Thursday, 12 November 2020

Financial Services Regulatory Authority of Ontario
5160 Yonge Street, 16th Floor
Toronto, Ontario
M2N 6L9

Dear Sir/Madame

RE: Financial Services Regulatory Authority of Ontario's "Notice of Proposed Rule and Request for Comment; Proposed Rule [2020-001] Financial Professionals Title Protection", herein referred to as "The Notice".

The following is a written submission to the FSRA's "***Notice of Proposed Rule and Request for Comment; Proposed Rule [2020-001] Financial Professionals Title Protection***", herein referred to as *The Notice*.

Section 1 of the submission provides an overview of issues associated with *The Notice* and summarises many of the issues addressed in more detail in the body of the submission.

Section 2 outlines key confounding issues with *The Notice* itself.

Section 3 addresses the fundamentals of *The Notice* and issues associated with consumer confidence.

Section 4 explores advice and advising as a central issue.

Section 5 addresses the issue of advice and advising in Canada and current minimum standards with respect to securities regulation.

Section 6 addresses minimum standards, title usage and regulatory burden.

Section 7 references key differences between *The Notice* and the Final Report of the Expert Committee.

Section 8 reviews international regulatory best practises and associated issues.

This submission is largely critical of *The Notice* and its proposed rules. This stance is principally due to the failure of *The Notice* to acknowledge a best interest obligation within its titles' framework. A best interests standard is a fundamental tenet of professional advice and advising. It is however supportive of harmonisation of standards, the beginnings of a greater recognition of professional advice per se and the critical implicit acceptance of comprehensive financial planning standards as a centrepiece of retail financial services.

Part of the problem may lie in the fact that the FSRA lacks regulatory power over areas which impact the application of the rule, but the critical issue is an historical failure by securities regulators generally to explore and deepen their understanding of advice per se and the resulting restrictions on the accountability and importance of advice within securities

regulation. Compared to international jurisdictions Canada lies at the bottom of the pile with respect to acknowledging the importance of professional advice and the intricacies and integrity of best interest practises. The standards associated with *The Notice* may deepen this disparity of standard.

Regulatory failure to explore alternatives and options to the restrictive practices of a product and transaction distribution framework is the single most important failure of regulation with respect to its inattention to the development of the public interest and especially investor protection.

This submission is however deeply supportive of the consultation process itself which was open, transparent and helpful. Engagement with the MOF and the FSRA was helpful, clear and direct. Responses were quick, detailed and clear and sufficient opportunity was provided for participants in the consultation to question and express opinions.

1. Overview

We cannot look at professional financial advice and its proposed regulation from the viewpoint that Ontario's and Canada's regulation of advice and ethical conduct are fit for purpose. We also need to look at the following:

- International regulatory development and global best practises, including global academic research on fiduciary standards, professional competencies, consumer expectations, asymmetries, and behavioural and neurological influences on decision making.

- Those professional bodies that have evidenced a long history of high professional standards and ethical conduct and the development of rigorous educational and evidence based/informed foundations that support their underlying competencies and standards of conduct. Ultimately professional standards should lead regulation.

- Consumer advocates and consumer interest groups that have long argued for change. If *The Notice* is to succeed in encouraging trust and confidence in the Titles regime it will need to resonate with consumer concerns.

- Gaps and inadequacies of Canadian regulation with respect to advice and advising across the spectrum of financial services, in particular a narrow focus on securities within both the advising and dealing registrations.

UK regulators started to address the divide between financial advice and products back in the 1980s ([1],[2]). Best interest standards for independent financial advice arguably started to appear in the UK in the 1990s and moves to formalise standards, professional and ethical, post 2008, have proceeded in the UK, Australia and Europe. The US Investment Advisers Act (1940) and associated case law have long since set the benchmark for fiduciary standards for personalised financial advice, discretionary or not in the US and the highly regarded CFA Institute has long argued for best interest standards for personalised financial advice.

The US was recently on the cusp of introducing a best interest standard for broker dealers but has since reverted to a lesser best interest standard. This move has attracted critical response from consumer groups and professional organisations. Confusion over the difference between suitability standards and their client first remits vis a vis true best interest standards abound.

International jurisdictions have also had strong legislative support for the development of best interest/fiduciary standards in financial services. Much work has also been spent developing wider associated issues, especially with respect to vulnerable investors[3].

One thing that is clear from appraising these many important perspectives is just how unclear the intent of the FSRA's proposed rule and its regulation is.

- Is it an attempt to acknowledge the wider scope of advice beyond the narrow confines of security suitability determination, to properly regulate advice and address the regulatory failure to do so?

[1] https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1689&context=jil
[2] https://www.ftadviser.com/article/22627/print-view
[3] https://www.fca.org.uk/publication/guidance-consultation/gc19-03.pdf

- Is it an attempt to address this regulatory deficiency, to properly frame and professionalise the market for financial advice, to define its standards, competencies and conduct to meet professional body recommendations and consumer needs?

- Or, is it an attempt to harmonise regulation of financial services (banking, insurance, mortgage, securities, financial planning) in Ontario via one common minimum standard?

  Certainly, from the FSRA perspective, with its wider financial services remit, and given the issues in the banking sector uncovered by CBC and evidenced in a number of FCAC reports, establishing minimum standards across the spectrum is a valid objective.

