Explanatory Note on "Regulated Activity" under the Insurance Ordinance (Cap. 41)

Insurance Authority

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A. Introduction

A.1 The regulatory regime for insurance intermediaries under the Insurance Ordinance (Cap. 41) (the "Ordinance") makes it a criminal offence for a person, without reasonable excuse to carry on a "regulated activity", or hold out that he is carrying on a "regulated activity", in the course of his business or employment or for reward, unless he is a licensed insurance intermediary or otherwise exempt.

A.2 The Insurance Authority ("IA") has issued an "Explanatory Note on Licensing Requirements for Employees of Authorized Insurers under Regulatory Regime for Insurance Intermediaries" in November 2018 and an "Explanatory Note on Licensing Requirements for Banking Sector under Regulatory Regime for Insurance Intermediaries" in October 2019, setting out its views on whether or not persons are carrying on "regulated activity" in certain sector-specific situations.

A.3 Since the regulatory regime for insurance intermediaries came into effect on 23 September 2019, the IA has received enquiries on the issue of "regulated activity" involving different types of distribution models that go beyond the scope of the two existing Explanatory Notes it has issued. Answering these enquiries has enabled the IA to refine and further develop its views on the application of the scope of "regulated activity" in the context of different business practices. To ensure persons considering the licensing requirements under the Ordinance have the benefit of these views, the IA has decided to issue this additional Explanatory Note ("Note").

A.4 In section B of this Note we set out the IA's general approach in considering the issue of whether or not a person is required to obtain a licence under the Ordinance, the factors which the IA takes into account when considering the scope of different types of "regulated activity", and other related matters. Section C of this Note sets out hypothetical case studies covering certain business practices where the issue of whether or not a person is required to be licensed under the Ordinance (and the related issue of whether an authorized insurer can accept business from such person) may arise.

A.5 Whilst this Note concerns the provisions in the Ordinance on "regulated activity" and related issues, it only represents the IA's views on these provisions. This Note is not binding on any court, does not have the force of law and should not be interpreted in a way that would override the provision of any law. Further, this Note is not intended to be a comprehensive guide and does not constitute legal advice. Persons who have questions on the licensing requirements under the Ordinance are advised to seek professional advice.

A.6 The IA reserves the right to review, amend, supplement or update this Note, especially in light of changing circumstances or developing business practices.

A.7 Unless otherwise specified, words and expressions in this Note shall have the same meanings as given to them in the Ordinance.

B. General considerations

B1 Licensing requirement under the Ordinance and "regulated activity"

B1.1 Under section 64G of the Ordinance, a person must not carry on a regulated activity, or hold out that the person is carrying on a regulated activity in the course of the person's business or employment or for reward, unless the person is a licensed insurance intermediary or is otherwise exempt under the Ordinance (for example, under one of the relevant exemptions set out in section 123 of the Ordinance).

B1.2 If a person contravenes section 64G of the Ordinance, the person commits a criminal offence and is liable (a) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 2 years and, in the case of a continuing offence, to a further fine of $20,000 for each day during which the offence continues; or (b) on summary conviction to a fine at level 6 (i.e. $100,000 at present) and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine of $2,000 for each day during which the offence continues.

B1.3 Deciding if a person needs a licence under the Ordinance involves an examination of whether the person carries on, or holds out that he carries on "regulated activity". The scope of "regulated activity" is set out in section 3A of, and Schedule 1A to, the Ordinance.

B1.4 Per Schedule 1A to the Ordinance, each of the following is a regulated activity:

(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.

B1.5 The key questions for considering whether a person needs to be licensed are, therefore, as follows:

(a) Is the person carrying on a regulated activity, or is the person holding out that he is carrying on a regulated activity?

(b) If the answer to (a) is "yes", is the person carrying on the regulated activity, or holding out that he is carrying on the regulated activity, in the course of the person's business or employment, or for reward?

(c) If the answer to (b) is "yes", do any of the exemptions under the Ordinance, particularly those in section 123 of the Ordinance, apply?

If the answers to (a) and (b) are "yes" and the answer to (c) is "no", then the person is required to be licensed as a licensed insurance intermediary, otherwise the person may contravene section 64G of the Ordinance and can be prosecuted for a criminal offence.

B1.6 The IA considers it appropriate to apply an objective test to the question of whether or not a person is carrying on a regulated activity, taking into account the full factual context and totality of the interactions which the person has with policy holders or potential policy holders. The question which needs to be asked, therefore, is whether a reasonable observer taking account of all the relevant circumstances, would consider the person to be carrying on a regulated activity or holding out that the person is carrying on a regulated activity.

B1.7 Further, in forming a view as to whether or not a person needs to be licensed, the IA will consider the matter in the context of its functions under the Ordinance. Under section 4A of the Ordinance, the principal function of the IA is to regulate and supervise the insurance industry for the promotion of the general stability of the insurance industry and for the protection of existing and potential policy holders. A relevant consideration in deciding whether a person needs to be licensed, therefore, is to what extent the activities carried on by the person involves the need to protect policy holders or potential policy holders by subjecting the person's conduct to regulation through licensing.

B1.8 The licensing requirement under the Ordinance is reinforced by section 64N of the Ordinance which prohibits an authorized insurer from entering into a contract of insurance through, or accepting a referral of insurance business from, another person in Hong Kong unless:

(a) that person is
  (i) a licensed insurance agency or a licensed individual insurance agent appointed by an authorized insurer; or
  (ii) a licensed insurance broker company; or
(b) that person's duties only involve clerical or administrative duties.

An authorized insurer which contravenes this prohibition commits a criminal offence.

B1.9 In the remaining part of this section B, we set out our views on the different types of "regulated activity" in the context of considering whether or not a person is required to be a licensed insurance intermediary under the Ordinance for carrying on, or holding out that he carries on, the regulated activity and other matters related to this issue.

B.2 "**Negotiating or arranging a contract of insurance"**

B2.1 The Ordinance does not contain any definition of the expressions "negotiating" or "arranging", leaving them to their natural meaning.

B2.2 "Negotiating" a contract of insurance, in the IA's view, would be the process of attempting to agree, or agreeing the terms and conditions of a contract of insurance between the insurer and the (potential) policy holder, through discussion and the communication of offers and acceptances. Whether a person negotiates a contract of insurance on behalf of a (potential) policy holder, or on behalf of the insurer, this would constitute a regulated activity.

B2.3 "Arranging" a contract of insurance, in the IA's view, denotes the activities that would bring a contract of insurance into effect, together with the issuance of the insurance policy to the policy holder. "Arranging" is therefore wider in scope than "negotiating". A person's actions would bring a contract of insurance into effect (and hence constitute arranging) if without the person having taken such actions, the contract of insurance would not have been effected. An example of a person arranging a contract of insurance would be where the person actively assists a potential policy holder to complete an application for insurance and sends it to an insurer. The IA also takes the view that if premium is being charged and collected by a person specifically for the purpose of effecting a contract of insurance, then the person involved is likely to be regarded as "arranging" a contract of insurance.

