Attention: Mark White, CEO

Financial Services Regulatory Authority of Ontario (FSRA).

Notice of Changes and Request for Further Comment - Proposed Rule 2022 – 001, Assessments and Fees

This submission contends that the existing OSC and SRO regulatory structure is incomplete with respect to oversight of "professionalism" within the advice-based relationship space that the new Title and credentialing regime looks set to occupy. Without the development of regulation to advance advice-based relationships as opposed to the current broker-client anchor, consumers will continue to face asymmetry within a framework that is archaic and inherently unfair. This issue is crystalised by the proposed transfer of credentialing body oversight to the OSC.

The Notice of Changes regarding Assessments and Fees specifically addresses CIRO subject to a recognition order under the Securities Act 1990 with reference to oversight functions carried out by the OSC.

The assumption is that the OSC with broad oversight of operations, governance and administration can also effectively perform FSRA oversight functions with respect to the credentialling body function of CIRO.

The implication, that the OSC will perform functions of FSRA with respect to the title regime should also require that the OSC take, and demonstrate, responsibility and accountability for the regime and its representation to consumers within its domain. While there are existing, well documented, differences of opinion[1] regarding the efficacy of the Title regime, these must now be set against the intent and detail of securities regulation itself. Securities regulators have historically left the precise definition of the registrant-client relationship and its ethical standards, on a case-by-case basis, to the courts, which is problematic[2].

Given the presumption of trust and confidence in professionalism, both implied and expressly stated within the various Title regime documentation and other communications[3], the incorporation of the Title regime within securities regulation needs to be well defined; that is well defined, and congruent, in the eyes of regulators, consumers, industry, professional bodies,

[1] Kenmar's submission to this consultation references many of these concerns and their sources. Please also reference: Teasdale A (2020). Re "Notice of Proposed Rule and Request for Comment; Proposed Rule [2020-001] Financial Professionals Title Protection. https://www.fsrao.ca/sites/default/files/comments/2020-11/Teasdale%20A%2C%20CFA%20%28Proposed%20Rule%20%5B2020-001%5D%20Financial%20Professionals%20Title%20Protection%20%29.pdf

[2] The vast subject matter expertise (evidence base re investment and standards and regulation) required to inform judicial determinations in securities litigation likely exceeds the ability of the court forum to address effectively. Regulators are essentially responsible for embedding a large element of the diverse evidence base into regulation, supported by evolved professional competencies and best practices used to define regulatory expectations. Where regulation is lacking a substantive evidence base, this risks impacting judicial determination. Problems with expert witness testimony are also well evidenced in a great many Canadian cases and in academic text e.g. - Robertson, Christopher T., Blind Expertise (February 1, 2010). New York University Law Review, Vol. 85, p. 174, 2010 , Available at SSRN: https://ssrn.com/abstract=1416943.

[3] ""Accreditation through New SRO will maintain high proficiency standards and give investors confidence that they are dealing with qualified and committed Financial Advisors," said Andrew Kriegler, CEO, New SRO." https://www.iiroc.ca/news-and-publications/notices-and-guidance/more-financial-advisors-ontario-have-their-credentials-officially-approved

external complaint bodies and the courts, and specifically with respect to the client relationship. A consultation on the matter, whereby regulators can clarify intent, is a necessary.

The provision of professional personalised investment advice and the intent to elevate the role of advice and the registrant in the eyes of the consumer, is part of a long running dynamic to incorporate advice giving within service representation and regulation[4]. By becoming a credentialing body (CIRO) and by taking on oversight functions (OSC), regulators may have crossed a line they have long avoided crossing.

Critically, one must ask, how does the new title and the potential representation of the term "financial advisor", especially and within the context of existing regulation, industry norms and culture, change, if at all, the inherent relationship between registrants and clients?

Consumers tend to value high ethical standards and assume that their professional advisors are held to a best interest standard and are generally ignorant of the actual standards their registrants are held to. Confusion and expectation over such standards are well documented[5]. Most consumers would appear to closely identify a professional standard with the provision of personalised investment advice under a best interest standard and express a clear preference for such a standard[6]. Canada remains at odds with developing global regulatory standards for the provision of advice, especially with respect to clear differentiation of advising from order taking. The new title regime requires that regulators urgently clarify the relationship and responsibilities between registrants and clients in terms of those registrations affected.

A client's interests first duty is markedly different from a best interests standard and insufficiently explained with respect to scope in Canadian regulation. The consumer has little to no transparency on the matter, anchoring[7], as many may have little choice, off the norms and culture of the industry for their reference points.