  But it all depends on those minimum standards and whether we can and should codify them as professional. The omission of the term trust in conjunction with the use of confidence suggests that the standards may not be sufficiently high as to warrant a professional standard with best interests at its heart.

I ask these questions because based on a review of international best practises the proposed rule arguably places Ontario at the bottom of the international pack in terms of standards, consumer protection, accountability and transparency over the quality and nature of advice itself.

The only jurisdiction that seems to match a harmonised minimum standard is that of New Zealand. Here recent legislation has sought to harmonise regulation and educational standards for the insurance, mortgage, banking and securities sectors. In New Zealand there is also a client interests first standard for non-discretionary advice and a best interests standard for discretionary investment managers, in spite of critical comment from professional bodies and consumers. In point of fact the recent act in New Zealand is a significant step forward in that there were no existing qualification requirements for many financial advisors in insurance, mortgage and sectors such as banking (RFAs/QFEs).

Why are these questions important?

There are many reasons, but one of them is to hold the FSRA accountable for the stated rationale of the proposed rule(s) and to properly attribute the influences that lie at its root. The extent to which the consumer can place trust and confidence in *The Notice* and its titles is important.

The Notice itself appears to state the following reasons for the proposed rule itself:

> "*Concerns have been raised by consumer and investor advocates about the wide array of titles and credentials currently used by individuals operating in Ontario's financial services marketplace, and how it has contributed to confusion over title usage*.
>
> *The absence of a regulatory framework governing the use of titles has also led to questions about the expertise and knowledge of individuals providing financial planning and financial advisory services*.
>
> *The requirements included in this Rule aim to establish minimum standards for use of the Financial Planner and Financial Advisor titles so that consumers can have confidence in the quality of the services they receive from individuals using these titles.*"

Consumer advocates have neither been asking for a consolidation of titles, nor a regulatory framework for titles. They have not been asking for minimum standards for title users in general, although standards and titles are of relevance.

Consumer advocates have been arguing for higher standards and greater accountability for advice, thereby holding the users of titles accountable to their representations and the scope of their service. Specifically, they have been asking for a best interest standard with attaching fiduciary duties that are relevant and encompassing of the scope of advice and services represented. To promote the regulation as something that focused only titles and that has evolved in direct response to consumer concerns with respect to titles alone is incorrect.

The truth is we do need professional standards. The move to broaden the accepted nature of financial advice via the inclusion and regulation of financial planning is most welcome and significant. Legislation is indeed needed to formalise advice and its regulation, to set professional standards and to raise the ethical conduct and competencies of registrants. This is required both at the firm and the advisor/er level. We need at the very least to demarcate those engaged in sales relationships from those engaged in and/or representing "advising as the primary foundation for any and all transactional outcomes".

We also need to harmonise standards of financial advice across the various sectors that are currently able to provide advice in spite of the limitations of the construct. Perhaps the FSRA's Notice should have considered a bifurcated approach a) a general minimum standard to harmonise regulation across the many silos and b) a secondary professional best interest standard for those advisors/ers willing and able to adhere to fiduciary standards.

The Notice's proposed duties for professional financial planners and financial advisors do not include a best interests standard. Introducing a best interest standard for advice and acknowledging the important fiduciary duties of loyalty and of care would go a long way to satisfying professional and consumer representations and concerns. Securities regulation does not explicitly provide for a professional standard with respect to financial advice and the proposed rule does at least introduce this.

Most in the industry are registered as dealing representatives and dealing representatives are noted as salespeople. The scope and accountability of advice provided by dealing registrations is poorly defined as is the wider dimensions of personalised advice generally. This needs to be addressed before we can start educating the consumer as to what the new titles actually mean in substance and application.

As it is the proposed rules, which effectively seek to establish advising as a regulated activity across the registration spectrum is in conflict with current regulation. Current regulation does not recognise non-discretionary roles as advising per se and advice irrespective of registration capacity is still overly focused on securities. *The Notice* therefore needs to expand on what it sees as advice and its scope and how this "advising" will be accommodated within regulation and to what extent.

> If we fail to acknowledge advice as a construct requiring integrity and limit best interests to discretionary portfolio management, more or less, we effectively acknowledge that fundamental, at times comprehensive and in certain instances complex, financial analysis cannot be conducted with the best interests of the client at hand. The root objective of advice should always be fundamentally in the client's best interests. This is the objective of professional training and professional development.

> With respect to current regulation the perception is that this focuses not on the higher duty of the advice process itself but on transactional discretion alone.

Are we talking about professional sales relationships or professional advising relationships?

The CSA have just come to the end of a (decades) long appraisal of financial advice including consideration of a fiduciary standard/best interest standard. It has decided in favour of a client interests first standard that is absent fiduciary duties and the retention of conflicts of interests. This standard remains essentially transaction focused and retains the foundational conflicts of interest that would vitiate the development of professional financial advising services. This decision disassociates Canadian regulation from a) broad international regulatory trends, b) established professional standards and c) academic research into consumer interaction with financial services.

As such, this submission, while supportive of harmonisation of standards, of recognising financial advice and in particular with respect to formal acceptance of financial planning as an important profession, is not wholly supportive of *The Notice* **and its proposals**.

The proposed rule lacks an overarching best interest standard for professional advice and appears to suggest that the proposed minimum standards will not be dissimilar to current regulatory standards for dealing representatives.