B2.4 However, persons who only perform clerical and administrative tasks as part of the process of bringing a contract of insurance into effect (being tasks which would still form part of "arranging" a contract of insurance), would not need to be licensed if the exemption in section 123(2) of the Ordinance applies. Section 123(2) of the Ordinance, in effect, exempts a person from having to be licensed if that person acts on behalf of an authorized insurer or a licensed insurance intermediary in carrying on a regulated activity, but the carrying on of that activity only involves the discharge of clerical or administrative duties for the insurer or the intermediary. For example, a secretary working for an authorized insurer or a licensed insurance intermediary whose duties are limited to tasks such as arranging for application forms or other documents received from a (potential) policy holder to be sent onto the underwriter or arranging meetings between the intermediary and the (potential) policy holder, or taking and passing on messages and other correspondence would, in the IA's view, fall within this exemption. Similarly, individuals whose tasks and duties are limited to pure data-entry (e.g. inputting data which is in an application or other form into a system) would, in the IA's view, likely fall within this exemption.

B.3 **"Inviting or inducing", or "attempting to invite or induce" a person to enter into a contract of insurance or make a material decision**

B3.1 The Ordinance does not contain any definition of the expressions "inviting" or "inducing", leaving them to their natural meaning.

B3.2 As stated in the "Explanatory Note on Licensing Requirements for Banking Sector under Regulatory Regime for Insurance Intermediaries" issued in October 2019, the IA generally

takes the view that "inviting or inducing" would 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 any such element may unlikely constitute inviting or inducing (or attempting to invite or induce).

B3.3 Inviting or inducing may generally be distinguished from a communication which merely seeks to inform or educate a person about certain matters. Inviting or inducing may also be distinguished from the mere provision of information, which is not accompanied by any element of encouraging, persuading or convincing. For example, a passive display of literature advertising insurance (for example, a medical provider leaving leaflets from an authorized insurer advertising the insurer's products in a waiting room) would not amount to the person who is displaying the literature, inviting or inducing or attempting to invite or induce a person to enter into a contract of insurance. However, if the content of the displayed literature includes any statement indicating that the person displaying the literature endorses the insurance product, or that such person encourages the reader to purchase a particular insurance product, then the person displaying the literature may be considered as inviting or inducing or attempting to invite or induce another person to enter into a contract of insurance.

B3.4 Whether an act or communication amounts to inviting or inducing or attempting to invite or induce a person to enter into a contract of insurance or make a material decision, would be assessed objectively taking account of the full factual context and totality of interactions of which the act or communication forms part. The question to consider is whether a reasonable observer, viewing the totality of the interactions between the person and the potential policy holder, would consider that the person is seeking to encourage, persuade or convince the potential policy holder to purchase an insurance policy or make a material decision.

B4 **"Material Decision"**

B4.1 In determining whether a decision constitutes a material decision (see paragraph B1.4 above), the IA will generally have regard to the following matters:

(a) whether the decision relates to a particular contract of insurance;

(b) whether the decision relates to an insurance matter; and

(c) whether the decision is made by a person in his capacity as an existing or potential policy holder.

Note: a policy holder includes a claimant[1], i.e. a person who makes an insurance claim.

[1] Under section 2 of the Ordinance, a policy holder includes a person to whom, under a policy, a benefit is due.

B5 **"Regulated advice"**

B5.1 In determining whether an opinion constitutes regulated advice (see paragraph B1.4 above), the IA will generally have regard to the following matters:

(a) whether the opinion relates to a particular contract of insurance;

(b) whether the opinion relates to an insurance matter;

(c) whether the opinion is given to a person in his capacity as an existing or potential policy holder; and

(d) whether only factual information is given.

B5.2 For example, a recommendation to a person to buy a specific life insurance policy from a specific insurer would likely constitute regulated advice. By contrast, a recommendation simply to buy life insurance (without specifying either a particular life insurance product or a particular insurer) would unlikely, on its own, be considered regulated advice.

B5.3 Further, the IA generally takes the view that for an opinion to be regulated advice, it would need to go beyond the mere provision of information on the contract of insurance or insurance matter (for example, the passive display of literature referenced in paragraph B3.3 above would unlikely be considered giving regulated advice). Giving regulated advice would generally involve the provision of a recommendation to a client on the contract of insurance or insurance matter, or be a statement made with a view to the (potential) policy holder placing reliance (regardless of whether the policy holder in fact relies on it or not) on that statement in respect of the contract of insurance or insurance matter.

B5.4 The medium through which the advice is given, whether face-to-face, by telephone or video-call, correspondence (including e-mail or other electronic medium) or through the provision of an interactive software system, would not likely make any difference to the issue of whether or not regulated advice is being given. Rather, the examination would focus on the substance of the communication being made and whether a reasonable observer would consider the content of the communication to be regulated advice. The IA would always assess this issue objectively and not look solely at a single communication. It would take account of the full factual context and view the communication in the context of the totality of the interactions with the (potential) policy holder of which the relevant communication forms part.

B6 **"Holding out" that a person is carrying on a regulated activity**

B6.1 The prohibition in section 64G of the Ordinance is not only on carrying on regulated activity without being a licensed insurance intermediary, but also on a person "holding out" that the person carries on regulated activity without being a licensed insurance intermediary.

B6.2 The IA is of the view that a person would be holding out that he carries on a regulated activity if, through his communications or in promoting his business, he represents that he

carries on a regulated activity. This might include, for example, a situation where a person is providing a non-insurance professional service, but in his marketing of that service he indicates a regulated activity to be included as an incidental part of the professional service he provides. It might also include a situation where the person gives the impression that he is licensed to carry on such regulated activity when this is not the case.

B6.3 Certain professions have the benefit of exemptions under section 123 of the Ordinance whereby they can provide regulated advice, and hold out that they provide regulated advice, which is incidental to their practice of their professional services, without having to be licensed. These professions include barristers, solicitors, certified public accountants and actuaries. They also include the loss adjusting professions (i.e. persons carrying on the business of loss assessment on behalf of an authorized insurer, policy holder or insurance claimant, or persons carrying on the business of settling claims on behalf of an authorized insurer). Professions which do not have the benefit of an express exemption under section 123 (or any other provision) of the Ordinance, are not permitted to hold out that they carry on (or, indeed, actually carry on) regulated activity, even if this would only be incidental to their profession, unless they obtain a licence.

B7 **A person carrying on regulated activity, or holding out that the person is carrying on regulated activity, "in the course of the person's business or employment, or for reward"**

B7.1 A person who carries on a regulated activity, or holds out that he is carrying on a regulated activity needs to be licensed if the regulated activity is being carried on in the course of the person's business or employment or for reward.

B7.2 In the IA's view, for the regulated activity to be carried on in the course of the person's business, the activity would need to be carried on for commercial purposes. Generally, commercial purposes would be where the person is expecting to gain a financial benefit of some kind in carrying on the activity (regardless of whether the person in fact gains a financial benefit). Usually, therefore, where a financial benefit is being obtained, the person would be both carrying on the regulated activity in the course of its business and for reward.

