

June 21, 2021

Financial Services Regulatory Authority (FSRA)
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Toronto, ON
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Submitted via FSRA Online Submission System

Re: Financial professionals title protection rule and guidance - second consultation

FAIR Canada is pleased to provide comments on the proposed Financial Professionals Title Protection Rule (Title Protection Rule), the Application Guidance, and the Supervisory Framework Guidance.

FAIR Canada is a national, independent charitable organization dedicated to being a catalyst for advancing investors' rights in Canada. As a voice of the Canadian investor and financial consumer, FAIR Canada promotes its mission through outreach and education on public policy issues, policy submissions to government and regulators, and proactive identification of emerging issues and other initiatives.¹

Governing Legislation

Before addressing the specific changes made to the Title Protection Rule and associated guidance in this second round of consultation, we would like to highlight several limitations inherent in the governing legislation (*Financial Professionals Title Protection Act, 2019*).

FAIR Canada believes these limitations should be reconsidered to ensure the proposed title protection framework delivers more robust consumer protections. In our view, and the view of many other stakeholders, the governing legislation will result in sub-optimal outcomes for consumers of financial services. It also stands in contrast with other efforts by the Government to modernize financial services and enhance consumer protections in Ontario.

The Expert Committee: Protect Consumers, Not Just Titles

The Expert Committee, which had been established by the previous Government to consider financial advisory and financial planning policy alternatives, issued a series of recommendations

¹ Visit www.faircanada.ca for more information.

that were delivered to Ontario’s Minister of Finance in November 2016.² In its final report, the Expert Committee emphasized: “The plethora of misleading titles used in the financial services industry combined with the lack of a clearly articulated duty to act in the best interest of the consumer leaves Ontarians vulnerable.”

In response, the Expert Committee recommended a comprehensive framework for regulating the conduct and activities (not just the titles) of individuals providing financial planning and financial advisory services.³ A three-part approach to address harm to consumers of financial services was envisioned. The chart below compares the fundamental elements of this three-part approach to the governing legislation:

Expert Committee	The Governing Legislation
1. Develop a specific, harmonized regulatory framework for financial planning and financial advice to ensure that no one can provide financial planning or financial advice without oversight by regulators.	<ul style="list-style-type: none"> No direct regulatory oversight of individuals providing financial planning and/or financial advice. Regulatory oversight limited to granting/revoking credentialing body (CB) approval. Responsibility for overseeing individual conduct rests solely with CBs.
2. Clear up the confusing array of titles and credentials and restrict the use of titles so that titles accurately reflect the credentials that underlie them.	<ul style="list-style-type: none"> Protects the use of only two titles: Financial Planner (FP) and Financial Advisor (FA). Does not adequately address consumer confusion and protection concerns over title usage.
3. Enact a universal statutory best interest duty.	<ul style="list-style-type: none"> No best interest duty.

The Expert Committee also recommended the Government further consider several critical issues that fell outside the committee’s mandate:

- The need for a simplified complaint and redress process for consumers.
- A simplified approach for handling of consumer complaints related to regulatory offences linked to financial planning, financial advice or selling of financial products.
- A consumer-friendly process to recover financial losses from firms or individuals caused by negligent financial planning, financial advice or selling of financial products.

Unfortunately, given the narrow focus of the governing legislation, none of these critical issues are addressed in the proposed framework.

² [Final Report of the Expert Committee to Consider Financial Advisory and Financial Planning Policy Alternatives](#)

³ *Ibid.*, Chapter 4, Regulation of Financial Planning or Financial Advice in Ontario.

Commenters Called for a Better Model

In addition to pointing out these shortcomings, many commenters highlighted the contrast between the proposed Ontario framework and a similar framework implemented in Quebec. The Quebec framework includes several important consumer protection elements that will not be available in Ontario.