Is the primary objective to professionalise and acknowledge financial planning and financial advising, to fill a gap left by regulation, or is the primary objective to set a minimum standard for all those engaged, in some shape or form, in financial services?

In this respect the rule lacks specific definition of its boundaries and its objectives with respect to some of the most important issues facing consumers of financial advice, the professional bodies that set standards for firms and practitioners and, for regulators and legislators charged with investor protection in a constantly evolving and complex universe.

Does the proposed framework really help establish a professional standard of conduct and competency for advice and is it able to evolve into a framework in which consumers can trust and have confidence in?

Addressing harmonisation is an important objective, but the proposed rules appear to have left out the single most important element impacting the consumer, their best interests.

2. Key issues with The Notice

There are a number of key issues with respect to *The Notice* itself.

- While the scope of the financial planner title is reasonably clear, *The Notice* does not fully address that of the Financial Advisor. The consultation documentation notes a wide range of stakeholders including life insurance. Unifying standards and expectations under different regulatory silos is unclear. Product restrictions impact the ability to provide professional advice and are a conflict with a best interest standard and a best interest expectation. How will regulation and the proposed rule address this? If harmonisation is the primary impact this aspect of the proposal is underdeveloped. Many issues associated with product silos have yet to be addressed in Canada.

    - Should those primarily addressing product sales be considered financial advisors especially if their scope is limited? An advisor should have high level expertise and sufficient experience to be able to address the comprehensive and the simple. This is something the CSA has already ruled against.

    - A professional standing would imply that advisors be able to provide both comprehensive and simplified advice. The minimum standards noted in the baseline competency profiles suggest otherwise. The scalability of the proposed rule and standards is unclear.

- The regulation is narrowly focused on the regulated use of specific Titles, not their conduct which falls to regulators and to which current regulation is ill suited to address. This is partly to do with the regulatory structure and the separate regulation of different areas of personal financial need (insurance, pensions, securities etc).

- The proposed regulation appears overly focused on consumer confidence in advice than the quality and accountability of advice itself. Confidence as noted is important, but confidence is an outcome dependent on standards and accountabilities. Aspects of consumer confidence may well be improved, especially with respect to areas that are not currently regulated or where competency, education and experience requirements may be lacking in comparison to minimum standards established in securities markets. An assessment of comparative standards in all areas likely to be impacted is lacking and would be useful to help inform consumer advocacy.

- There is both uncertainty (SRO credentialing) and concern (omission of best interests) over minimum standards of conduct under which Title holders would be regulated and those expected of credentialing bodies.

    - The baseline competencies in *The Notice* for credentialing are likely at odds with the principles, experience requirements and standards of conduct that many professional bodies set for their members.

    - Allowing SROs to be credentialling bodies adds to confusion over the intended professional standards associated with the Titles. Will those with Titles be held to higher regulatory, ethical and professional standards? Or, will all registrants who currently satisfy basic registration requirements be titled? While the titling process may be of benefit in areas where there are currently no minimum

standards the result in established areas of regulation is ambiguous. Do we risk misleading consumers over critical expectations?

- The proposed standard of care "professionally, fairly, honestly and in good faith" is below that of many professional and international regulatory bodies especially with respect to investment advice. While it does add the term professional (See MIFID), which is an arguably an important overarching standard, the omission of best interests (MIFIDII, Australia, UK, US IA Act1940 (Implied)) would allow it to be accommodated within existing regulatory standards for dealing registrations. These standards are for sales and not advising relationships.
    - Credentialing bodies only need to comply with the standard of care described in *The Notice*. For some professional bodies this would mean complying with a lower standard than they require their members to be held to.
- Canadian securities regulation has not acknowledged advising capacities performed by many of its registrants and is more appropriate for a transparent transactional relationship. It is difficult to see how a Title regime emphasising professional advice could be effectively implemented in Ontario without definition and acceptance of advising per se, irrespective of whether this is currently a transactional discretionary role or a non-discretionary transactional role. One could argue that even within advising registrations that understanding of advice and its accountability is underdeveloped.

- There is uncertainty with respect to educational, competency and ethical and professional standards of credentialing bodies under *The Notice*.
    - Baseline competency profiles appear benchmarked off transactional suitability standard information requirements and parameters. For example, "confirm a client's risk profile" is different from understanding and performing risk profiling, understanding behavioural biases, educating and guiding the client and establishing best interest outcomes with respect to risk profiles and preferences. "Understanding ethical practices" is different from a code of ethics and professional standards and this section could be met from existing educational registration requirements[4].
    - This type of minimum standard is better addressed by a regulator setting standards and registration requirements.
    - Allowing other organisations to be independent credentialing bodies for regulatory titles does not appear to have a precedent and there may be good reason for this.
- The proposed regulation is not definitively clear with respect to its statements concerning minimum standards and the scope of its comments with respect to regulatory time/cost burdens.

[4] https://www.iiroc.ca/Rulebook/MemberRules/Rule02900_en.pdf

- Imposing additional standards onto existing regulation of certain registrations is different from codifying new regulations and differentiating registrations (i.e. allowing for non-discretionary advising and codifying advice as part of the regulatory framework outside of discretionary portfolio management).

- There is an opportunity to both harmonise minimum standards at one level and to introduce higher professional standards held to a best interest/fiduciary standard at another. The FSRA in its Notice is missing an important opportunity to better define advice and its responsibilities and to allow the development of a competitive market in professional financial advice.

