

CONSUMER ADVISORY PANEL

September 24, 2021

Financial Services Regulatory Authority of Ontario
25 Sheppard Avenue West, Suite 100
Toronto, ON
M2N 6S6

Re: Approach Guidance – Proposed Transparent Communication of FSRA Enforcement Actions

1. Introduction

This comment letter is respectfully submitted by the Financial Services Regulatory Authority of Ontario's Consumer Advisory Panel (the "CAP"). The CAP is pleased to engage on the Approach Guidance for Proposed Transparent Communication of FSRA Enforcement Actions (the "Approach Guidance") as part of FSRA's stakeholder engagement process by providing comments. The CAP is an initiative of FSRA to help inform FSRA's work, and to ensure that consumer, member and beneficiary perspectives inform FSRA's direction and decisions. The CAP also supports FSRA's Consumer Office to provide an effective challenge function within FSRA.

The importance of enforcement transparency cannot be overstated. Transparency in enforcement serves three primary purposes:

- deters industry participant malfeasance using threat of publication of enforcement information;
- narrows information asymmetries between regulator and consumer, informing consumer decision-making; and
- can impact regulator behavior by increasing public scrutiny of enforcement actions.

In general, the proposed Approach Guidance represents a positive contribution to addressing enforcement transparency and represents a significant step forward. We are pleased that FSRA has made enforcement transparency a priority. Our specific comments follow and are organized thematically.

2. Specific Comments

Consumer Awareness

We understand that the proposed approach would substantially expand the range of enforcement documents that become public, which will better represent the

enforcement lifecycle from the time of Notice of Proposal onwards. Doing so should help to close an information gap for stakeholders and, importantly, for consumers. Publicizing enforcement information in a timely fashion, and at an earlier stage of the enforcement process, should support better-informed consumer decision-making (for example, when consumers are working with or selecting service providers) and thereby prevent possible harm. We support FSRA's approach to the extent that it expands what enforcement information becomes public on a timely basis.

Another component of the Approach Guidance, as set out in its purpose statement, is not only *what* FSRA will make public but *how*. To the extent that the Approach Guidance proposes the posting of Enforcement Information (as defined in the Approach Guidance) to FSRA's website and the issuance of news releases as a fulsome statement on its anticipated consumer awareness methodologies, we recommend that FSRA continue to engage in further consideration of additional awareness tactics that are less passive, more proactive, and more realistically likely to reach the intended audience. The intended audience must be considered to include everyday consumers.

FSRA may already know, or otherwise should accept, that the average consumer is unlikely to follow regulatory corporate press releases, and that content on a regulator's website will primarily be found by those who go looking for it. Perhaps it is already the case that more proactive dissemination and awareness tactics for Enforcement Information have been identified for use by FSRA without being specifically enumerated in the Approach Guidance. In any event, we recommend further consideration on tactics for implementation, especially as it relates to awareness and everyday consumers.

Finally, enhanced enforcement transparency, along with sufficient publicity, may additionally reach stakeholders whose specific business and mandate it is to seek out other consumers who may have suffered harms that are similar to the first cases who came forward: class actions law firms. This type of attention is likely to result in greater compliance overall.

Systemic Issues

Another matter that has implications for consumer awareness strategy is the issue of the limited nature of scope of investigations. We understand that investigations pursuant to complaints received by FSRA generally focus on the complainant who filed the complaint without a corresponding obligation or process that seeks to identify who else may have been harmed by similar conduct (and who might also not be aware of it).

If it is the case that it is not possible or pragmatic for FSRA, in the case of an individual complaint, to more broadly seek out who else may have been harmed but hasn't come forward, we recommend that FSRA consider further avenues to support the

identification of similar cases and potential related systemic issues. For example, if industry members were obligated to publicize, directly to their customers, Enforcement Information news pertaining to that entity, more consumers may be better able to self-identify similar conduct patterns as a result of such direct dissemination and publicity. This, in turn, could help FSRA to identify and take action to correct potential systemic problems.

File Status Transparency

In the case of the current approach to enforcement transparency, there is potential for an information black hole, of sorts, to exist between the time of issuance of a Notice of Proposal and the issuance of an Order. The information gap could be lengthy, depending on the case. For example, in cases of tribunal review and complex cases, there could be no information and limited transparency for a substantial period of time – whose implications regulatory staff might understand but everyday consumers likely will not. Such information black holes, so to speak, could have the potential to inhibit educated and informed consumer decision-making.

We recommend that FSRA consider mechanisms for informing the public, and supporting stakeholder comprehension, on the status of active files between document publications. For example, a publicly available and easy to locate chart/ list of active cases could, theoretically, include a column on file status. This could help to manage expectations of interested stakeholders, enhance enforcement transparency, and improve consumer comprehension of the enforcement process and associated public documents.

Given that the complaints process feeds into enforcement, and lengthy information gaps might also sometimes exist during the complaints process, FSRA should consider policies for keeping complainants apprised of the status of their complaints while their complaints are advancing through the system as well.

Summary Administrative Penalties

We understand that Summary Administrative Penalties (as distinguished from General Administrative Penalties), which are penalties that do not involve enforcement actions because they do not implicate direct consumer harm, do not result in any publications under the ambit of Enforcement Information and only implicate information disclosures in FSRA's licensee registries. We recommend, in such cases, that FSRA ensure that registry information, such as terms, conditions and suspensions, are communicated clearly and designed thoughtfully, with an eye to its intended everyday consumer end users, to ensure stakeholder comprehension of registry information. We also encourage FSRA to engage in active efforts to drive traffic to FSRA licensee registries for the

conducting of licensee due diligence, and to raise consumer awareness regarding the existence of licensee registries and the importance of checking licenses and registration.

Decision Reasoning

The CAP recommends that FSRA ensure that published Orders include sufficient detail to function as effective industry education and deterrent. This should include disclosure of mitigating and aggravating factors.

3. Conclusion

The role and goal of a good transparency and information disclosure regime should be, in part, to ensure that consumers know what they're getting. This is well-known in the context of enabling consumer comparison of products and services and it should be no different in the context of evaluating and comparing service providers. Publication of the proposed wider range of enforcement documents might not, on its own, make the general public better decision-makers. But in combination with effective consumer awareness tactics and adequate disclosure of Order reasoning it should. Clear, timely and sufficiently detailed enforcement information has the potential to improve industry compliance on a large scale and reduce malfeasance and complaints.

For all of the reasons described, as a concluding remark, we are encouraged by FSRA's prioritization of enforcement transparency and proposed substantial shift forward pursuant to the proposed Approach Guidance. We thank you for taking the time to review and consider this letter and we hope that these comments assist FSRA staff in producing a strong enforcement transparency approach from a consumer protection perspective.

Sincerely,

Consumer Advisory Panel