B7.3 There may, however, be situations where even though the person does not appear to be carrying on the regulated activity for reward, the person would still be carrying it on in the course its business. For example, a non-insurance professional or business may be providing a regulated activity for free, as an incidental part of its non-insurance goods or services. In such scenario, in the IA's view, the regulated activity would still likely be provided in the course of business, as the underlying purpose of the person providing the regulated activity would likely be to promote customer retention or to encourage customer loyalty for its non-insurance business. Another example may be where, although the person does not accept payment for carrying on the regulated activity, as a condition of providing the regulated activity the customer must agree to his personal data being used by the person for the person's non-insurance business. Again, this would likely mean the regulated activity is being carried on in the course of the person's business.

B7.4 For the regulated activity to be carried on in the course of a person's business, one would also generally expect the activity to be carried on with a degree of regularity. Again, however, this would not always be the case. For example, if a financial benefit was received for carrying on the regulated activity and this was significant, it would likely satisfy the "course of business" test even if this was an isolated activity (and in any event, it would also satisfy the "reward" test – see B7.5 below).

B7.5 As regards carrying on regulated activity for "reward", this would cover any situation where the person is obtaining a financial benefit, whether directly or indirectly, for carrying on the regulated activity (any form of commission payment or fee, being an obvious example of a "reward"). Note that even in a situation where the person is not carrying on the regulated activity in the course of the person's business, if the person is doing it for "reward" then the person would still need to be licensed.

B7.6 An example of a situation where a person would be carrying on a regulated activity but <u>not</u> in the course of the person's business or employment or for reward (and hence is not required to be licensed), would be where it is apparent to a reasonable observer taking account of all the relevant circumstances, that the person is carrying on the regulated activity purely out of friendship or for altruistic purposes, the provision of the regulated activity is entirely unconnected to the person's business or profession, and there is no suggestion of any benefit being obtained by the person in return.

B8 **Authorized insurers and carrying on regulated activities**

B8.1 According to section 78(1) of the Ordinance, an authorized insurer is not required to be a licensed insurance intermediary in order to carry on any regulated activity or hold out that it is carrying on any regulated activity. This, therefore, serves as an exception to the general prohibition in section 64G against a person carrying on regulated activity, or holding out that the person is carrying on a "regulated activity" in the course of the person's business or employment or for reward, unless the person is a licensed insurance intermediary.

B8.2 There are, however, in the IA's view two important limits to the exemption in section 78(1) of the Ordinance, in respect of which authorized insurers should pay particular attention.

B8.3 Primarily, in the IA's view, the exemption in section 78(1) of the Ordinance only applies to an authorized insurer in respect of the regulated activity it carries on as an authorized insurer. Accordingly, in the IA's view, the exemption in section 78(1) of the Ordinance only permits an authorized insurer to carry on regulated activity without having to be a licensed insurance intermediary in relation to the contracts of insurance it offers and underwrites in the classes of insurance business for which it is authorized.

B8.4 Secondly, although an authorized insurer is exempt from the licensing requirement under section 78(1) of the Ordinance, such exemption does not extend to the insurer's employees. Whilst section 78(1) of the Ordinance exempts an authorized insurer from becoming a licensed insurance intermediary in order to carry on any regulated activity or hold out that it is carrying on any regulated activity, section 78(2) of the Ordinance states that the exemption in section 78(1) does not extend to the insurer's agent. As a matter of law, an

employee is an agent of his/her employer. By reason of section 78(2), therefore, section 78(1) would not exempt employees of authorized insurers from the regulatory regime. Accordingly, an employee of an authorized insurer who carries on a regulated activity or holds out that he/she is carrying on a regulated activity, would need to be licensed unless another exemption applies. Relevant exemptions are set out in section 123 of the Ordinance. Please refer to the "Explanatory Note on Licensing Requirements for Employees of Authorized Insurers under Regulatory Regime for Insurance Intermediaries" issued by the IA in November 2018, where these issues are addressed.

B9 Authorized insurers and section 64N of the Ordinance

B9.1 Authorized insurers also need to comply with section 64N of the Ordinance. Section 64N of the Ordinance prohibits an authorized insurer from entering into a contract of insurance through, or accepting a referral of insurance business from, another person in Hong Kong unless that person has the requisite licence to carry on regulated activities, or the person's duties only involve clerical or administrative duties.

B9.2 In the IA's view, section 64N of the Ordinance reinforces the objective of the licensing requirement. That objective is to ensure that persons serving members of the public in carrying on regulated activity in the course of business or employment or for reward, need to have demonstrated through obtaining a licence, that they meet the requisite fit and proper standards (in terms of education and qualifications, reputation, character, reliability and integrity and financial status etc.). Section 64N of the Ordinance thereby complements section 64G of the Ordinance by prohibiting an authorized insurer from accepting business produced through certain regulated activity carried on by persons who do not have the requisite licence (save in the limited exception of where the person's duties are confined to clerical and administrative matters).

B9.3 The prohibition in section 64N(1) of the Ordinance is on "entering into a contract of insurance through another person in Hong Kong". Entering into a contract of insurance "through another person" in Hong Kong denotes a situation where the contract of insurance is being entered into between an authorized insurer and a policy holder through a third party acting as an agent for either the authorized insurer or policy holder. In the IA's view, this would equate to the third party carrying on the regulated activity of "negotiating or arranging a contract of insurance" on behalf of either the authorized insurer or policy holder in the course of business or employment or for reward, which would require that person to be licensed under section 64G of the Ordinance. Section 64N(1) of the Ordinance, therefore, prohibits an authorized insurer from entering into a contract of insurance if the third party negotiating or arranging the contract of insurance on behalf of either the insurer or policy holder is unlicensed.

B9.4 The prohibition in section 64N(2) is on accepting "a referral of insurance business from another person in Hong Kong". "Referral of insurance business" is not defined in the Ordinance. In accordance with its ordinary meaning, a referral of insurance business to an authorized insurer would denote where a third party introduces a potential policy holder to the insurer in order for that potential policy holder to enter into a contract of insurance with

the insurer. In this regard, section 64N(2) of the Ordinance aims to ensure that regulated activity with members of the public is only carried on by persons with the requisite licence (save where the limited exceptions under the Ordinance apply). Accordingly, where an unlicensed third party introduces a potential policy holder to an authorized insurer in Hong Kong by "inviting or inducing" or "attempting to invite or induce" the potential policy holder to enter into a contract of insurance with the insurer, or by giving "regulated advice" to the potential policy holder to enter into a contract of insurance with the insurer, and this is done in the course of business or employment or for reward, section 64N(2) of the Ordinance would prohibit the insurer from accepting the business (as these would be regulated activities requiring the third party to be licensed).

B9.5 The IA takes the view that section 64N(2) of the Ordinance is not aimed at preventing an authorized insurer from accepting business from a customer who has chosen the insurer because the customer has been told by his friend or relative about the friend or relative's positive customer experience in dealing with the insurer. These types of informal "word-of-mouth" testimonials based on actual customer experience are a normal part of everyday social interaction and the information exchanged in these conversations is for altruistic purposes (and outside the scope of business or employment or where the person relating their customer experience is doing so for reward). In the IA's view, the regulatory regime under the Ordinance does not intend to prohibit this type of normal social interaction.