- Harmonising minimum standards would create additional regulatory burden for those areas that lie below the standard while incurring no additional "regulatory" cost for those lying at the standard. Current baseline competency profiles suggest competencies would lie at or around current standards noted in NI 31-103 and NI 31_103CP.

    - The additional costs for those already satisfying minimum standards would be limited to the costs of the Title process and the additional costs that a credentialing body would need to incur to monitor and police its responsibility.

    - If a regulatory body were to be a credentialing body and minimum standards were already in situ, the lowest cost option for credentialing would be afforded by the regulatory body. Professional credentialing bodies would still be responsible for their own membership oversight and for dealing with professional complaints.

- The existing regulatory framework does not acknowledge accountability for financial advice or investment advice outside of discretionary portfolio management (and even here this may only be indirectly re transactional discretion) and lacks clarity as to what constitutes advice.

    - This is the biggest barrier to the effective implementation of Titles denoting professional financial advising and planning and its evolution, as evolve it surely must do. The CSA clearly do not want to represent dealing registrants as professional financial advising registrants and have not entertained any options that would allow for experimentation and exploration of regulatory change.

    - This central issue raises public interest concerns regarding investor protections and misleading communications and representations of service and accountabilities.

    - *The Notice* would benefit from an analysis of financial advice, registration capacities and regulation of advice with respect to the impact of *The Notice* itself. This would provide clarity for consumer and investor advocates.

- There is lacking a harmonised view and vision of regulation between the various product lines, in particular insurance based and non-insurance based channels.

- The concept of a financial advising or financial planning registration capacity is not difficult to accept or understand. The concept of two titles that must cover the gamut of and scalability of financial advice and financial planning itself though is difficult to comprehend.

The Notice and its proposals mirror more a uniform titling standard for industry registrants pursuant to a reorganisation of self-regulatory organisations and possibly wider consolidation and centralisation of other components of financial advice, notably insurance and insurance-based investment advice.

The focus on minimum standards that arguably match those in situ for the securities industry, which would allow SROs to be credentialing bodies supports this view.

As noted, harmonisation is a valid and critical objective. But the association of professional financial advising with this harmonisation without an attendant best interest standard, at least as an optional and more "onerous" registration capacity, is not.

3. The fundamentals of the Notice

From the title of "*The Notice*" itself the prima facie focus of the proposed regulation appears to be on financial professionals and the protection of specific titles (FP and FA) used by financial professionals.

But what is most important to investors?

- The names by which they address those on which they depend for financial advice?
- The trust and confidence they have in the advice?
- The integrity, competency and accountability of the advice itself?
- The outcomes of the advice, its service processes and its accountability?

This submission contends that outcomes and their accountability ultimately matter most and that advice, its integrity and competency is foundational to both outcomes and trust and confidence in Titles. Titles that imply professional advising without bona fide professional standards and competencies and an effective and comprehensive regulatory framework to hold their representation accountable is of questionable value.

> *The Notice* mentions the importance of confidence in financial advice as a public interest matter but fails to address the issue of trust. Trust in financial advice is one of the most important issues in regulation.
>
> > "investors cite "trust" as the most important determinant in seeking a financial service professional for advice[5]"
>
> Trust also has important neurological and evolutionary components that need to be addressed by investor protection.

In truth the problem has never been one of protecting titles but protecting investors from misrepresentations of advice and standards. Titles without standards and accountabilities are the issue.

In the FSRA's educational promotion of the new titles rule it will need to be clear the extent to which consumers and investors can rely on titles and their supporting professional competency and ethical standards, including regulatory oversight.

Addressing professional advice and registrations associated with titles, including their regulatory and professional accountabilities, competencies and standards is much needed in Ontario. Ontario and Canada in fact lag behind the rest of the world with respect to regulating advice and supporting the development of professional advice and conduct standards.

[5] https://www.rand.org/content/dam/rand/pubs/working_papers/WR1000/WR1075/RAND_WR1075.pdf

Consumer trust and confidence

The text of *The Notice* emphasises consumer confidence "in the quality of services" and in the "minimum standards of expertise and knowledge when providing financial planning or advisory services".

Confidence should be dependent on outcomes driven by professional and educational standards, expertise, service quality, accountability and regulatory enforcement and development of regulatory standards.

Titles on their own are not the type of input that would materially impact consumer confidence. Can educational standards likewise be the most important aspect of change.

Educational and professional standards may well conflict with the intent of the Titles regulation if there is no regulatory adjustment to how investment advice is regulated and held accountable.

Without a fully developed conceptual model of advising within a regulatory, firm and professional framework we risk attempting to influence perception rather than the substance.

The above questions are relevant if Titles themselves have no meaningful impact on standards, competencies, ethics and/or accountability. There is no reason why a Title regime alone will change consumer outcomes and consumer confidence in advice.

In order for Titles to raise consumer confidence this must imply a measurable improvement in conduct, in the standards and duties, process and professionalism to support confidence. Otherwise we risk an additional regulatory burden with no other purpose than to better frame what already is.

Trust and confidence may well be one measure of the effectiveness of the output of a professional standard and a higher standard regulatory environment. But is this the real issue?

The Notice discusses confidence but omits trust and trust is an important component in an advising relationship. Emphasising trust however would change the nature of the credentialing criteria noted in 5(1) and 6(1) to include in the best interests of the consumer/investor/client.