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[4] The evidence base for this is wide and well documented, not only in Canada but globally. Referencing and detailing this evidence base is outside the scope of this submission.

[5] To name but a few references: Hung, Angela A., Noreen Clancy, Jeff Emmett Dominitz, Eric Talley, Claude Berrebi, and Farrukh Suvankulov, Investment Advisers and Broker-Dealers. Santa Monica, CA: RAND Corporation, 2008. https://www.rand.org/pubs/research_briefs/RB9337.html. – Brondesbury Group (2012). Investor behaviour and beliefs: Advisor relationships and investor decision-making study. Available at https://www.getsmarteraboutmoney.ca/wp-content/uploads/2017/06/Adviser-relationships-and-investor-decision-making-study-2012.pdf - Carp. (2017, June 12). New poll: Older Canadians want government action to protect their life savings. CARP. https://www.carp.ca/2017/04/20/new-poll-older-canadians-want-government-action-protect-life-savings/

[6] "We have consistently seen over time that retail investors most value someone who will be "trusted to act in my best interest." An ability to achieve high returns is important; the importance of achieving high returns has increased the most among adviser hiring considerations since 2020. But it remains a distant second to being "trusted to act in my best interest"" – CFA Institute (2022). Enhancing Investors' Trust - 2022 CFA Institute Investor Trust Study - https://www.cfainstitute.org/-/media/documents/article/Enhancing-Investors-Trust-Report_2022_Online.pdf

[7] Much of the Canadian consumer experience and knowledge used to assess suitability and guide consumers in decisions may come from exposure to less than professional standards. If we are to improve consumer knowledge and experience we also need to improve a key source of their education. Professional standards and their accountabilities could better shape consumer decision making and outcomes. Note: "A framework for ethical decision making can help people look at and evaluate a decision from different perspectives, enabling them to identify important issues, make wise decisions, and limit unintended consequences". CFA Institute (2023). Ethics and Trust in the Investment Profession. https://www.cfainstitute.org/en/membership/professional-development/refresher-readings/ethics-and-trust-investment-profession#:~:text=A%20framework%20for%20ethical%20decision%20making%20can%20help,issues%2C%20make%20wise%20decisions%2C%20and%20limit%20unintended%20consequences.

> CSA Client first standard: "the client first standard, along with the suitability factors, applies to assessing account type suitability, to periodic reviews of a client's account, to acting in response to client instructions and liquidating securities, and to the overall approach of assessing suitability for a client."[8]
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> CFA Institute Viewpoint regarding US nomenclature: "Those who refer to themselves as "financial advisors" and provide personalized investment advice should have to register with the SEC as investment advisers and be held to a fiduciary duty standard. Broker-dealers should have to disclose on client documents that they adhere to a suitability standard and are not required to have the client's best interests in mind."[9]

The CFA Institute, body with substantial knowledge, evidence base and expertise in this area, denotes (above), and with respect to the Client Focused Reforms, the arguably higher US Regulation Best Interest standard (for broker-client relationships) as a suitability standard. The CFA Institute also notes, while referencing US regulation, that anybody wishing to name themselves as a "financial advisor" needs to register with the SEC and adopt fiduciary duty standards.

Is the Canadian client first standard a standard strictly for a broker client relationship, where advice is incidental to the transaction? What of those advising relationships where the transaction is incidental to the advice? The standard appears to be a fudge, an expediency, that addresses only the minimum standard while leaving other relationships and representations[10] and their standards for the courts to decide? The presumption here might be that all but a few clients fall under the broker-client relationship, rendering differentiation extraneous. Additionally, the only logical conclusion is that the broker-client relationship is the industry standard with professional personalised advising lying outside this boundary.

But if it is ultimately the courts who are charged with determining the exact relationship, then it is also the courts who are charged with determining the duty of care, outside of the broker-client frame, and not the regulators. In this respect regulators are remiss in only noting one end of the duty of care spectrum. Regulators thus incompletely define, and knowingly limit, regulation of consumers-registrant relationships. This is not investor protection. If the dynamic is for professional personalised advice giving, then this gap and the regulatory liability is only going to get bigger. What may have been extraneous and expedient, is no longer.

If a regulator is to oversee credentialing bodies with respect to the Titling regime and its intent, it needs to be fit for purpose, specifically with respect to a) the regulation of representations of professionalism and competency and b) the fairness and standards of advice outputs. This also means oversight of the firm as well as the registrant within this advice-based relationship space.