B9.6 If, however, an authorized insurer seeks to offer a gratuity to its existing customers for referring friends or relatives to the insurer as potential new customers, the insurer would need to consider carefully whether such scheme would place it in contravention of section 64N of the Ordinance (and its customers in contravention of the licensing requirement under the Ordinance), by motivating its customers to carry on regulated activity for reward. If the authorized insurer is simply providing customers with a small token of appreciation for their "word-of-mouth" testimonials (which the customer would have told their friends irrespective of obtaining the token of appreciation), this may not place the insurer in contravention of section 64N of the Ordinance[2]. If, however, the gratuity is such as to motivate customers to invite or induce or attempt to invite or induce (e.g. encourage, persuade or convince) their friends or relatives to enter into contracts of insurance with the insurer, or to advise their friends or relatives on the specific merits of a particular insurance product offered by the insurer with a view to their friends or relatives purchasing it, then the insurer may be at risk of (a) contravening section 64N of the Ordinance; and (b) placing its customers at risk of carrying on regulated activity for reward without the requisite licence in contravention of section 64G of the Ordinance.

[2] Please also refer to Case Study 4 for further details and illustrative example.

C. Case studies

In this section C, we set out various hypothetical case studies covering certain business practices where the issue of whether or not a person is required to be licensed under the Ordinance might arise and the considerations which the IA takes into account when considering these practices. Although hypothetical, the case studies are loosely based on situations where the IA has given its views in response to particular complaints or enquiries.

CASE STUDY 1

An authorized insurer or a licensed insurance intermediary (i.e. a regulated entity) 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 being structured to utilize the non-insurance entity's website or app which is targeted on the non-insurance entity's customers, to promote or offer the insurance products offered by the regulated entity. Can the proposed collaboration arrangement proceed without the non-insurance entity having to obtain a licence?

The following is a non-exhaustive list of considerations that, in the IA's view, would need to be scrutinized when examining the proposed collaboration arrangement to ascertain whether the non-insurance entity is or is not carrying on (or holding out that it is carrying on) regulated activities:

Objective analysis

The matter would be considered objectively, i.e. from the perspective of the reasonable observer, considering how the arrangement would work in practice. The focus would not be on any particular snapshot of a single communication, display or message on the website or app in isolation. Rather, one would look at the proposed process as a whole and the totality of the proposed interactions with the customer.

Is there a clear segregation of regulated activities and non-regulated activities in the arrangement?

If it is proposed that the non-insurance entity does not obtain a licence, then there would need to be a clear segregation between the regulated activities and non-regulated activities, with the regulated activities being carried on (and being seen to be carried on) only by the regulated entities.

The collaboration or arrangement would therefore need to include appropriate and adequate systems and procedures to establish this segregation of activities (and to maintain the segregation throughout the operation of the arrangement). In addition, it would need to be sufficiently apparent to a customer using the website or app that all the regulated activities are being carried on by the regulated entity and not the non-insurance (unlicensed) entity.

Further, the responsibility for the regulated activities would lie with the regulated entities and hence the regulated entities would need to ensure they have sufficient controls and procedures in place (and means of maintaining such controls and procedures through, for example contractual rights in the collaboration arrangement with non-insurance entity) to ensure they can discharge their responsibilities and obligations for the regulated activities.

"Inviting or inducing"

If the arrangement includes an option to purchase insurance appearing on the non-insurance entity's website or app, this may be an "invitation or inducement" to a person to enter into a contract of insurance (and hence "regulated activity") where it is presented so as to encourage, persuade or convince the customer to obtain the insurance. For example, where the wording and the accompanying images serve as a "call to action" for the customer to apply for the insurance (e.g. *"Add insurance to your purchase", "Limited offer, purchase insurance now",* or an icon which states *"Get XYZ insurance",* or images with ticks or thumbs-up suggesting that customer should act positively to the suggestion), then this would likely be an invitation or inducement.

An exception may be where only a link to the regulated entity's website or app is provided which is represented solely by the regulated entity's name or logo (where the link can be activated by clicking the name or logo). A link of this sort, presented as only a name or logo (and without any accompanying narrative) may not have sufficient element of encouragement or persuasion to be considered as an invitation or inducement.

Assuming the option to purchase is an invitation or inducement, then it would have to be presented in such a way so it is apparent to a reasonable observer, that the invitation or inducement comes from the regulated entity and not the non-insurance entity (e.g. there would need to be a clear and visible accompanying narrative stating something like: *"this offer is brought to you directly by [XYZ insurer/broker company]"*). The clarity of the presentation would have to be sufficient to displace the reasonable assumption a customer might have that, since the option is on the non-insurance entity's website or app, the non-insurance entity is making the invitation or inducement (or at least endorsing it). In other words, it should be apparent that the regulated entity is simply using the non-insurance entity's website or app as a "shop window" to offer its insurance product directly to customers (with the non-insurance entity simply providing its website or app as the shop window). Reinforcing this through clearly worded disclaimers and consistency of representations wherever the insurance is referenced on the website or app, would also be important.

Notwithstanding the above, additional caution should be exercised where the non-insurance entity is an entity that provides financial services as its core business (for example a bank[3]). Insurance, and the carrying on of regulated activities in relation to contracts of insurance, are financial services. As such, in a situation where a non-insurance entity whose core business is to provide financial services, places an advertisement for insurance on its website or app, it may be difficult to displace the reasonable assumption a customer would have that the non-insurance entity (whose core business is financial services) is making an invitation or inducement in relation to the insurance products of the insurer (or at least endorsing the insurance products), even if there are disclaimers in place in an attempt to distinguish the role of the non-insurance entity from the regulated entity. As such, a non-insurance entity which provides financial services as its core business, where it participates in such arrangement with a regulated entity should be particularly

[3] For the purpose of this Note, "bank" means an authorized institution defined in section 2(1) of the Banking Ordinance (Cap. 155).

mindful of the risk of it being considered as carrying on regulated activities and hence should consider obtaining a licence.

"Regulated advice"

To ensure the customer makes an informed decision, the customer would need to have the opportunity to consider the key features, exclusions and other information in relation to the insurance before proceeding with the option to purchase. The question which needs to be considered is whether the information provided about the insurance product on the non-insurance entity's website or app would constitute the provision of "regulated advice". In a situation where the information concerns a specific insurance product and is being provided in the context of an option to purchase (which the customer is being encouraged to consider), this is likely to be considered "regulated advice" and hence a "regulated activity".

It would need to be made clear from the presentation, therefore, that the information on the product is provided by the regulated entity (*"this information is provided by XYZ insurer"*). Similarly, if information on the insurance product is presented in the form of FAQs, then it would need to be made clear that the answers are provided by the regulated entity. Further, the contact details of the regulated entity (not the non-insurance entity) should be provided for any questions the customer may have on the insurance product. This should be reinforced through clearly worded disclaimers and consistency of representations wherever the insurance is referenced on the website or app.

