

GFIA comments on the IAIS consultation on proposed revisions of ICPs 4, 5, 7, 8, 23 and 25, including the glossary

Glossary Definitions (related to governance and group supervision):

A proposed new definition for “Control, including the terms ‘controlling’ and ‘controlled by’” would read: “This term would be defined by the legislation of the applicable home jurisdiction that addresses the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a legal entity, whether through the ownership of voting securities, by contract, or common management or influence, or otherwise.”

Term #4: *Corporate Governance* – The definition should be clarified to read: “A set of relationships between an insurer’s board, senior management, customers and other stakeholders that provides a structure through which the objectives of the insurer are set, as well as the means of attaining those objectives and monitoring performance.”

Term #5: *Corporate Governance Framework* – The word “means” should be replaced with “structure”.

Term #6: *Financial Conglomerate* – The definition should be clarified to read: “Two or more legal entities under common control, at least one of which is an insurance legal entity and one of which is a regulated entity in the field of securities or banking that has control over one or more insurance legal entities.”

Term #10: *Home Jurisdiction* – The words “head office” should be replaced with “home office”; and the phrase “or principal place of management” should be deleted. The revised definition would read:

“The jurisdiction in which either:

- The insurance legal entity is incorporated or its home office is located, as applicable (for solo entities), or
- The head of the insurance group or (insurance-led) financial conglomerate is incorporated or its home office is located, as applicable.”

Term #11: *Home Supervisor* – The existing Glossary definition should be maintained, which reads: “The supervisor from the home jurisdiction. (see: home jurisdiction).”

Term #14: *Insurance Group* – The definition should be clarified to read: “Two or more legal entities, at least one of which is an insurance legal entity and at least one of which has control over an insurance legal entity, whose collective primary business is insurance.”

Term #16: *Insurance Legal Entity* – The definition should be clarified to read: “A legal entity, including its branches, that is licensed to conduct insurance business and is regulated and subject to supervision in the home jurisdiction and applicable host jurisdictions (whether through its branches or the provision of services).”

General Comments on ICPs:

At the outset, we wish to express our appreciation for providing a draft of the revised ICPs and holding an open discussion session before the beginning of the formal consultation. We found it to be a very useful exchange of information between stakeholders and the chairperson and members of the IAIS Governance Working Group and IAIS staff.

We support the effort to make the governance related ICPs as flexible as possible so as to recognize different corporate structures and jurisdictional legal regimes. Accordingly, some of our comments go to how to better make that point.

A matter of critical importance to supervisors and stakeholders is the issue of proportionality. While the ICPs recognize the importance of the principle of proportionality, there are few if any examples provided in guidance as to what proportionality means in practice and/or examples of how to implement it when applying the governance related ICPs. We think this is a very important matter and so some of our comments go to this point.

Comments on ICP 4

4.0.1.

We note that throughout the ICPs, the new definition of “insurance legal entities” is used and it includes branches that may be recognized under jurisdictional laws. Accordingly, it would be helpful to provide more guidance as to what should be required and what need not be required for branch supervision, based on the IAIS paper that dealt with the issue. For example, branches of legal entities may not need to comply with all jurisdictional laws applicable to subsidiaries.

4.0.2

We note with approval the language on avoiding undue delay.

4.3

We understand that this language is not intended to authorize supervisors to mandate restructuring. However, it still might be interpreted that way. Accordingly, we suggest the addition of: “*This does not imply that supervisors should mandate restructuring.*” In the fifth bullet point, with regard to capital requirements, subsidiaries and branches should not necessarily be treated the same.

4.3.1

The “supervisors should issue guidelines” theme has been moved from current 4.7.2. However, we miss the valuable guidance in the current text on pre-application contracts and suggest re-introducing guidance to this end: “*To make the formal licensing procedure easier and prevent any unnecessary delays, the supervisor may encourage persons proposing to establish an insurer to contact the supervisor prior to applying for the license to receive advice on the licensing requirements and procedures involved in the application process.*”

4.5.2

We strongly support the new language on transparency of reasons for licensing actions. We recommend the addition of: “*And, supervisors should provide a process for correction without undue delay.*”

Comments on ICP 5

Overall, we are concerned with the danger of supervisory overreach and the absence of any right of appeal to a neutral third party in case that occurs.

5.2.3

We feel that the guidance on education and training micro-manages the process as to how the undertaking ensures that its Board members are suitable.