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[8] OSC (2019). REFORMS TO ENHANCE THE CLIENT-REGISTRANT RELATIONSHIP - NOTICE OF AMENDMENTS TO NATIONAL INSTRUMENT 31-103& AND COMPANION POLICY 31-103CP. https://www.osc.ca/sites/default/files/pdfs/irps/ni_20191003_31-103_reforms-enhance-client-registrant-relationship.pdf (Annex B, P22)

[9] CFA Institute (nd). Fiduciary Duty: Fiduciary Standard & Regulations. https://www.cfainstitute.org/en/advocacy/issues/fiduciary-duty#sort=%40pubbrowsedate%20descending

[10] "I am left with the impression that in order to secure Mr. Stradiotto's business, Mr. Weller over-sold himself, the level of service that he would provide and what the Stradiottos could reasonably expect from their portfolio" - Stradiotto v. BMO Nesbitt Burns, 2014 ONSC 3477 (CanLII), <https://canlii.ca/t/gf9p3>, retrieved on 2023-05-27

But, the courts, based on historical determinations, still appear to be anchoring off a broker-client relationship[11] when assessing the evidence as to the actual relationship, and when referencing case precedent. Note in Miller V RBC Dominion Securities Inc., 2021 Justice Steeves noted that "the primary contractual duty of an advisor is to carry out the instructions of the client[12]" and in TD Waterhouse V Ghebrezghi (2019)[13], on appeal, the court noted, while citing Varcoe v Sterling (1992) "The relationship of broker and client is not per se a fiduciary relationship. As the cases cited above have stated, it depends on the circumstances of the individual case". In the absence of evidence to the contrary, the fundamental anchor of the relationship does not appear to have changed for decades or more.

Arthur Laby might have said as much in his 2010 essay on "Fiduciary Obligations of Broker-Dealers and Investment Advisers[14]" when he delineated a typical 1930s broker-client relationship and noted the first aspect as being one of acting "as a broker in the purchase and sale of securities and in borrowing and lending stocks."

It would seem exigent that regulators clearly differentiate, through regulation and registration, advice-based relationships, and advice-based expectations, from the primarily transactional and client self-initiated transaction of the broker-client relationship. This is an essential element of what should be an overarching regulatory fairness construct. Inserting the financial advisor regime without addressing clear regulatory gaps is unfair to consumers of financial services.

The intent of regulation in Canada has clearly been to modernise the broker-client model through enhanced suitability standards and disclosure[15]. It has avoided developing regulation of advice and to better understand differentiation of the advice-based model. The introduction of the financial advisor title attached to "professional standards" risks clouding the issue, creating an unaccountable presumption that professional standards exist as cultural norms.

Consumers should know, at outset, which relationship and accountability their registrant is representing and being held to. To wait, long after the fact, for judicial determination, to address and clarify the actual relationship, is unfair and not in the best interests of the consumer and the wider public interest.

The introduction of the "financial advisor" title and the implied elevation of professionalism within financial services elevates the importance and significance of resolving this long-standing regulatory gap.

[11] In a jurisdiction which has a best interest standard and where advice is regulated, the anchor and frame is different to one which sets off from a broker-client relationship. If you are anchoring to a broker-client relationship the evidence bar may be lower (easier to falsify a fiduciary relationship and negligence and harder to confirm negligence and fiduciary responsibilities) and higher for an advice-based relationship with fiduciary responsibilities.

[12] Miller v RBC BCSC 1811 (CanLII), <https://canlii.ca/t/jj3lq>, retrieved on 2023-05-23

[13] TD Waterhouse Canada Inc v Ghebrezghi, 2019 ABCA 319 (CanLII), <https://canlii.ca/t/j27ns>, retrieved on 2023-05-27

[14] Laby, Arthur B., Fiduciary Obligations of Broker-Dealers and Investment Advisers (September 29, 2010). Villanova Law Review, Vol. 55, No. 3, p. 701, 2010, Available at SSRN: https://ssrn.com/abstract=1899732

[15] European Commission, Directorate-General for Financial Stability, Financial Services and Capital Markets Union, D. Uličná, M. Vincze, M. Mosoreanu et al. 2022. "Disclosure, Inducements, and Suitability Rules for Retail Investors Study." Publications Office of the European Union. https://data.europa.eu/doi/10.2874/647061

Merely allowing for a perceived elevated title and designation regime within existing norms, regulation and industry infrastructure ignores the reality that the bodies of knowledge that encompass professional competencies and ethical standards, are only one component of professionalism and one determinant of fair and trusted outcomes for consumers. A body of knowledge represented by a designation does not and cannot equate to professionalism.