"Arranging"

If the non-insurance entity is not going to be licensed, then all steps involved in "arranging" the contract of insurance (being a regulated activity) would have to be performed (and seen to be performed) by the regulated entity (not the non-insurance entity).

The IA is neutral regarding the technology set-up the parties use to achieve this, whether it is through a link to the regulated entity's website or app, an API providing a connection to the regulated entity's platform after the option to purchase has been clicked, or any other type of solution. Ultimately, however, after the option to purchase has been activated, the process for applying for the insurance product, the processing of the application, the payment of the premium and the issuance of the insurance policy should be transacted between the customer and the regulated entity, so that the non-insurance entity does not perform any step in this process. This should also be made clear to the customer.

As indicated, the charging and collection of premium by a person specifically for the purpose of effecting an insurance policy, would mean the person is performing actions that constitute "arranging" an insurance policy. The payment of premium, therefore, should be made by the customer directly to the regulated entity (rather than the non-insurance entity charging the customer and collecting the premium from the customer on behalf of the regulated entity). There may, however, be situations where a customer pays the premium to the regulated entity from the e-wallet which the customer maintains with the non-insurance entity. In effecting payment from an e-wallet maintained with the non-insurance entity, the customer is effectively giving the regulated entity permission to deduct the premium from the customer's e-wallet, such that the

transaction is taking place directly between the customer and the regulated entity. Even though the payment is being made from the e-wallet which the customer maintains with the non-insurance entity (and the non-insurance entity operates the e-wallet in strict accordance with the customer's instructions), this would not, in the IA's view, actively involve the non-insurance entity in "arranging" the insurance policy (and hence would not constitute regulated activity being carried on by the non-insurance entity).

"Holding out"

In order to ensure that the non-insurance entity does not hold itself out as carrying on regulated activity, it should be wary of any narrative on its website or app in which it references the arrangement it has with the regulated entity in the collaboration. Any narrative which indicates that the non-insurance entity is playing an active role in the provision of the offer of the insurance product should be avoided, e.g. "*in partnership with XYZ insurance company, we are able to bring you this exclusive insurance offer*". As well as "*attempting to invite or induce a person to enter into a contract of insurance*", these types of narrative may also involve the non-insurance entity as holding out that it is carrying on a regulated activity. Similarly, if the non-insurance entity indicates that if the customer has any queries on the insurance being offered through the website or app, the customer can contact the non-insurance entity, then this may constitute the non-insurance entity holding out that it provides regulated advice or carries on other regulated activity.

Remuneration

There is no hard and fast rule prohibiting a non-insurance entity from charging a regulated entity fees for using its website or app to offer insurance products. However, as stated, when assessing a collaboration arrangement in the context of the licensing requirements under the Ordinance, the IA would consider the collaboration model holistically and from end-to-end. Any remuneration to be provided to the non-insurance entity would be relevant to this overall assessment. For example, a flat fee arrangement (where the fee is not tied to the number of insurance products sold or premium generated) would in general be less suggestive of regulated activities being carried on by the non-insurance entity. Remuneration which is tied to the premium generated through sales through the website or app, by contrast, may prompt a more in-depth enquiry as to whether regulated activities are being carried on. This would be a matter, therefore, for the parties to think through carefully and consider seeking professional advice on.

Section 64N of the Ordinance

If all regulated activity in the collaboration is only carried on (and is only seen to be carried on) by the regulated entity and not the non-insurance entity, then in the IA's view an authorized insurer entering into contracts of insurance as a result of the collaboration would have no issues concerning potential violations of section 64N of the Ordinance. If, however, the non-insurance entity "invites or induces", "attempts to invite or induce" or gives "regulated advice" to a customer to enter into a contract of insurance as part of the collaboration, the authorized insurer entering into the contract of insurance would risk contravening section 64N(2) of the Ordinance by accepting a referral of insurance business from a person in Hong Kong who does not have the requisite licence.

CASE STUDY 2

A non-insurance entity which provides non-insurance services, wishes to include as an incidental part of its services to its clients, assistance in procuring suitable insurance. To provide the insurance-related part of the service offering, the non-insurance entity is considering entering into an arrangement or facility with a licensed insurance intermediary. Can this arrangement proceed without the non-insurance entity having to be licensed?

The IA, from its enquiry work, has come across situations where non-insurance entities which provide non-insurance services, seek to include certain insurance-related services as part of their service offering. Examples include:

- property managers or yacht managers which may seek to include as part of their management services, assistance in procuring appropriate insurance for the properties or yachts they manage;
- estate agents who may seek to arrange property, home contents, or renters insurance for their clients as an incidental part of the estate agency services;
- car dealers which may seek to arrange motor vehicle insurance for the purchasers at the time when the cars are being sold; and
- domestic helper recruitment agencies which may seek to arrange clients to procure the compulsory employee compensation insurance for any domestic helper they hire.

To assist with the provision of the insurance-related part of their service offering to their clients, the non-insurance entity may have an arrangement or facility in place with a licensed insurance intermediary.

The following is a non-exhaustive list of considerations that, in the IA's view, would need to be scrutinized when examining such arrangement or facility to ascertain whether the non-insurance entity is or is not carrying on (or holding out that it is carrying on) regulated activities.

Is there a clear segregation of regulated activities and non-regulated activities in the operation of the arrangement or facility?

In the operation of the arrangement or facility, there would need to be a clear segregation between the regulated activities and non-regulated activities, with the regulated activities being carried on (and being seen to be carried on) only by the licensed insurance intermediary.

The operation of the arrangement or facility should, therefore, include appropriate procedures to maintain the segregation throughout its operation, so that where regulated activity is being performed, this is performed directly between the licensed insurance intermediary and the client.

The licensed insurance intermediary should comply with section 5.4 of the Code of Conduct for Licensed Insurance Agents or section 5.5 of the Code of Conduct for Licensed Insurance Brokers ("Codes of Conduct"), as the case may be, whereby the intermediary would need to make certain disclosures to the client so that the client understands, among other matters, that it should only deal directly with the intermediary for the purposes of arranging the insurance (and not the non-insurance entity).

"Regulated Advice"

The non-insurance entity must be careful not to provide any regulated advice to a client if it does not have a licence. That regulated advice is only provided by persons who have the requisite qualifications and skill-set, is a vital aspect of policy holder protection and the licensing regime under the Ordinance underpins this.

Whilst a non-insurance entity may give a generic opinion to a client that the client may consider obtaining (for example) property insurance or yacht insurance, any advice in relation to a specific contract of insurance from a specific insurer, or the specific coverage which the client needs under such insurance to address the client's insurance needs, should come directly from the licensed insurance intermediary.