The Quebec framework features, among other things, the following elements:

- A requirement to be licenced by the Autorité des marchés financiers (AMF).
- A standard code of ethics set out in regulation that includes a best interest standard.
- Titles deemed too similar to “financial planner” are listed in a regulation and prohibited.
- Regulatory oversight is delegated to a single self-regulatory organization - the Chambre de la Sécurité Financière (CSF).
- The CSF has delegated authority to impose fines of up to \$50,000 per offence as well as other disciplinary measures, including stripping an individual of their financial planning designation.
- Because the CSF also oversees mutual fund, insurance and scholarship plan reps, an individual who engages in misconduct will have their certifications in all these areas revoked simultaneously.
- University-level education requirements.
- A single CB (the Institut québécois de planification financière (IQPF)).
- A regulation specifying continuing education requirements.

None of these aspects of the Quebec model found their way into the governing legislation or any regulation.

Recommendation:

- The proposed title protection framework should be expanded to better protect consumers against misconduct, as opposed having a narrower focus on protecting titles.
- Like many commenters in the original consultation, we urge the Government to revisit the governing legislation and look to the Quebec approach and Expert Committee recommendations in doing so.
- At the end of the day, Ontarians should have the same level of consumer protection available to individuals in other jurisdictions.

Raising the Bar – Best Interest Standard of Care

In response to numerous first-round comments about adopting a best interest standard of care for FPs and FAs, FSRA simply stated that it does not regulate the conduct of individual financial planners or advisors. Rather, it will be left to the CBs to require individuals to comply with a code of ethics and professional standards.

The Application Guidance, however, does not require this code of ethics to include a best interest standard or requirements equivalent to the Client Focused Reforms adopted by the Canadian Securities Regulators.

This response is troubling as it fails to squarely address at least two options, as set out in the recommendations below, that remain open to FSRA in achieving this fundamental objective. Either of these two options would be preferable to leaving this important question unaddressed or to the discretion of individual CBs.

Recommendations:

- Explicitly require approved CBs to adopt a code of ethics that includes a best interest standard or other equivalent client focused requirements established by FSRA; and/or
- Draft a code of ethics with a best interest standard (or comparable requirements) to be included directly in the Title Protection Rule or associated guidance.

Reasonably Confusing Titles

The study commissioned by FSRA in the fall of 2020 to support the design of the proposed title protection framework included the following finding:

- Only 31% of consumers are confident that they can explain the difference between FPs and FAs, and only 6% are completely confident.

This is not a reassuring starting point for a regime designed to protect these two titles and address consumer confusion. Moreover, we note that in Quebec, the title “Financial Adviser” itself is prohibited as being too similar and confusing with “Financial Planner.”

This suggests that not only is the distinction between an FP and FA poorly understood, but the scope of titles that could be reasonably confused with either the FP or FA title is very broad.

To try to address this, the Supervisory Framework Guidance now includes two lists of sample titles. The one list sets out titles that could be reasonably confused with the title of Financial Planner or Financial Advisor. For example, “Senior Financial Planner” or “Financial Investment Advisor”. The use of these titles would be protected by the proposed framework and any individual using them would need to be credentialed by a recognized CB.

The other list includes titles that FSRA considers would not create any confusion for the public. These include titles such as “Financial Consultant” or “Wealth Manager”. The titles on this second list could be used by anyone without having to comply with the proposed framework.

In our view, this approach creates risks for consumers and fails to address the fundamental problem of title confusion for consumers.

Given the low level of understanding identified in FSRA's study of the terms "Financial Planner" and "Financial Advisor," we suspect many Ontarians could not explain the difference between a "Financial Advisor" and a "Financial Consultant."

To effectively protect consumers, we believe the problem of title confusion should have been addressed more comprehensively. One approach would be to identify potentially confusing titles as follows:



Any title that would be confusing would then be prohibited unless it was granted by a CB.

We also believe that the list of titles in the Supervisory Framework Guidance that are not considered to be confusing with FP and FA will have unintended consequences. For example, anyone could simply use the title "Financial Consultant" (as opposed to Financial Advisor) to avoid any regulatory requirements under the proposed framework. This possibility risks undermining the viability and effectiveness of the proposed framework. This outcome can and should be avoided.

Recommendations:

- A list of potentially confusing titles should be developed and their use prohibited.
- The final list of titles should be validated and tested with focus groups of individual consumers.

Enforcement

One of the more troubling aspects of the governing legislation is that responsibility for supervising and enforcing the conduct of FPs/FAs rests solely with CBs - not with FSRA. In fact, FSRA retains no authority to take direct action to protect a consumer should a CB fail to take meaningful enforcement action against one of its credential holders.