Professionalism depends on structures, standards, processes and ethics within the industry and a commitment to the client by registrants, firms and regulators alike – these are environments that often take decades to refine and develop. Professionalism likewise takes years to hone and refine and requires supportive professional environments of integrity. Addressing the regulatory gap with respect to a best interest standard for advising relationships and clearly differentiating transactional broker client relationships would help set the standard and expectation for the development of professionalism with Canada's broad retail financial services market. In this respect, as noted, oversight of the Title regime should go beyond the registrant to include the firm and the industry.

The introduction of the financial advisor title is evidence of the imperative for substantial regulatory reform. The interplay between standards in practise, regulation and professional designations and their attaching body of knowledge is key to defining financial services outcomes. The significance of becoming a credentialing body (CIRO) and of overseeing professional standards per se (OSC) should not be underestimated. This is a step up, without an apparent step to hold it.

To solidify professionalism within the industry we also need to be able to define and oversee professional standards in practise. Clarity as to what is an industry standard is also lacking. Sah (2017)[16] noted the importance of cultural norms in defining standards:

> "Professional advisors…learn norms that define their professional roles...professional norms are often learned through socialisation practices within the institution in which one works. In some institutions, advisors' primary roles may be to make money for their institutions, rather than to serve their clients (Friedman, 2007). Indeed, bankers or other sales people may be socialised into a culture in which they can only succeed by offloading stocks or goods, regardless of their worth or benefit to the client (Cohan, 2016).
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> "In a series of studies, Sah (2017) demonstrated that advisors who were required to disclose a conflict of interest reacted differently depending on the perceived professional norms of the context. "
>
> "advisors' perceptions of institutional norms encourage them to either indulge in self-interest and bias or prioritise their advisees. Perceptions of an ethical organisational culture can therefore serve as a powerful defence against conflicts of interest. Even when legal regulations are weak or unenforceable, or awareness of bias is low, if professionals are reminded of relevant ethical norms, they may comply with standards simply because putting the advisee first is the right thing to do."
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> "Thus, one way to improve professional advisors' ethical behaviour is to activate feelings of obligation and responsibility towards advisees. In contexts with strong

[16] SAH, S. (2017). Policy solutions to conflicts of interest: The value of professional norms. Behavioural Public Policy, 1(2), 177-189. doi:10.1017/bpp.2016.9

> ethical norms, conflict of interest disclosure may do so inherently (Sah, 2017). In other contexts, changing professional norms and the ethical climate from the top down will be necessary (Mayer et al., 2009). "

In this respect, the weak client's interest first duty of care, combined with inherent transactional remuneration in a transaction focused industry, is going to remain insufficient to support and help develop professional standards. The headwinds against financial advisor professional competencies within industry culture remain unaddressed.

Regulators may also need to properly evidence current standards through an empirical review of practise and outcomes to better assess standards, expectations and regulation in both the broker-client and advice-based models. An external complaint body with systemic investigative powers and binding decisions, along with a respect for the large body of knowledge that ombuds organisations bring to bear would also go some way to supporting the development of professional advice and an industry capable of accommodating such.

If there is a lack of clarity as to what a client's interest first duty of care actually means[17], in the eyes of registrants, consumers and those fora charged with resolving disputes, how on earth can a titling regime supported by credentialing bodies charged with setting competency standards be effective with respect to its objectives?

What is the overarching ethical standard that financial advisors can anchor off and what does it mean? Industry standards if we were to reference legal cases, are vague and extremely difficult to parameterise against regulation.

Unfortunately, there are few sources to ascertain so called industry standards, good or bad. There is limited transparency with respect to OBSI decisions, and a systemic remit, that leaves SRO enforcement and judicial determinations. Industry standards can be wide in a transactional system where new registrants can be advising within months and where relationships, often anchored to transactional culture, span the gamut from investor initiated entropic gambling or independent self-directed relationships to the dependent or reliant professional client-adviser relationship. A review of judicial determinations sees considerable ambiguity with respect to what are and what are not industry standards[18].

While proposed IIROC competencies[19] for registrants are detailed, and one would expect supportive of structured and disciplined advice, there is no detail on expectations regarding the firm's processes and culture with regard to the same. Account supervision guidance[20] is also hard to parameterise to competency profiles and especially noteworthy is the absence of reference to advice and fairness outcomes. Similarly, IIROC's 2019 Three-Year Strategic Plan

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[17] "Client interests first" simply tells us that if the interests of the adviser and client conflict, then the client's interests are to take priority. Exactly what does this mean in a professional context?" – Berry J (August 2016). Client interests: first, best or last? Good Returns - https://www.goodreturns.co.nz/article/976504569/client-interests-first-best-or-last.html