Australia's FASEA in its "Financial Planners and Advisers Code of Ethics 2019 Guidance" does not shy away from promoting trust

> "*By applying the Code and acting ethically in the service of each of your clients, you will contribute to building public trust and confidence in your profession.*"[6]
>
> *The Code requires financial advisers to act in a way that demonstrates, realises and promotes the following five values: (a) Trustworthiness; (b) Competence; (c) Honesty; (d) Fairness; and (e) Diligence*
>
> *The Code stipulates that these values are paramount and that all provisions of the Code (which includes the Standards) must be read and applied in a way that promotes the values.*

[6] https://www.fasea.gov.au/wp-content/uploads/2019/12/FASEA-Financial-Planners-and-Advisers-Code-of-Ethics-2019-Guidance-1.pdf

Acting to demonstrate, realise and promote the value of trustworthiness requires that you act in good faith in your relationships with other people. Trust is earned by good conduct. It is easily broken by unethical conduct. You earn trust by being reliable in your relationships with others, and by doing what you say you'll do. Trust requires having the courage to do what is right, even though you may suffer personal detriment by doing so. It requires that you are loyal to each of your clients, and that you keep client personal information entrusted to you private and confidential. It requires that you should not subordinate your duty to your client, or your client's lawful interests, to your own interests and any obligation you may owe to a third party, including an employer or a financial services licensee.

4. Advice a central issue

If we believe that advice is central to the Title's framework, it must be properly addressed, framed, scoped, and appropriately regulated. The failure to define and scope advice is a weakness of the proposed regulation, as it is a weakness of current regulation.

The continued failure to consider advice as a process deserving of a true best interest standard is a continuing concern.

If the roots and fundamentals of advice are insufficiently robust to deserve a best interest standard, then what is the standard for advice itself?

The FSRA is looking to set standards for Title usage and to approve credentialing bodies with requisite conduct requirements and professional standards. Setting minimum standards for the provision of financial advice within the context of say a dealing registration, with no wider fiduciary accountabilities, is a different mechanism from setting a minimum standard for professional advice with such accountabilities. Indeed one of the benefits of professional bodies is to allow regulators to defer to professional standards as benchmarks for regulation and registration.

How high or how low those standards, competencies, conduct requirements and professional standards are set is key. Many professional standards are arguably much higher than those of current minimum regulatory standards, many of which are framed around the exigencies of products and sales-based relationships. Globally professional standards are already at a best interest level or are moving towards one. Some legislators and regulators are pushing outwards and exploring professional duties that extend beyond the amorphous term "best interest" itself.

In Ontario, and in Canada generally, advice and advising is a difficult concept to pin down within legislation and regulation. Despite various waves of regulatory reform, advice, its scope and its accountability remain poorly defined.

If you want to better define advice and its regulatory standards you need look no further than the submissions of professional bodies and the work of international regulators and legislators; the CFA Institute for example has been supportive of fiduciary standards for personalised investment/financial advice, discretionary or not, and critical of the lesser suitability standard. The FCA produce countless detailed papers on various aspects of consumer outcomes and Australia has developed important reports on financial service standards and ethical codes for advisors/ers.

Consumer advocates and consumer focused organisations have also repeatedly supported best interest standards.

The modernisation of the transactional/distributional model in Canada, culminating in the Client Focused Reforms, has brought retail financial services as close as it possibly can to an accountable product advice-based model. It has yet to fully develop a professional, ethical, competent model accountable and capable of delivering best interest advice-based outcomes.

In Canada, the only area of financial services which can be confidently accorded a best interest fiduciary standard is where the registrant is a portfolio manager with discretionary authority regulated directly by a securities regulator. This is at odds with most other jurisdictions and at odds with the views of most credible professional bodies. It is essential, in order for the

transaction to have integrity, for advice to be constructed within a framework that optimises the client's best interests.

The Titles regulation itself is prima facie simple: two titles, select credentialing bodies, set expected standards, police those who use a Title without authorisation and let the regulators and professional bodies regulate and oversee conduct. The reality is somewhat different. Depending on the standards set many professional bodies may not wish to engage. Differing standards amongst credentialing organisations will confuse and mislead.

At the moment irrespective of the legislation there is no framework within existing regulation to actually monitor the conduct of those authorised to hold titles if these titles represent bona fide advising capacities.

> A good deal of the complexity in responding to this consultation is the uncertainty over the scope, the accountabilities, the competencies, the regulation and the ethical and professional standards and the already increasing divergence between Ontario and international jurisdictions.

With respect to Canadian securities regulation, you are either an advising registration held to fiduciary standards or you are a dealing registration held to a lesser "suitability standard". A 2019 CFA article with comments referencing the US regulatory system, which is the most similar to Canadian regulation, addresses this important distinction:

> "The carefulness with which Americans are given investment advice has become a topic of great interest since the 2008 recession. In particular, debate often centers on the standard of care investment professionals owe to their clients. For example, investment advisers are required to act in the best interests of the client (the fiduciary standard), whereas brokers only have to provide advice that aligns broadly with client goals and preferences (the suitability standard)."[7]

Canadian regulators have decided not to institute Fiduciary standards (2012 Consultation) as well as a weaker overarching, product focused, best interest standard (2016 consultation) and have moved to an ambiguous and confusing "clients' interests first" standard.