As stated in section B6.3 of this Note, however, certain professions have the benefit of exemptions under section 123 of the Ordinance whereby they can provide regulated advice, and hold out that they provide regulated advice, which is incidental to the practice of their professional services, without having to be licensed. The professions which have the benefit of such exemptions are barristers, solicitors, certified public accountants, actuaries and the loss adjusting professions (i.e. persons carrying on the business of loss assessment on behalf of an authorized insurer, policy holder or insurance claimant, or persons carrying on the business of settling claims on behalf of an authorized insurer). Non-insurance entities which do not have the benefit of an exemption under section 123 of the Ordinance (e.g. property managers, yacht managers, estate agents, car dealers, recruitment agents etc.) are not permitted to give regulated advice, even if this would only be incidental to their services, unless they obtain a licence under the Ordinance.

"Arranging"

The non-insurance entity should ensure that it does not perform any acts which would constitute carrying on the regulated activity of "arranging" a contract of insurance (unless it obtains a licence under the Ordinance). For example, if the non-insurance entity takes the initiative to assist a potential policy holder in completing an application for insurance and then sends it to an insurer, this would likely constitute "arranging" a contract of insurance and thus require the non-insurance entity to be licensed.

The charging and collection of premium by a person specifically for the purpose of effecting an insurance policy, would also likely involve the person in performing actions that constitute "arranging" an insurance policy. It is imperative, therefore, that the non-insurance entity does not charge a customer for premium or collect the premium from the customer. Rather, the customer should always pay premium directly to the authorized insurer or, where appropriate, the licensed insurance intermediary[4].

[4] Licensed insurance broker companies may collect premium provided they are paid into their client accounts. Licensed insurance agents must not collect premium unless their principals provide them with the authority to do so (and must comply with General Principle 8 of the Code of Conduct for Licensed Insurance Agents).

Is the non-insurance entity "holding out" that it is carrying on a regulated activity?

The non-insurance entity should not hold itself out as being able to carry on a regulated activity as part of its services, unless it has the requisite licence under the Ordinance.

The non-insurance entity should therefore be careful regarding any representation which may be objectively construed to suggest that it is carrying on regulated activities as part of its service offering. For example, a non-insurance entity should not, in the brochure for its services, on its website, or in any of its marketing materials which describe its services, indicate that it can provide insurance-related services or has specific expertise or experience on insurance matters, as this may be construed as holding out that it is carrying on regulated activity. Narrative which indicates that the non-insurance entity has a specialist "insurance division" or personnel with requisite "insurance expertise" should be avoided, as this may objectively be construed as holding out that the non-insurance entity's business includes regulated activities as part of its service offering.

Instead, the non-insurance entity should accurately describe the arrangement or facility it has in place with the licensed insurance intermediary and make clear that any regulated activities involving insurance matters will be provided directly to the client by the licensed insurance intermediary under the arrangement or facility.

"In the course of business"

Given that the non-insurance entity would be offering the client access to its collaboration arrangement or facility with the licensed insurance intermediary in connection with the non-insurance services provided by the non-insurance entity, the non-insurance entity would be acting "in the course of business". This reinforces the need for the non-insurance entity to ensure that it is not carrying on (and is not holding out that it carries on) any regulated activity.

Remuneration

The non-insurance entities which are the subject of this example – property agents, yacht managers, estate agents, car dealers and domestic helper recruitment agencies – and other professions which provide similar services, often have an agency relationship with their client (i.e. where the client is the principal and the non-insurance entity acts as its agent in the provision of its services on behalf of the client). Section 9 of the Prevention of Bribery Ordinance (Cap. 201) ("PBO") makes it an offence for an agent to solicit or accept any advantage without the permission of the principal when conducting his principal's affairs or business. The person who offers the advantage is likewise guilty of an offence.

It is imperative, therefore, that the non-insurance entity and the licensed insurance intermediary which are parties to the arrangement or facility, be mindful of, and comply with all applicable laws including the PBO, if it is proposed that the licensed insurance intermediary pays any kind of introduction or referral fee to the non-insurance entity for referring clients to the intermediary under the arrangement or facility. Licensed insurance intermediaries should also refer to Standard and Practice 1.4 in the Code of Conduct for Licensed Insurance Agents and the Code of Conduct for Licensed Insurance Brokers.

CASE STUDY 3

An entity operates a price comparison website for insurance products, which enables a customer to search for and obtain quotes for different types of insurance products, compare their prices and coverage and then select an insurance product to purchase.

The IA from time to time receives enquiries on whether operators of price comparison websites are required to be licensed under the Ordinance.

A price comparison website enables a potential policy holder to search for, obtain and compare premium and certain details about the terms and conditions for the same type of insurance product offered by different insurers. If the potential policy holder wishes to buy, he can then be redirected to the website of the insurer to complete the purchase.

The following is a non-exhaustive list of considerations that the IA would scrutinize when considering whether, in operating a price comparison website, a person is carrying on regulated activities, or holding out that it carries on regulated activities.

"Holding out"

The fact that the sole purpose of a price comparison website is to provide the functionality for a customer to input certain details, obtain quotes on particular insurance products and then provide a means of acting on those quotes (through redirection to an insurer's website to make the purchase) would, to a reasonable observer, suggest that regulated activities are being carried on. The likelihood is, therefore, that a price comparison website for insurance products would by reason of the role it performs, appear to a reasonable observer to be holding itself out to carry on regulated activities.

The limited exception may be where the operator of the website actively and very clearly displaces this reasonable perception, in the way that it presents the website. It would have to be made abundantly clear through the way in which the website is presented, for example, that:-

- the website's function is limited solely to a technology function, namely providing a search-engine which customers can use to obtain aggregated search results of information on different insurance products;
- the search results and information are presented in an entirely neutral way;
- there is no evaluation made of the relative merits of the insurance products displayed in the search results; and
- no recommendation is provided in respect of any of the insurance products, and customers should contact the insurers directly for any questions they may have on the insurance products.

In considering this issue, one would not view the narrative used to explain the role of the website in isolation, but the entire way in which the website is presented to a customer. For example, any indication of insurance expertise on the part of the operators of the website, may be suggestive of holding out that the website is carrying on regulated activities (e.g. if the individuals who run the website are stated to have insurance experience or insurance industry backgrounds).

It can be seen from the above that, in the IA's view, it would be difficult (albeit not impossible) for a price comparison website to be operated without it being held out as carrying on regulated activities. If a price comparison website were to operate without a licence, it would only be able to do so within very restricted parameters which are made very clear to customers.

"Regulated advice"

Whether the display of the premium, terms and conditions for the different insurance products in the search results constitutes the provision of "regulated advice", would depend on whether it is simply a passive and neutral display of information, or whether the display includes an evaluation or assessment of the relative merits of the insurance products, indicating which product is most suitable or economical for the customer (i.e. it includes the element of a recommendation). For example, any indication that a particular insurance product is the "best pick" or "best buy" or any ratings given to the insurance products (e.g. starred ratings) or displaying the insurance products in order of ranking (e.g. where the methodology used aims to rank the insurance products in order from most appropriate for the customer to least appropriate for the customer) may be construed as a recommendation and hence "regulated advice". Further, if the website has arranged for a discount to be offered on certain insurance products in the search results but not others, this may be construed as recommending the discounted product.

