enter into a contract of insurance or make a material decision”** would:-
 - (a) require an element of encouraging, persuading or convincing a person to enter into a contract of insurance or to make a material decision. It follows that an act or communication which does not have such element would be unlikely to constitute inviting or inducing;
 - (b) generally be distinguished from a communication which merely seeks to inform or educate a person about certain matters as well as merely providing information which is not accompanied by any element of encouraging, persuading or convincing;
 - (c) however passive display of literature would not normally involve inviting or inducing a person to enter into a contract of insurance or make a material decision unless the literature includes a statement indicating endorsement of a product or encouraging the reader to purchase the product;
- **“A material decision”** is based on whether the decision relates to a particular contract of insurance, the decision relates to an insurance matter and the decision to be made by the person making the decision is made in its capacity as an existing or potential policy holder. More generalised decisions would not come within the scope of this concept.
- **“Regulated advice”** is similar so in determining whether an opinion on a particular matter constitutes regulated advice, the opinion must relate to a particular contract of insurance, must relate to an insurance matter and the opinion is given to a person in its capacity as an existing or potential policy holder. This would include a recommendation to buy a specific policy but not a recommendation to buy policy of a particular category or class. Also, it would need to go beyond the mere provision of information on the contract of insurance or insurance matter and would generally need to involve the provision of a recommendation on the contract of insurance or insurance matter with a view to the potential policy holder placing reliance on it.
- **“Holding out”**. Regulated Activities are carried on by someone who holds himself out as carrying on a Regulated Activity and in the view of the IA, a person would be holding out as carrying on a Regulated Activity if he represents that he carries on that activity. Thus, where a person is providing a non-insurance professional service but in his marketing of that service indicates a Regulated Activity would be included as part of the professional service, it would constitute “holding out”.
- **“In the course of the person’s business or employment, or for reward”**. The IA’s view is that for the Regulated Activity to be carried on in a person’s business, the activity would need to be carried on for a commercial purpose. This would normally occur where the person is expecting to gain a financial benefit. There may be cases however where the activity is not carried on for a reward where it is still being carried on in the course of a business and the underlying purpose would be to promote customer retention and encourage customer loyalty for the non-insurance business. An area not covered would be where the person is carrying on the activity purely out of friendship or for altruistic purposes, the provision of the Regulated Activity is entirely unconnected with person’s business or profession and there is no suggestion of any benefit being obtained by the person in return.
- The Explanatory Note also elaborates on **Section 78(1) of the Insurance Ordinance** which states that an authorised insurer is not required to be an insurance intermediary to carry out Regulated Activities but clarifies that this is subject to two important exceptions namely that it only applies to an insurer carrying out Regulated Activities in respect of contracts of insurance which it offers and for which it is authorised and that it does not apply to insurer’s employees which may be required to be licensed as explained in the IA’s “Explanatory Note on Licensing Requirements for Employees of Authorized Insurers under Regulatory Regime for Insurance Intermediaries”.
- The Explanatory Note also offers guidance on **Section 64N of the Insurance Ordinance** which prohibits authorised insurers from entering into a contract of insurance or accepting referral of a contract of insurance from another person unless that person is an insurance intermediary or the person’s duties only involve clerical duties. Referral of business to an authorised insurer would denote that the referrer introduces a potential policy

holder to the insurer for that policy holder to enter into a contract of insurance with the insurer. Accordingly, where an unlicensed third party introduces a potential policy holder to an authorised insurer by inviting or inducing or attempting to invite or induce a policy holder to enter into a contract of insurance or by giving regulated advice, the insurer is prohibited from accepting the business. Excluded from this, however, is accepting business from a customer who has chosen the insurer because the customer has been told by his friend or relative about the relative's positive experience in dealing with the customer. These types of word-of-mouth testimonials are part of normal everyday social interaction and should not constrain an insurer from entering into a contract of insurance. Where however an insurer seeks to offer a gratuity to existing customers for referring friends or relatives, it may be constrained. If the insurer is simply providing customers with a small token of appreciation, this may not place the insurer in contravention of Section 64N of the Ordinance but if the size of the gratuity is such as to motivate customers to invite or induce their friends to enter into contracts of insurance with the insurer, the insurer is likely to be at risk of contravening Section 64N of the Ordinance.

The Explanatory Note goes on to set out a number of case studies which elaborate how these principles apply in practice and are as follows:-

- An insurer or a licensed insurance intermediary proposes to enter into a collaboration with a non-insurance entity to promote or offer insurance products to the customers of the non-insurance entity. The arrangement is structured to utilize the non-insurance entity's website or app which is targeted to the non-insurance customers to promote or offer insurance products offered by the Regulated Activity.
- A non-insurance entity which provides non-insurance services which is to include as an incidental part of its services to its clients, assistance in procuring suitable insurance. To provide the insurance part of the service offering, the non-insurance entity is considering entering into an arrangement or facility with a licensed insurance intermediary.
- An entity operates a price comparison website for insurance products which enables a customer to search for or obtain quotes for different types of insurance products, compare their prices and coverage and then select an insurance product to purchase.
- An authorised insurer proposes to launch a referral scheme whereby existing policy holders of the insurer can enjoy cash coupons if they successfully refer their friends to the insurance to purchase an insurance policy from the insurer.

This Explanatory Note will be of importance to unregulated entities who are operating as referrers of insurance business to either insurers or insurance intermediaries as it provides greater detail on the views of the IA the extent of the activities which they may or may not carry on under the Insurance Ordinance.

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