A recent NASAA survey of US broker dealers and investment advisors with respect to Regulation Best Interest also found an empirical difference between the two standards (suitability v fiduciary):

> "found notable differences between broker-dealers operating under a suitability standard and investment advisers operating under fiduciary duties…Investment advisers generally took more conservative investment approaches overall, avoiding higher cost, riskier, and complex products…reported more robust due diligence, disclosure, and conflict management practices."[8]

This submission recommends that in the securities area especially, a new registration to accommodate those advisors who wish to meet a best interest standard and to represent their

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[7] https://static1.squarespace.com/static/59e8d89d914e6b37450c946a/t/5dd5d3b041a56d7f764a19ce/1574294448786/2019-Q3_FAJ+Brokers+or+Advisers.pdf

[8] https://www.nasaa.org/55758/nasaa-releases-results-of-benchmarking-initiative-to-help-measure-effectiveness-of-regulation-best-interest/

advice in the context of competent, professional and ethical advice be set up within current regulation. Protecting the use of advising Titles from sales and dealing registrations and to allow their use for advising registrations should be an objective.

The complexity and scope of planning and advising

Personal financial advice and advising, whether this is comprehensive financial planning or investment planning (which uses many of the FP inputs) addresses a wide construct: the accumulation and deaccumulation of capital, the planning and management of capital with respect to accumulation and deaccumulation, the insurance of risks with respect to future flows and the associated estate planning and bequests. Complexity is added for those with businesses, complex pension arrangements etc, but all these components are central to addressing a person's best interests.

At one level a professional adviser should be aware of this complexity, their interdependencies and effects. While the immediate scope of a professional may be narrow, they need to be aware of missing informational components and the impact of their advice and recommendations on other aspects of the financial situation.

Much of the work that impacts asset allocation and the security selection, for example, occurs well before the product/security even enters the frame. All components of financial advising are connected professionally. To discount the importance of this analysis as not worth being conducted in the client's best interests lacks clear logical foundation.

A professional financial advisor is someone who is able to address comprehensive and complex scenarios and knows the limits of their own expertise and ability. Expertise should also be scalable, and at the same time be able to provide simplified advice for those with less complex needs. Costs matter and trade-offs between comprehensive advice and simplified solutions need to be made. This is also part of the professional's remit. Importantly the professional frame is also a firm construct as opposed to purely an advisor/er construct; scalable components of best interests can be met by the firm from a variety of competencies and areas of focus.

5. Advice & advising in Canada

What is considered advising in Canada and especially in Ontario with respect to the new proposed rule?

Current representations of advice and advising

In the CSA's Investor Tools[9] it addresses "Choosing An Adviser" but fails to explain the important differentiation between trading and advising:

> "In Canada, anyone trading securities or in the business of advising clients on securities must be registered with the provincial or territorial securities regulator, unless an exemption applies. A securities regulator will only register firms and individuals if they meet certain standards. The category of registration tells you what products and services a firm or individual can offer."

The document "understanding registration[10]" show individual registration categories and these are:

- Dealing Representative - A person that buys or sells investment products on your behalf based on your instructions. What they can sell or buy depends on the registration category of the firm that employs them.

- Advising Representative - A person who provides advice on investment products. They can manage your investment portfolio according to your instructions. They can also make decisions and trades on your behalf. Advising Representatives are employed by Portfolio Managers.

    - Associate Advising Representative - A person who provides advice under the supervision of an Advising Representative

The information provided does not differentiate between what a dealing representative and an advising representative can provide with respect to advice, or what the accountabilities and responsibilities are with respect to the advice provided by them. Selling and advising are clearly noted as two distinct roles. However, an advising representative does not need to be a discretionary position based on this definition even though the CSA appears loathe to develop an advising registration for non-discretionary roles.

Standards are considered important and the differing standards for an advising representative and a dealing representative are yet to be clearly defined and made transparent. This confusion needs to be addressed, one way or the other, as part of the implementation of any new rules.

In its document "Working with a financial adviser[11]" the CSA provides the following spectrum of advice:

[9] https://www.securities-administrators.ca/investortools.aspx?id=84
[10] https://www.securities-administrators.ca/uploadedFiles/General/pdfs/UnderstandingRegistration_EN.pdf
[11] https://www.securities-administrators.ca/uploadedFiles/General/pdfs/Working%20with%20an%20adviser%20web_ENG_2012.pdf

> An adviser can help you: • set your investment goals • build an investment plan • design a portfolio • choose suitable investments • track your progress, and help you adjust as necessary

All the above components, with the exception of choosing suitable investments, are rooted in the advice process including investment and portfolio construction planning and management disciplines. Yet there is no mention as to whether these are roles of a dealing and/or an advising registration or the accountabilities and reliance implicit in the process. The regulatory disclosure is vague.

The Government of Canada website already uses the title financial advisor in an FCAC web page "Choosing a Financial Advisor"[12]. It defines the scope of financial advising as follows:

An advisor can create a detailed financial plan, which involves:

- assessing your current situation
- determining your present and future goals and needs
- giving advice on the financial products that are right for you
- reviewing and updating your investments periodically

While the above omits determining asset allocation and portfolio structure, key to validating security selection, it does indeed suggest that a financial advisor is much more than a product/sales specialist. The emphasis here is on a detailed financial plan and both an FP and an FA should be capable of providing detailed written recommendations and analysis of financial circumstances and of their specific subject matter expertise.