5.3.2

The sentence “*The supervisor should assess the suitability of Board Members, Senior Management, Key Persons in Control Functions and Significant Owners prior to changes in the positions*” should be changed to: “*The supervisor should assess the suitability of successor Board Members, Senior Management, Key Persons in Control Functions and Significant Owners*”, or clarified to state that the supervisor would not be approving such changes in the positions.

5.3.3

This provision allows supervisors to reach deeply into staffing beyond managers. We are concerned about the danger of over intrusion into the company and a blurring of the critical line between supervisors and supervised entities. Accordingly, we propose to delete this guidance as it is too detailed and restrictive.

5.3.7

In the first bullet, “*Criminal indicators: The individual should not have a record or evidence of conduct and activities such as:*” should be changed to: “*Civil and criminal indicators, such as:*” in order to allow for a record or evidence of such conduct and activities which can then be reviewed and evaluated for relevance and materiality. In the second sub-bullet, the words “*civil liability*” and “*or pending proceedings*” should be deleted.

Comments on ICP 7

Many of the provisions in this ICP are too prescriptive, including 7.2.4 and 7.3.6. In addition, the word “*ensure*” should not be used when referring to the Board - the word “*oversee*” should be used instead since it is more accurate.

7.0.4

We do not agree with the complete removal of the proportionality clause. We would prefer to see a regular reference to the proportionality principle rather than just a commitment to proportionality in the introduction. This is because it means different things in different places, but also because if a supervisor reads one of the principles in isolation, he/she might overlook the overall commitment.

7.0.5

Some jurisdictions also leave companies a choice between a one-tier and a two-tier board system (e.g. Finland, Norway).

7.0.7

We object to the elimination of the explanatory sentence about mutual and cooperative structures. The first sentence of the paragraph states that the governance of mutual and cooperative insurers is different from that of joint stock companies, but without specifying in what exactly consists this difference. Therefore, we believe it is important to emphasize briefly this difference.

In order to align ICP 7 with the OECD Guidelines on Insurance Governance, we also suggest adding the following sentences:

“The main difference between a cooperative and a stock company is that the shares of a cooperative cannot be negotiated and therefore the entity cannot be quoted. A mutual is generally an entity without shared capital, hence, in most cases, without shares or shareholders, and managed collectively by its policyholders.”

7.0.8

The definition of insurance groups should be clarified and supplemented as follows: “...business and risks of the insurance group and the legal entities which belong to it”.

7.0.11

We strongly approve of the reference to branches.

7.1

We appreciate that, consistent with its recent issues paper, the IAIS recognizes that different corporate structures exist and that is not necessarily negative. In addition, the ICPs should explicitly recognize that differences exist between jurisdictions as to the roles of the Board and senior management.

7.1.1

The sentence *“The separation of the roles of the Chair of the Board and the Chief Executive Officer (CEO) reinforce a clear distinction between accountability for oversight and management.”* should be deleted. Many CEOs, especially those of smaller companies, are also effective chairs of their Board of Directors, and should not be precluded from taking on both roles.

7.1.3

The sentence *“The effective oversight of the executive functions should be performed by the non-executive members of the Board because they are not involved in the day-to-day management of the insurer.”* should be deleted. Many companies, especially smaller ones, have their CEOs and/or other employees on their Boards and such individuals should not be precluded from providing oversight of their companies’ executive functions.

7.2

In the sentence *“The supervisor requires the insurer’s Board to set and oversee the implementation of the insurer’s corporate culture, business objectives and strategies for achieving those objectives, in line with the insurer’s long term interests and viability.”*, the word “set” should be replaced with “set or approve”, as it is senior management who sets or creates the insurer’s corporate culture, business objectives and related strategies.

7.2.1

The areas mentioned in here are subject to specific requirements in certain jurisdictions. Therefore, we suggest adding *“in accordance with jurisdictional provisions”*.

In the first sentence, *“setting (including approving)”* should be replaced with *“setting or approving”*, for the same reason as stated in 7.2.

7.2.2

While treating customers consistent with legal requirements is a reasonable general supervisory and business objective, we question whether inclusion in governance ICPs of a subjective and undefined consumer protection standard (“the interests of policyholders”) might lead to unintended consequences. For example, what are the interests of policyholders and who determines that? Does this not lead to a broad potential range of new and unintended second guessing, contention and even liability?

7.2.6

In the first sentence, *“have been properly implemented”* should be replaced with *“have been, or are being, properly implemented”*.

7.3

We consider this standard as an example where the proportionality clause should absolutely be kept.

7.3.2

With due respect to efforts to shorten the ICP texts, we consider that cross-references make them easier to understand. Therefore, we recommend maintaining the cross-reference to ICP 5. In other parts of the ICP such as 7.5.1 and 7.11.2, there are new additions which cross-refer to other ICPs and we think that the same approach should be followed in 7.3.2.