All FSRA could do in these circumstances would be to revoke the CB's credentials.

While this power may seem credible, in practice it may amount to window dressing. In other words, FSRA would likely never revoke a CB's credentials because it would lead to all credential holders, and not just the bad apple, losing their ability to use their titles. This response

would certainly be challenged as excessive and unreasonable given its disproportionate impact on other credential holders. In short, it is difficult to imagine any scenario where FSRA would take this step should a CB fail to take appropriate enforcement against one of its credential holders.

In our view, this degree of reliance on a CB to protect consumers from misconduct exposes a significant weakness with the framework.

From the perspective of a consumer who has suffered harm due to FP/FA misconduct, the following is the result:

- The relevant CB is the only recourse for a remedy.
- The CB will not be able to order compensation for any losses suffered as a result of the misconduct.
- Unless the FP/FA is a securities registrant, there will be no potential fines or penalties – the FP/FA could simply choose to give up the FP/FA title rather than honour any order imposed by the CB.

Recommendations:

- The governing legislation should be revised to give FSRA a greater role in enforcement.
- To the extent that FSRA's enforcement role remains limited, in our view and the view of many stakeholders, it will be critical for FSRA to set a high bar when approving who can become a CB.
- FSRA will also need to implement a rigorous oversight program for any approved CBs.

We are concerned, however, that there will be an unlevel playing field because of inconsistent approaches towards enforcement by different CBs.

Supervisory Framework

Annual and On-site Reviews

The Supervisory Framework Guidance asserts that FSRA's Monitoring and Supervision Framework will act as a "deterrent for non-compliance and promote proper marketplace conduct." FSRA's approach to its oversight of CBs will be crucial to achieving this fundamental consumer protection objective.

As described, the annual reviews of CBs contemplated by the Monitoring and Supervision Framework will focus on the CB's governance structure, expertise, resources, practices, and code of ethics. Missing from this list is a clear statement that the CB's enforcement record will be an area of focus in these reviews.

The Monitoring and Supervision Framework also indicates that FSRA "may" conduct on-site reviews. In our view, effective supervision requires a more definite statement here.

Recommendations:

- Explicitly state that a CB's enforcement record will be an area of focus for annual/on-site reviews.
- Specify that on-site reviews of all CBs will be conducted on a periodic, risk-based approach.

Complaints Monitoring

The Supervisory Framework Guidance makes several references to FSRA “reviewing” complaints but does not specify potential actions that will be taken because of those complaints.

The one exception is in the case of individuals using FA/FP titles without an approved credential. Only in this instance does the Supervisory Framework Guidance specify that complaints will be investigated and actioned with possible issuance of a compliance order. This leaves a considerable degree of uncertainty in terms of how complaints will factor into the supervisory framework.

Recommendations:

- Specify criteria that will be applied in determining whether complaints will be investigated and actioned by FSRA.
- Provide consumers with guidance on how to make a complaint and what to expect in terms of the complaints handling process.

The FSCO Market Regulation Supervisory Framework⁴

In assessing the completeness of the Supervisory Framework Guidance, we suggest a comparison with the FSCO Market Regulation Supervisory Framework (2018). We note several key elements in that framework that are absent from the Supervisory Framework Guidance, including:

- thematic reviews;
- an annual supervisory plan; and
- reporting of individual/aggregate findings.

Recommendation:

- Augment the Supervisory Framework Guidance with key elements from the FSCO Market Supervisory Framework as specified above.

CB Approval Process*CB Independence*

The Application Guidance includes a new requirement for CBs to have policies and procedures on conflicts of interest which reinforce the commitment to serve the public interest. The issue of ensuring CBs serve the public interest is critically important. While a step in the right direction,

⁴ [FSCO Market Regulation Supervisory Framework](#) (2018).

addressing conflicts of interest with “policies and procedures” is not, by itself, sufficient. To ensure a strong commitment to serve the public interest, we recommend the following enhancements.

Recommendations:

- Exclude member-funded organizations that engage in political lobbying activity on behalf of their members from approval as CBs.
- Require CBs to operate on a not-for-profit basis.