The government of Canada site states that terms such as financial advisor and financial planner do not always mean the person "has specific qualifications, expertise or certifications". It is much clearer about financial planning designations. The issue of definition lies mainly with "financial advisor":

> "A **financial advisor** is a general term that can be applied to anybody who helps you manage your money. This could include an employee of your financial institution, a stock broker or an insurance agent."

This lack of consistency in terms of representation, expectations and standards of advice and outcomes remains a concern in *The Notice*. Harmonisation would theoretically address this issue specifically. Again, given the limited remit of the legislation and regulatory barriers, *The Notice* and the proposed rules does not address how conduct will be dealt with.

CSA Consideration of Titles

The CSA in its 2016 consultation (33-404) pondered the issue of titles. One option considered naming those registered as discretionary portfolio managers as "securities advisor – portfolio management" and those with non-discretionary accounts as "securities advisors". These two

[12] https://www.canada.ca/en/financial-consumer-agency/services/savings-investments/choose-financial-advisor.html

titles assumed non-proprietary or mixed product lists. Those with proprietary product lists would be termed securities salespersons.

> Note the emphasis on securities and not the underlying personal financial advice construct.

Another option considered was the use of "advisor" for portfolio managers and firms registered with IIROC with discretionary authority. All other non-discretionary registrations would be sales-persons, not advisors or advisers.

The first option considered non-discretionary registrants as advisors but only with respect to securities and the second option considered only discretionary activities as worthy of the name advisor. The final option was that existing registration categories (dealing and advising) would be used. It is unclear whether any of the options were being seriously considered by the CSA or whether they were merely formulations designed to attract comment.

The Client Focused Reforms do not nail down specific titles but rules against the use of misleading titles. You could argue that the proposed rules fall into the category of misleading titles, especially with respect to the public's existing confusion over best interest standards and relationship accountabilities.

Client focused reforms

The Client Focused Reforms[13] noted that titles and designations were part of longer-term projects, as were competencies.

Within "REFORMS TO ENHANCE THE CLIENT-REGISTRANT RELATIONSHIP (Client Focused Reforms) NOTICE OF AMENDMENTS TO NATIONAL INSTRUMENT 31-103 AND COMPANION POLICY 31-103CP[14] there is no mention of the advising scope of non-advising registrants. Advising is mentioned 165 times, 114 times are in the context of advising or associate advising representatives. The term advising also crops up 19 times in the phrase dealing or advising and 1 time in advising and trading.

The CFR's prescribed component structures for suitability and suitability determinations are arguably below those of many professional standards.

The CSA is not explicit as to why it does not allow an advising registration for non-portfolio manager registrants providing non-discretionary services even though the process of personalisation of a portfolio is a much deeper process than security specific advice.

Emphasis within CSA rules is placed on discretionary decision making by portfolio managers, even though definitions of advising representative function allows for non-discretionary decisions. Emphasis within this is placed on proficiency and education and the CSA provides examples of functions and experience that would be accorded an advising registration.

Interestingly when addressing adviser registration categories (7.2, NI 31-103) the companion policy guidance emphasises personalisation of advice:

[13] https://www.osc.gov.on.ca/documents/en/Securities-Category3/ni_20191003_31-103_reforms-enhance-client-registrant-relationship.pdf
[14] https://www.osc.gov.on.ca/documents/en/Securities-Category3/ni_20191003_31-103_reforms-enhance-client-registrant-relationship.pdf

> "The registration requirement in section 7.2 applies to advisers who give "specific advice". Advice is specific when it is tailored to the needs and circumstances of a client or potential client. For example, an adviser who recommends a security to a client is giving specific advice."

In this context the provision of advice personalised to the needs and circumstances of a client is considered advising. The CFA Institute has long argued for best interest/fiduciary standards for personalised investment/financial advice, as per its own standards.

It is unclear, from the CSA perspective, what differentiates personalised advice in a dealing registration from personalised advice within an advising registration, even where a registrant possesses comparable experience, education and designation.

So, what, in terms of competency, education, oversight and experience would the CSA require to elevate dealing registrations from a dealing non advising registration to an advisory advising registration?

The FSRA's Notice should, if it is to address regulatory standards, detail the way it complements and supplements existing regulation with respect to this issue. Does it create a higher level, an additional registration, differences in accountability and scope of service?

This spectrum of advice is neither addressed in securities regulation and is unaddressed in *The Notice* itself.

NI 310-103 bafflingly assumes that it is clear that dealing/trading and advising categories are different, that advice for both categories are a) treated differently and b) that this difference is understood.

Client focused reforms and a best interest standard

Many professional bodies and international jurisdictions have introduced best interest/fiduciary standards governing the provision of personalised advice and have removed transactional conflicts of interest. Additionally many jurisdictions have also raised competency and professional standards of its registrants, a prerequisite for fiduciary standards.

This three pronged approach that includes a) a best interests standard, b) professional standards and competencies and c) removal of remuneration dependent on the transaction and the product has allowed the financial framework to fully address the competencies and processes needed to provide advice. Such a framework is scalable.

The FSRA's Notice, mirroring the CSA's rules, does not provide for a best interests/fiduciary standard for non-advising registrations? Conflicts of interest remain central to retail financial services provision.