7.3.4

The requirement for the Board to “review, at least annually, its own performance” seems too prescriptive and we suggest instead the following wording “*on a regular basis, depending on proportionality considerations and organizational structure*”.

7.3.6

We find the language added is very inflexible. We are concerned that it could be misunderstood to propose rejecting a variety of measures that jurisdictions and/or insurers have in place to promote checks and balances. In addition, the example provided could be disproportionate to the nature, scale and complexity of the governance structure, and it could result in serious negative impacts to many companies which have their CEO or another employee who serves as chair of the Board and/or Board committees. Furthermore, it can even conflict with jurisdictional corporate law, where specific legally defined governance structures exist. Accordingly, we urge the IAIS to delete the last sentence. If the deletion we propose is not accepted by the IAIS, at a minimum, we urge the IAIS to add language that explicitly recognizes the specificities of jurisdictional law and potential alternative measures to take when an Executive Board Member serves as chair.

7.3.7

It is not clear what the reasoning is behind deleting the reference to “nature, scale and complexity” as it is a reference to the principle of proportionality, which is very important to all insurers, particularly to small and medium sized insurers.. Is the wording used in ICP 8.02 the preferred wording for reference to the principle of proportionality that should also be used here?

7.3.10

We suggest using the wording “*adequate resources*” instead of “resources, such as adequate funding, staff and facilities”.

7.4.3

A member of an insurer’s Board who also serves on another Board(s) has a duty of loyalty to all of the companies in which he/she is a Board member. Therefore, the phrase “*there should be clear and well defined procedures that require the member of the insurer’s Board to act in the best interests of the insurer, putting the insurer’s and policyholders interests ahead of that of any other entity or that of his/her own*” should be replaced with “*there should be clear and well defined procedures regarding the member’s duty of loyalty to the insurer*”. The revised provision would read:

“Where a member of the Board of an insurer has common membership on the Board of any other entity within or outside the insurer’s group, there should be clear and well defined procedures regarding the member’s duty of loyalty to the insurer. These may include appropriate disclosure and in some instances shareholder approval of such overlapping roles. In the event of a material conflict with the interests of the insurer, the member should disclose such conflicts promptly to the Board of the insurer and its stakeholders as appropriate, and be required to decline to vote or take any decisions in any matters in which he/she has an interest.”

7.6

It is our view that remuneration, to the extent it is dealt with, should be the subject only of very high level principles. We fear that this section is trending toward a too prescriptive approach borrowed from banking regulation without a clear justification of need in the insurance sector.

7.6.1

In the third sentence, the phrase “*thereby promoting sound overall governance of insurers and fair treatment of customers*” is unnecessary and should be deleted.

7.6.4

In the first sentence, the phrase “*and its policyholders and other stakeholders*” is unnecessary and should be deleted.

7.6.10

The fourth bullet states “*The award of variable remuneration should contain provisions that enable the insurer, under certain circumstances, to apply malus or claw back arrangements in the case of subdued or negative financial performance of the insurer ...*”

In the U.S., the Securities and Exchange Commission (SEC) recently proposed new, enhanced claw back rules that are expected take effect in the near future, and we are concerned that this ICP provision could create potential conflicts with the new SEC rule. We, therefore, recommend that language be added to state that companies that are compliance with the new SEC rule would also be in compliance with this ICP provision.

7.6.14

The language “*... it is appropriate that future vesting and holding restrictions for share-based remuneration remain operative even upon cessation of employment ...*” could be interpreted to mean that there should not be any acceleration of vesting for equity (stock) grants upon the termination of employment. Such interpretation would conflict with the term of many insurers’ compensation programs, and should be clarified accordingly.

7.7.1

In the first sentence, the phrase “*The Board is responsible for having adequate systems and controls*” should be replaced with “*The Board is responsible for overseeing the insurers’ systems and controls*”.

7.8.2 (third bullet point)

We wonder whether it should be the Board’s responsibility to have a policy on the external auditor’s compliance with his/her professional standards. The content of these standards is not usually well known by others other than external auditors themselves.

7.8.5

This provision states “*The supervisor and the external auditor should have an effective relationship that includes appropriate communication channels for the exchange of information relevant to carrying out their respective statutory responsibilities*”. With the exception of the financial examination process, we are not aware of any other instances in which the external auditor is able to communicate directly with the insurer’s supervisor about company-specific matters without the insurer’s participation. Therefore, this provision should be appropriately clarified.