[18] "I do not think it is adequate to brush off the concerns raised by the plaintiffs about asset mix with sweeping statements that industry standards were met…" - Stradiotto v. BMO Nesbitt Burns, 2014 ONSC 3477 (CanLII), <https://canlii.ca/t/gf9p3>, retrieved on 2023-05-27

[19] IIROC Competency Framework – Retail Registered Representative and Investment Representative – Reference Document. IIROC. https://www.iiroc.ca/media/12336/download?inline

[20] Account Supervision Guidance – GN-3900-20-001. IIROC - https://www.iiroc.ca/news-and-publications/notices-and-guidance/account-supervision-guidance-0

is palpably devoid of statements regarding advice and consumer fairness outcomes[21]. The OSC's Statement of Priorities has also for some time been lacking with respect to consumer protection and the OSC lacks a clear commitment to fairness of consumer outcomes. Assimilation of professional competencies, ethics and commensurate consumer fairness outcomes are currently lacking within a regulatory framework that has for some time sidestepped such issues.

As such, it is not clear how the OSC would claim and effect accountability for the operation, credentialing and use of the FA title (or FP titles where these are displayed) or indeed if it wishes to do so. It is also unclear as to how securities regulators (OSC and CIRO) would accommodate the financial advisor title and the new representations and pretensions for professional conduct within current regulation and or oversee it with respect to industry cultural norms.

It is also unclear how regulation can possibly bind professional standards to regulatory standards or indeed use regulation to define professional standards per se. Even though regulators tend to set competencies that need to be met by education providers[22], regulatory standards have tended to benchmark off, to lesser (as in Canada's case) or greater extent (as we have seen increasingly in international jurisdictions), professional standards and industry best practices – this is especially so with respect to best interest standards that had evolved earlier within professional bodies. Additionally, professional standards evolve dynamically with evolving practise, technology and evidence base. It would seem odd for regulators to lead or constrain in this respect.

If credentialling is meant to bootstrap to "high proficiency standards[23]" to "give investors confidence that they are dealing with qualified and committed Financial Advisors[24]" how will regulators ensure that the credentialling standard remains a "professional standard"? If it is not meant to do so, then transparency over regulatory intent with respect to registrant-client relationships, as argued in this submission, is required.

Additionally, if we are to anchor off professional standards, are our regulators going to be monitoring professional standards and evolving good and best practices to ensure that regulation co-evolves at an appropriate pace?

[21] IIROC's Three-Year Strategic Plan and Priorities for Fiscal 2020, 19-0099. IIROC. https://www.iiroc.ca/news-and-publications/notices-and-guidance/iirocs-three-year-strategic-plan-and-priorities-fiscal-2020#toc-support-industry-transformation

[22] Note the FCA Review of appropriate qualification exam standards - Review of the FCA's appropriate qualification exam standards, Policy Statement PS17/11 (May 2017). FCA UK. https://www.fca.org.uk/publication/policy/ps17-11.pdf#page=100

[23] Huston Lake (April 2023). Setting standards for financial advisors and financial planners in Ontario. Wealth Professional - https://www.wealthprofessional.ca/news/opinion/setting-standards-for-financial-advisors-and-financial-planners-in-ontario/375339

[24] "Accreditation through New SRO will maintain high proficiency standards and give investors confidence that they are dealing with qualified and committed Financial Advisors," said Andrew Kriegler - More Financial Advisors in Ontario to Have Their Credentials Officially Approved (March 2023). CIRO OCRI. https://www.iiroc.ca/news-and-publications/notices-and-guidance/more-financial-advisors-ontario-have-their-credentials-officially-approved

Summary

Regulation is a reflection of both the present and future intended path of an industry and in this case the profession of financial or rather investment advising. Industry standards and current regulation are lacking in this respect.

This submission contends that the existing OSC and SRO regulatory structure is incomplete with respect to oversight of "professionalism" within the advice-based relationship space that the new Title and credentialing regime looks set to occupy. Without the development of regulation to advance advice-based relationships as opposed to the current broker-client anchor, consumers will continue to face asymmetry within a framework that is archaic and inherently unfair.

Critically, one must ask, how does the new title and the potential representation of the term "financial advisor", especially and within the context of existing regulation, industry norms and culture, change, if at all, the inherent relationship between registrants and clients?

The subject matter relevant to financial professional proficiency is extensive. The number of issues impacting the Title regime is likewise extensive and complex. While FSRA has developed a simplified construct, the Titles and certain minimum standards, the transfer of responsibility for the oversight and practise of the titles is far more complex, entering as it is within the yet to be fully developed regulatory domain of advice-based professional relationships.

Yours Sincerely

Andrew Teasdale, CFA