Similarly, if the operator of the website displays the insurance products in such a way as to make one insurance product more prominent to encourage a consumer to select that insurance product, this may constitute a recommendation (or indeed an invitation or inducement or an attempt to invite or induce a person to enter into a contract of insurance) and hence regulated activity. [5]

"Inviting or inducing"

The search results on a price comparison website are usually presented to the customer as a series of quotes from insurers on their insurance products, providing the customer with an option to proceed and purchase any of the insurance products presented. Depending on how the quotes are presented, these could have the element of encouragement or persuasion to be "inviting or inducing" or "attempting to invite or induce" the customer to enter into a contract of insurance.

Any indication that the website recommends any of the insurance products, through ranking, starred ratings and indications that certain products are "best buys" or have discounts on (e.g. through the display of promotion code), would likely be sufficient to give the reasonable observer the impression that customers are being "invited or induced" to enter into contracts of insurance in respect of the insurance products presented. Further, if the website as a whole is presented as being operated by persons who have expertise in insurance, then the reasonable observer may construe this as providing endorsement to the insurance products presented in the search results,

[5] While section 123(1)(f)(iii) of the Ordinance provides an exemption to section 64G of the Ordinance such that a person is not prohibited from giving regulated advice through electronic communication to the public, where the way in which the information on a price comparison website is displayed, or the way the website operates, involves other types of regulated activities (such as "inviting or inducing", "attempting to invite or induce" or "arranging" for a person to enter into a contract of insurance) this exemption would not apply.

which would give the presentation an element of encouragement or persuasion to purchase the insurance products (and hence inviting or inducing).

"Arranging"

Many price comparison websites require the customer to complete a questionnaire, the answers to which are then used to search and filter the insurance products to be displayed in the search results for the customer. If the information provided by the customer in this questionnaire is transferred by the price comparison website to the insurance provider of the insurance product which the customer selects to purchase, for the purposes of the customer's application for that insurance product, then this is likely to mean the operator of the price comparison website is "arranging" a contract of insurance and hence carrying on regulated activity.

Similarly, if the price comparison website collects the premium for the insurance product which the customer has selected to purchase or its staff contacts the customer (or its staff's contact is provided to the customer) for the purpose of effecting a contract of insurance, this would mean the operator of the website (including through its staff) is arranging a contract of insurance and thereby carrying on regulated activity.

"In the course of business"

The price comparison website's function is to provide its customers with a price comparison service. As such, in the IA's view, simply by providing a price comparison service, the operator of the price comparison website would be acting "in the course of business". Providing price comparisons of different insurance products goes well beyond any pure education purpose, as the objective is to provide customers with a means of comparing prices and insurance products so they can make purchasing decisions.

Even if the revenue model of the operator of the price comparison website is not dependent on fees paid by insurance providers of the insurance products displayed in the price comparison searches, but on advertising, or the price comparison service is being offered simply to generate brand recognition for other businesses offered by the operator of the price comparison website, the act of providing the price comparison website would, in the IA's view, satisfy the "business" test.

Remuneration

It is likely that the operators of the price comparison website obtain remuneration of some kind for operating the website. This may be in the form, for example, of introduction fees paid by insurers whose insurance products are purchased by customers after seeing the quote for the insurance product in the search results.

As indicated above, simply by operating a price comparison website, the "business test" (i.e. carrying on the regulated activity "in the course of business") is likely to be satisfied. Hence, it may not be necessary to assess whether the alternative of carrying on the regulated activity "for reward" is also satisfied. One would, however, factor in any remuneration received by the operator or its related entities in a holistic review of the way in which the price comparison website is being operated for the purpose of assessing whether or not the operator of the website is carrying on

regulated activity. Where the remuneration is tied to the premium generated through sales introduced through the comparison website, or the number of times the insurance products of the insurer appear in the search results, or the number of times customers click on information relating the insurance products of the insurer in the search results so as to be re-directed to the insurer's website, this would prompt a more in-depth enquiry as to whether regulated activities are being carried on by the website operator. Whatever the revenue model may be, however, it may (at the very least) serve to reinforce the conclusion that the "business test" is satisfied (as well as potentially indicating that the service is being offered "for reward").

Section 64N of the Ordinance

Authorized insurers which knowingly engage with operators of price comparison websites to market their insurance products, should consider whether the operator is required to have, and (if so) has the requisite licence (based on the activities which the price comparison website performs and the way it is held out to the public). If the operator of the price comparison website is not licensed, the authorized insurer should satisfy itself that the operator is not carrying on regulated activity such as "inviting or inducing" a customer to enter into a contract of insurance, or "arranging" a contract of insurance. If the operator is performing these regulated activities without a licence and the authorized insurer enters into the contracts of insurance from engaging with the price comparison website, the insurer may be at risk of contravening section 64N of the Ordinance.

Policy holder protection

In evaluating whether the operators of a price comparison website are carrying on regulated activities, the IA will view the issue through the lens of policy holder protection and the question of whether policy holders are being treated fairly. In its licensing work, the IA has granted licences to operators of price comparison websites. Operators of such websites on obtaining a licence are required to comply with the relevant requirements under the Ordinance and the guidelines and codes of conduct issued by the IA. This helps underpin trust in the way the price comparison website is operated which is important for policy holder protection and fair policy holder treatment.

CASE STUDY 4

An authorized insurer proposes to launch a referral scheme whereby existing policy holders of the insurer can enjoy cash coupons if they successfully refer their friends or relatives to the insurer to purchase an insurance policy from the insurer. Would existing policy holders who participate in the scheme contravene section 64G of the Ordinance in carrying on regulated activity for reward without a licence? Would the authorized insurer be at risk of contravening section 64N of the Ordinance?

Section 64G of the Ordinance provides that a person must not carry on a regulated activity, or hold out that the person is carrying on a regulated activity in the course of the person's business or employment or for reward, unless the person is a licensed insurance intermediary or is otherwise exempt under the Ordinance. Section 64N of the Ordinance prohibits an authorized insurer from entering into a contract of insurance through, or accepting a referral of insurance business from another person in Hong Kong unless that person has the requisite licence to carry on regulated activities, or the person's duties only involve clerical or administrative duties.

The following is a non-exhaustive list of the types of considerations the IA would take into account when considering matters related to sections 64G and 64N of the Ordinance in the context of schemes such as that described in this case study:

Overriding consideration

If an authorized insurer wishes to run a referral scheme which offers some form of gratuity (such as cash coupons) to its existing customers for referring friends or relatives to the authorized insurer as potential new customers, the insurer must ensure that the scheme is designed and operated so as not to motivate its existing customers to carry on regulated activities, such as inviting or inducing their friends or relatives to buy a specific insurance policy from the insurer or advising their friends or relatives on the merits of a particular insurance policy offered by the insurer with a view to encouraging them to buy it (in a way that goes beyond merely sharing of their own positive customer experience). Otherwise, the insurer in running the scheme would contravene section 64N of the Ordinance in accepting referrals of insurance business from unlicensed persons in Hong Kong and place their customers in a position where they potentially contravene section 64G of the Ordinance by carrying on regulated activity without the requisite licence.