7.8.6

This provision states “*Reports prepared by the external auditor for the insurer (e.g., such as management letters) should be made available to the supervisor. Such information should be provided to the supervisor without the need for prior consent of the insurer and the external auditor should be duly protected from liability for any information disclosed to the supervisor in good faith*”. We are not aware of any specific authority that would allow a supervisor to require an external auditor to convey such information directly to the supervisor without first bringing it to the attention of the insurer. Therefore, this provision should be appropriately clarified.

7.9.3

In the last sentence, “*Supervisors should safeguard such information having due regard to the confidentiality of commercially sensitive information and applicable laws*”, the word “*should*” should be replaced with “*shall*” in order to require supervisors to safeguard information that is in their possession.

7.11.5

This provision would allow a supervisor to interview the Board and to attend and observe Board meetings. *In some jurisdictions, these are not appropriate roles of the supervisor and the language should be changed to reflect that fact.*

ICP 8

Many of the requirements in this section are borrowed from FSB and/or banking regulation. We are not sure that the insurance sector should be subject to the same mandates.

Since not all risks can or should be mitigated, the words “*mitigate*”, “*mitigating*” and “*mitigation*” should be replaced with “*manage*”, “*managing*” and “*management*” in 8.1.1., 8.1.2 (fifth bullet), 8.1.9, and 8.4 (first bullet).

In order to appropriately clarify a Board’s role, the word “*should*” should be replaced with “*may*” in 8.3.5, 8.3.7 and 8.3.17.

8.0.1

While we agree that protection of policyholders is an important objective, raising it in the context of corporate governance may create unintended legal and other consequences.

8.0.2

We encourage the IAIS to maintain the explicit reference to dimensions that determine proportionality, such as nature, scale and complexity of the insurer or its risks.

8.0.4

Insurers in the EU are concerned about the use and definition of the term “functions”. In Solvency II, “functions” are defined as “an administrative capacity to undertake particular governance tasks”. We think that the explanation “whether in the form of a person, unit or department” is too narrow, restricts choice and does not take into account the possibility to outsource functions.

8.1.3

The sentence in 8.1.6 may not be necessary, given the enumeration in 8.1.2.

8.1.8

The concept of “early warning” is new and therefore not defined in the IAIS glossary. A definition would be welcome, alongside a clarification that these do not automatically trigger supervisory intervention.

8.3.9

We have serious concerns about the implementation of this guidance for small and medium sized insurers (where probably no person has no “direct business line responsibilities”). The proportionality principle should be applied here to recognize the reality faced by small and medium sized insurers.

8.4.4

In the second bullet, the words “*actual, emerging, and potential*” should be replaced with “*current and emerging*” which is more accurate.

8.5.1

It is too inflexible to state that the compliance function has a broader role than a legal role as this might not always be the case. We would propose that the sentence be rewritten to read: *“The compliance function could have a broader role than a legal role, taking into consideration the governance structure of the company, and jurisdictional law, for monitoring...”*

8.5.2

The sentence: *“The Board is ultimately responsible for establishing standards for honesty and integrity throughout the insurer and for creating an effective corporate culture that emphasizes them.”* should be changed to: *“The Board or Senior Management is ultimately responsible for establishing standards for honesty and integrity throughout the insurer and for creating an effective corporate culture that emphasizes them.”*

8.5.7

We agree that this additional guidance is valuable, as it expressly includes the proportionality principle.

8.6.4

In the seventh bullet, the term *“consistent with policyholders’ reasonable expectations”* should be deleted since it is not consistent with U.S. jurisprudence, is very subjective, and can vary from individual to individual.

Comments on ICP 23 (Group-Wide Supervision):

23.3.2

This provision provides that: *“Where a supervisor has no direct legal power over certain legal entities in the scope of the group-wide supervision, the supervisor will use its power over regulated entities to obtain similar supervisory outcomes.”* We believe this overstates the actual authority of the group-wide supervisor, and may ignore the existence of other regulators who do have direct supervisory control over the entity in question. Therefore, this provision should be replaced with *“Where a supervisor has no direct legal power over certain legal entities in the scope of group-wide supervision, the supervisor may consult with other appropriate regulators to achieve an appropriate result.”*

Comments on ICP 25 (Supervisory Cooperation and Coordination):

We submit the following comments on ICP 25 due to increasing concerns that the growing circulation of forward-looking, internal company information warrants additional attention to the legal protections that should be afforded to that information.

