



Submission on the Proposed Rule [2020-001] - *Financial Professionals Title Protection*

Submitted to: Financial Services Regulatory
Authority of Ontario

Submitted by: Ontario Bar Association



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



Table of Contents

Introduction	2
The Ontario Bar Association	2
Recommendations	2
Conclusion	6



Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to provide this submission to the Financial Services Regulatory Authority of Ontario (“FSRA”) on the Proposed Rule [2020-001] Financial Professionals Title Protection (the “Proposed Rule”).

The Ontario Bar Association

The OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. This submission has been prepared by a working group of lawyers from the Insurance Law section of the OBA, which includes leading experts in the insurance industry. OBA members participating in this submission include lawyers who represent a wide range of clients within the industry, including both plaintiff and defence counsel and in-house lawyers at Canadian insurance companies.

Recommendations

The OBA is generally supportive of the impetus by FSRA to address consumer and investor advocates’ concerns regarding usage of titles within the financial services industry. However, the OBA has concerns in the long-term with respect to the narrow scope of the presently proposed rule with respect to limiting usage of titles for financial professionals.

In this respect, the OBA has specifically reviewed the Proposed Rule as well as the document “Financial Professionals Title Protection – Administration of Applications – Approach No. FPFA0001APP – Guidance” (the “Guidance”). In the Guidance under the heading entitled “Rationale and Background,” FSRA quotes, “The primary objective of the framework is create minimum standards of title usage, without creating unnecessary regulatory burden for title users.”

The OBA has concerns that creating a title limitation scheme without any resultant regulation directly by the regulatory authority (FSRA) will do too little to address the underlying issues with respect to protection



of the public interest and instilling consumer confidence in the long term. The *Financial Professional Title Protection Act* (hereinafter “**the Act**”) as drafted generally appears to limit the usage of the two terms “Financial Advisor” and “Financial Planner,” and also creates a scheme for approving credentialing bodies, but does not specifically govern the individual FP/FA’s themselves and does not hold the FP/FA’s to any particular regulatory standard contained explicitly within the Act.

The OBA believes that the primary concern with respect to implementing legislation to limit the usage of the FP/FA terms should be that of consumer protection. By failing to have a regulatory scheme (including but not limited to a code of ethics, a searchable database for licensees, an enforced disciplinary procedure by the regulator, an accessible published decision bank for disciplinary conduct, etc.) contained specifically within the *Act* itself (and/or by regulation) the pitfalls of the *Act* are that it presently only relies on “trickle-up” economics, and allows employers, credentialing bodies and other organizations to create the standard of what is acceptable and unacceptable behaviour in this industry.

The OBA understands that there are costs associated with broader regulation. However, the present confusion of titles and the goal of the protection of the public interest should be paramount in balancing what reasonable costs are associated with regulation. The OBA is generally agreeable to the Proposed Rule as drafted but stresses that this should be part of a short-term solution. In the long-term, the *Act* should be amended to include more direct licensing and regulation.

With respect to drafting and statutory organization, the OBA has specifically reviewed the Quebec legislation “Act Respecting the Distribution of Financial Products and services, CQLR, c. D-9.2” (hereinafter referred to as the “**Quebec Act**”). The OBA identifies and believes that Ontario should mirror its legislation with the *Quebec Act*. Quebec has a 20+ year history of enacting and enforcing their legislation and efforts by the Ontario lawmakers should take lessons from this legislative regime where appropriate.

The OBA has specifically noted numerous positive elements of the *Quebec Act* which contains (within the regulations to the Act):

- A **specified code of ethics** for all financial services representatives, “*Code of Ethics of the Chambre de la securite financiere, CQLR c D-9.2 r 3*”



- Regulations for **compulsory professional development** of financial planners, *“Regulation respecting the compulsory professional development of financial planners, CQLR c D-9.2 r. 14.1”*
- Requirement of **information to be disclosed to consumers** by advisors, *“Information to be provided to consumers, Regulation respecting, CQLR c D-9.2, r. 9”*
- **Specific limitation of all titles that cannot be used** – and restricted use of only one title “financial planner”, *“Regulation respective titles similar to the title of financial planner, CQLR c-D-9.2, r. 20”*

The OBA has noted a number of ways in which the proposed Rule can be improved so as to better achieve the goal of consumer protection. On this specific note, responses to the specific issues raised by FSRA in the Notice of Proposed Rule and Request for Comment (the “Notice”) are set out below.