As such, an authorized insurer could only offer such a scheme if it is operated within limited defined parameters, which ensures that the scheme serves only to provide its customers with a small token of appreciation for the type of informal "word-of-mouth" positive customer-experience testimonials, which customers would likely have told their friends irrespective of obtaining the token of appreciation.

Materiality of the gratuity

A key issue to consider, in the IA's view, would be the extent to which the gratuity (e.g. the coupons) being offered as part of the scheme serve as a "reward". Would a reasonable observer consider the gratuity as serving to motivate the authorized insurer's customers to encourage, persuade, convince or recommend others to buy insurance policies from the authorized insurer (i.e.

carry on regulated activity), with the aim of obtaining the gratuity (i.e. for reward)? Or would the gratuity be such that, from the reasonable observer's perspective, it merely serves as a token of appreciation for an act the customer would have performed for their friend or relative out of altruism in any event?

The more material the gratuity in terms of amount or value, the more likely an individual will be incentivized into making statements which encourage, persuade or convince a person to buy an insurance product, or give recommendations on an insurance product in order to obtain the gratuity (i.e. carry on regulated activity for reward). The authorized insurer would therefore have to consider this issue carefully and demonstrate that the gratuity is insufficiently material so that it will not motivate its customers to do anything other than provide the type of "word-of-mouth" testimonials about the customer's positive experience in dealing with the insurer, which the customer would likely have told their friends or relatives in any event.

Conditions for obtaining the gratuity

Another key issue to consider would be the conditions that need to be fulfilled under the scheme in order for the gratuity to be given to the customer. For example, if the gratuity is contingent on the friend or relative of the customer successfully purchasing a specific insurance product from the insurer, the greater risk would be of the customer having invited or induced the friend or relative to enter into the specific insurance product or given regulated advice on the specific insurance product (by pointing out its beneficial terms and conditions). As a result, the insurer would need to ensure the level of the gratuity is set at such a minimal level so as to remove as far as possible the motivational "reward" element.

The situation may be different, if the gratuity was contingent merely on the friend or relative purchasing any insurance product (rather than a specific insurance product) offered by the authorized insurer, or indeed merely on introducing the friend or relative to the insurer (irrespective of whether a successful purchase follows). Since the gratuity would not be contingent on the purchase of a specific insurance product, the likelihood of the customer being motivated to give encouragement, persuasion or recommendation on a specific insurance product (i.e. regulated activity) would be reduced. Instead of a referral of "insurance business" (i.e. a referral of a customer to purchase a specific insurance product), the customer would simply be receiving the gratuity for referring the customer to the insurer on the basis of the insurer's reputation.

Fair treatment of customers

The IA is of the view that authorized insurers contemplating referral schemes like that described in this case study, should be aware of their continued obligation to treat their customers fairly, including its existing customers whom the insurer wants to engage to participate in such referral scheme. In particular, if an authorized insurer in implementing a referral scheme as contemplated by this case study, seeks to secure compliance with sections 64G and/or 64N of the Ordinance by effectively placing the compliance burden onto its customers participating in the scheme (for example, by requiring them to declare that they have not carried on "regulated activities"), it is questionable whether the insurer would be treating its customers fairly. Is it reasonable, for

example, to expect a customer to be fully conversant with the definition of "regulated activities" and other provisions in the Ordinance?

Rather, in order to be fair to customers considering participating in the scheme, an authorized insurer should provide warnings in plain language to such customers informing them to limit themselves to telling their friends and network about their own authentic customer-experience in dealing with the insurer, but not to encourage, persuade, convince or recommend their friends and network to buy any specific insurance product offered by the insurer (as this may be an offence under the Ordinance).

Comprehensive risk assessment and adequate controls

Given the above considerations, an obvious way for an authorized insurer to avoid the risk of contravening section 64N of the Ordinance would be not to embark on schemes such as that contemplated in this case study. However, if an authorized insurer is contemplating proceeding with such a scheme, it would be imperative for an authorized insurer to perform a robust assessment of the risk of sections 64N and 64G of the Ordinance being contravened, structure the conditions of the scheme (and the level of gratuity) so as to avoid such contraventions, and implement adequate controls so as to mitigate the risk of any breach during its operation. The risk assessment and documentation on the design and operation of such scheme should be made available to the IA on request.

What if a licensed insurance intermediary wants to launch a referral scheme, whereby existing customers of the intermediary can enjoy cash coupons if they successfully refer their friends or relatives to the intermediary to purchase an insurance policy through the intermediary?

If a licensed insurance intermediary intends to launch such a scheme, similar considerations as set out above in relation to authorized insurers should be taken into account. In particular:

- The licensed insurance intermediary should ensure that the scheme is designed and operated so as not to motivate its existing customers to carry on regulated activities in breach of section 64G of the Ordinance, such as inviting or inducing their friends or relatives to buy a specific insurance policy through the intermediary or advising their friends or relatives on the merits of a particular insurance policy offered by the intermediary with a view to encouraging them to buy it (in a way that goes beyond merely sharing of their own positive customer experience).

- The intermediary should ensure that the gratuity being offered to its existing customers for referring their friends and family is insufficiently material so that it will not motivate its customers to do anything other than provide the type of "word-of-mouth" testimonials about the customer's positive experience in dealing with the intermediary, which the customer would likely have told their friends or relatives in any event.

- The intermediary would have to be careful about setting the conditions that need to be fulfilled under the scheme in order for the gratuity to be given to the customer, such that it does not motivate its customers to carry on any regulated activity (see "Conditions for obtaining gratuity" above).

- In establishing such schemes, intermediaries should be aware of their continued obligation to treat their customers fairly and act in their customers' best interests (as per General Principle 2 of the Codes of Conduct). Particular consideration should be given, in this respect, to existing customers whom the intermediary wants to engage to participate in such referral scheme. Warnings in plain language should be provided to their customers informing them to limit themselves to telling their friends and network about their own authentic customer-experience in dealing with the intermediary, but not to encourage, persuade, convince or recommend their friends and network to buy any specific insurance product offered by the intermediary (as this may be an offence under the Ordinance).

- Licensed insurance agencies and licensed insurance broker companies contemplating proceeding with such a scheme, should assess the risk of section 64G of the Ordinance being contravened by their customers, structure the conditions of the scheme (and the level of gratuity) so as to avoid such contraventions, and implement adequate controls so as to mitigate the risk of any breach during the operation of the scheme. This would be part of the agency's or broker company's obligation to implement adequate controls and procedures to ensure the interests of its customers are not prejudiced under Section IX of the Codes of Conduct.

- Licensed insurance agents contemplating such scheme would also need to comply with their obligations under their agency contract with their appointing insurers (including, if required, obtaining their prior consent to run such a scheme) and comply with the policies, procedures and other applicable requirements of their appointing insurers (per General Principle 1 of the Code of Conduct for Licensed Insurance Agents).

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