ICPs 25.1.7 through 25.1.14 should specifically indicate the critical importance of a strict confidentiality regime. It is essential that parties to any Memorandum of Understanding (MoU) possess the legal authority to enter into the MoU. We believe that ICP 25 should also include specific reference to confidentiality agreements and not only focus on MoUs.

We object to the language contained in ICP 25.1.14 that invites communication on a regulator’s initiative and ask that it be removed from the document. *“Members of a supervisory college should also consider whether to communicate, on their own initiative, information which appears to be essential for other involved supervisors.”*

ICP 25.1.19 states that *“A key element of assessment and recognition is that the regime being assessed can, at a minimum, demonstrate compliance with relevant IAIS ICPs and standards. However, this does not exclude the possibility of an assessment of equivalence with the assessor’s own regime.”* We are concerned that this language conflicts with the provisions of ICPs 25.1.16 and 25.1.17 and that an assessor could determine that there is “equivalence” where there is inadequate confidentiality or other protections in the second jurisdictions.

ICP 25.1.25 indicates that supervisory recognition can be achieved by unilateral, bilateral or multilateral agreement. This is only achievable where the regulator has the legal authority to so act. A qualifying phrase should be added at the end of the sentence indicating that this is permissible only where the law or regulation empowers this capacity.

ICP 25.1.47 addresses confidentiality and information sharing agreements. ICP 25.1.48 specifically indicates that jurisdictional confidentiality rules are to be respected. A supervisor's willingness to enter into an MoU does not necessarily give that person the legal capacity to maintain confidential information in the same manner as the original jurisdiction. It is essential that confidential information have the same protection from the "other supervisor" as it does from the "original supervisor" that receives the information.

We support the concept contained in ICP 25.1.53 that envisions having special conditions in an information sharing agreement.

ICP 25.1.67 addresses the beginning and end of recognition agreements. We do not believe that it needs to be this formalized and question the need for this language. Our experience is that the reporting criteria noted in this ICP are typically included in meeting minutes of the examination or supervisory college.

ICP 25.6.1 lists a number of materials and documents that supervisors should review. We recommend that annual risk reports, annual corporate governance filings, and the SEC filings of publicly held companies (and the filings required by similar stock exchanges) be added to the list. These materials contain a wealth of information that is often not fully used by the regulators.

ICP 25.6.3: We believe that another role to be added in ICP 25.6.3 is that the group-wide supervisor should help educate and create awareness with other regulators, especially since the group-wide supervisor is usually more involved with the insurance group than other jurisdictions would be. It may also be beneficial to explain what a crisis management plan involves and to reference any later explanation of it in the document. One suggestion for an explanation is that a crisis management plan "*coordinates a plan of action on a particular issue for the insurance group.*"

ICP 25.7.5 addresses several items that supervisory colleges must consider, including legal constraints. "*Ensuring professional secrecy and confidentiality are vital elements in allowing supervisors to share and exchange relevant information. Where there are legal constraints to information exchange, the effectiveness of a supervisory college would be limited. In such a case, in considering the establishment of a supervisory college, supervisors should be encouraged to address any such legal constraints.*" We are concerned with this language because it could be interpreted to give license to the supervisory college to avoid or attempt to circumvent legal constraints. We believe that the last sentence should be revised to read: "*In such a case, in considering the establishment of a supervisory college, supervisors should comply with legal constraints.*"

ICP 25.7.25 contains a list of items that may be included in the terms of operation of a supervisory college. We recommend adding "*a review of corporate governance of the insurance group*" to the 5th bullet.

ICPs 25.8.14 and 25.8.22 each make reference to "*joint inspections*". We recommend that the word "reviews" should be added to "*inspections*" in both ICPs. In addition, earlier in the document when it addresses supervisor recognition, we suggest that the ICPs emphasize that the supervisor participants are to be knowledgeable. The success of a supervisory college, which is a large meeting to organize, is only as good as the participants selected to be part of that college. This responsibility rests with the group supervisor.

ICP 25.8.18 also contemplates having special conditions in an information sharing agreement. This provision provides that "*The ability of each supervisor to share information should be determined to ensure that information remains confidential. The need to establish information sharing agreements should be considered to ensure confidentiality and define the parameters in which the information can be used.*" We support this provision and recommend that it also include a reference that each supervisor must have the legal authority to receive and to share information.

We recommend that the words "*subject to a legal determination that confidentiality requirements will not be violated*" be added to the end of ICP 25.10.19.

There is a very detailed document that is prepared before insurance companies undergo financial exams called the *Planning Questionnaire*. We believe that this would be a useful tool to add to the list of relevant key information contained in ICP 25.10.21 of this section.

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About GFIA

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