(1) FP & FA Credentials

The criteria set out in pages 7-8 of the Notice accurately reflect some of the credentials that should be held by any individual using the FP or FA titles. Otherwise, the legislation as drafted does not include any specific credentials. This should be remedied so as to provide both the public and applicants with clarity. FP and FA title users should be required to disclose their credentials to the public. In addition, there should be annual continuing professional education requirements so that title holders remain current with their credentials. Title users should also have specific education requirements as it relates to proper identification of clients and identity theft issues as more client interactions will be conducted on virtual and/or online platforms.

(2) Disclosure

As previously stated, title users should be required to disclose their credentials to all potential consumers and the public at large upon request. One recommended standard form of disclosure is the creation of a registry by FSRA which would be searchable by members of the public. It would be akin to the Lawyer and Paralegal Directory maintained by the Law Society of Ontario (“LSO”), and would include information regarding credentials, disciplinary history and other pertinent information. The benefit of a registry is that it gives consumers a certain amount of control, and also provides accountability for title users.



(3) Exemptions

The OBA agrees that there should be exemptions so as to allow for a grace period during which FAs and FPs can take steps to obtain the necessary credentials. However, if a potential title user does not yet hold the credentials, this should be disclosed to clients before engaging in provision of services.

(4) Fees & Assessments

There should be a fee structure in place and the principles governing the fee structure are acceptable. There are concerns that the fee structure might become prohibitively expensive over time and that the costs could either be passed on to consumers or price people from entering the professions. However, that being said, all regulation involves costs and the prospect of increasing costs and barriers to entry for the profession also will increase the possibility of consumer protection. It is recommended that FSRA make professional liability/errors & omissions insurance a requirement for title users. This will protect both the public and title users.

(5) Consumer Education

A broad advertising campaign is recommended so as to inform and notify consumers of the changes, what the titles actually mean and what recourse they have to FPs or FAs who violate any specific codes of ethics. This campaign should utilize digital formats such as Internet advertising and YouTube for its marketing campaign. The education should be simple and consumer focused, and there should be a user-friendly website maintained (such as the LSO website). To this end, consumer education should be guided by the principle of public protection.

(6) Other Issues Identified

As stated in the preamble above, the OBA took extensive time to review the *Quebec Act* and believe that there is much to be learned from that legislation and the corresponding regulations.

In particular, the Quebec legislation includes a Code of Ethics in the regulations. This is something that is noticeably absent from the Ontario proposed rule. Without a code, there is uncertainty with respect to the obligations of the advisors. We recommend that FSRA consider modeling its own legislation after the requirements and elements of the Quebec legislation.



As a final comment, proponents for fewer regulations on the basis of costs should be made aware that without a clear code of enforceable ethics accompanied by a delineated system of redress by the FSRA regulator, then the standard of what is acceptable in this industry will ultimately be that of the credentialing bodies, employers, and private entities. Moreover, when disputes arise, the laws of governing the provisions of financial services will ultimately fall to the duties of the courts of this province to govern. Ultimately, when making decisions, judges will need to fall back to the common law, borrowing concepts from contract law, fiduciary duties, and from rules of other professions which are already regulated. This is likely not an appropriate separation of powers. This is likely a more costly outcome to the public at large (to be forced to access remedies against financial advisors by court mechanisms only). The OBA suggests that regulating the conduct of its own members presents an opportunity for FSRA to control its own processes. Courts should only become involved after all appeals processes at the FSRA regulator have been exhausted.

Conclusion

Once again, the OBA appreciates the opportunity to make this submission to FSRA on its Proposed Rule. The OBA is generally supportive of FSRA's goals to provide the public with clarity with regards to the usage of the titles and credentials used by individuals operating in Ontario's financial services marketplace, and encourages FSRA to consider additional regulatory changes to work towards this goal.