Accreditation Standards

The CB approval criteria still does not specify a requirement to meet any internationally recognized accreditation standards such as those established by the International Organization for Standardization (ISO).

Recommendation:

- While we appreciate that FSRA researched ISO and other standards in setting the CB approval criteria, these standards should be explicitly set out as part of the criteria.

Timeline for Approval

Given the essential role played by CBs in the title protection framework, we are concerned that 60 days may not be sufficient to determine whether a CB qualifies for approval.

Recommendation:

- Do not specify a timeline for approval of CB applications, thereby giving FSRA the flexibility needed to undertake a thorough assessment of each application.

Baseline Competency Profiles

The Application Guidance now includes a somewhat more detailed breakdown of the baseline competency profiles for FPs and FAs. While helpful, the overall lack of detail leaves open the possibility for the bar being set too low. As a reference for a more appropriate level of detail, we would refer you to the competency profile proposed by the Investment Industry Regulatory Organization (IIROC) for Registered Representatives and Investment Representatives.⁵

In addition, we are disappointed that the competency profiles still fail to establish a minimum education requirement, such as a university degree. No policy rationale has been provided for this material omission from the Ontario framework.

⁵ [Notice 20-0174 Consultation Paper – Competency Profiles for Registered Representatives and Investment Representatives, Retail and Institutional.](#)

Finally, while the competency profiles do require “an understanding of the concept of suitability and the provision of suitable recommendations”, there is no reference to the underlying concept of asset allocation. Without grasping this fundamental concept, the FP/FA would not be adequately equipped to provide suitable recommendations.

Recommendations:

- Provide additional detail to the baseline competency profiles like the above-cited IIROC-developed competency profiles.
- Establish a minimum education requirement, such as a university degree in a related discipline, as part of the baseline competency profiles.
- Require an understanding of the concept of asset allocation as part of the baseline competency profiles for both FPs and FAs.

Central Registry

We are very pleased to see that FSRA will develop a consolidated public registry of credentialed FPs and FAs. We understand that FSRA will also be collecting disciplinary information from CBs.

In describing the registry however, the Supervisory Framework Guidance does not indicate that it will include information with respect to an individual’s disciplinary or complaints record. Including this type of information is vital to the success of the registry.

Recommendation:

- Ensure that the central registry of credentialed FPs and FAs includes an individual’s disciplinary and complaints record.

Disclosure of Titles and Credentials

In the initial consultation, FSRA asked for comments on whether FP and FA title users should be required to disclose their credential to clients.

In its summary response to comments received, FSRA indicated an expectation that CB codes of ethics and professional standards will include requirements to disclose this information to clients and listed examples of acceptable methods of disclosure. While this is helpful, this expectation and these examples are not set out in the Application Guidance.

Recommendation:

- Specify FSRA’s expectations with respect to disclosure of title credentials to clients in the Application Guidance. This will help ensure compliance with these expectations.

Transition Periods

The shortening of the transition periods in the Title Protection Rule to 4 years for FP title use and 2 years for FA title use, while welcome, fails to adequately address the concerns raised by many commenters with respect to the original transition periods.

Any significant transition period would enable individuals who have not been properly credentialed to continue using the restricted FP/FA titles, thereby frustrating the consumer protection purpose of the Title Protection Rule.

Recommendations:

- Eliminate or at least significantly reduce the transition periods.
- While this may cause some degree of inconvenience for individuals already using the FP or FA titles who require time to obtain an approved credential, this could be addressed by permitting these individuals to add a qualifier to their titles indicating their credential is pending.

Conclusion

Although we appreciate the enhancements made to the proposed title protection framework to date, we believe that to meets stakeholders' and financial consumers' expectation for a robust consumer protection framework, further changes are needed.

If left in its present form, we are concerned that the title protection framework risks providing consumers with a false sense of security when dealing with a credentialed FP/FA. We urge the Government and FSRA to do all that it can to avoid this unfortunate outcome.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting. Please be advised that we intend to make our submission public by posting it to the FAIR Canada website. We would be pleased to discuss our submission with FSRA should you have questions or require further explanation of our views on these matters. Please contact me at jp.bureaud@faircanada.ca.

Sincerely,



Jean-Paul Bureaud,
Executive Director
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