The CFR requires that the "interests of the client come first" and that this is intended to be a "broad, principles-based standard". The basic requirement is that when making "a suitability determination" that the client's interests come first.

What does this mean? This is what the CFR documentation said:

> "In our view, to put the client's interest first and to address conflicts of interest in the best interest of the client mean that the interests of the client are paramount. A registered

> firm and its registered individuals must put the interests of their clients first, ahead of their own interests and any other competing considerations. In the enhanced suitability determination requirement, we specifically used the words "put the client's interest first" to signal that there is not necessarily only one "best" course of action. We have included related guidance in the Companion Policy. We stress that the Amendments do not impose a fiduciary duty on registrants as a regulatory standard of conduct. "
>
> "when choosing between multiple suitable options, the broad standard means that registrants must put the client's interest before their own interests and any other competing considerations, such as a higher level of remuneration or other incentives"
>
> "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."
>
> "the CSA have no default expectations for registrants to automatically select the lowest cost options to meet their suitability determination requirements. However, we expect an assessment of the relative costs of the options available to clients at the firm when making a suitability determination, as well as the impact of those costs."

The suitability determination resulting in "the action" is noted as being based on KYC information, security/product assessment, the impact of the action (including concentration and liquidity), and the impact of costs; the determination must also consider a reasonable range of alternatives.

Most of these factors would be a consideration in professional advice and execution, but the determination clearly omits the broader structural frameworks and processes used by professionals in planning, constructing and managing assets to meet financial needs.

There is nothing in the CFR suitability determination to suggest that the process is or could lie well beyond the transactional moment. The final CFR rules also incorporated a large number of amendments to initial suitability requirements, know your product, account monitoring and reassessment of needs and circumstances that one could argue place the overall standards at less than those required by professional bodies.

The second concern with current regulation is the continuing existence of remuneration conflicts of interest. Third party payments, internal compensation and incentives and proprietary restrictions are still allowed.

Placing the pay-off for advice on the transaction, and/or the number of transactions and securities recommended, clearly impacts the ability to put the client's interests first. Within the machine itself the client's interests are not fundamentally first.

> "An intermediary who seeks to 'stand in more than one canoe' cannot."[15]

The client's interest first principle has the appearance of a principle intended to remove the transactional and product conflicts from the decisions surrounding the product suitability determination to shapes the transaction in the client's interest.

[15] https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf

Unfortunately, the nature of product distribution and the operational and financial imperatives of organisations dependent on products and transactions shapes the foundational structures and processes of advice itself. Prior to the transaction the interests of the firm and the advisor shape and predominate. This is the framework on which the client's interests first principle sits.

The CFR therefore eschews a best interests standard replacing it with a construct that impacts the transaction point/suitability determination.

The US Regulatory Best Interests standard acknowledges this limitation. The use of the term advisor/adviser in the context of broker dealing capacities would be a violation of the regulation. The US regulation at least acknowledges that the narrow focus of the suitability determination is on the limited point of the transaction.

Within the CFR the interests of the firm and the advisor remain unaligned with those of the client/consumer. That the CFR attempts to remove the transactional conflict by requiring advisors and firms to better account for transactional remuneration and incentives, sets current minimum standards at odds with best professional practices that emphasise best interests and professional competencies and high ethical conduct.

Advising and associate advising representatives experience requirements

In the "REFORMS TO ENHANCE THE CLIENT-REGISTRANT RELATIONSHIP (Client Focused Reforms) NOTICE OF AMENDMENTS TO NATIONAL INSTRUMENT 31-103 AND COMPANION POLICY 31-103CP[16] the CSA refers to the proficiency requirements for an advising representative.

> "An advising representative may have discretionary authority over investments of others. Accordingly, this category of registration involves the most onerous proficiency requirements. We expect an individual who seeks registration as an advising representative to demonstrate a high quality of experience that is clearly relevant to discretionary portfolio management."
>
> "We may consider experience performing discretionary portfolio management in a professional capacity to be sufficient"
>
> "We may consider experience supporting registered portfolio managers or other professional discretionary asset managers to be sufficient to meet the relevant investment management experience requirement for registration as an advising representative. This may include: working with portfolio managers to formulate, draft and implement written investment policy statements for clients, and researching and analysing individual securities for potential inclusion in investment portfolios
>
> We may consider experience performing research and analysis of individual securities with recommendations for the purpose of determining their suitability for inclusion in client investment portfolios to be sufficient to meet the relevant investment management experience requirement for registration as an advising representative.

The same document refers to the same for associate advising representatives:

[16] https://www.osc.gov.on.ca/documents/en/Securities-Category3/ni_20191003_31-103_reforms-enhance-client-registrant-relationship.pdf

> "We may consider client relationship management experience with a registered portfolio manager firm to be sufficient…where the applicant has assisted portfolio managers in tailoring strategies for specific clients. This may include experience assisting the portfolio managers in assessing suitability, creating investment policy statements, determining asset allocation, monitoring client portfolios and performing research and analysis on the economy or asset classes generally"
>
> "We may consider corporate finance experience involving valuing and analysing securities for initial public offerings, debt and equity financings, takeover bids and mergers to be sufficient"

With respect to IIROC and advising and associate advising representatives:

> "IIROC registered representatives…may offer a broad range of products involving security-specific research and analysis of their own, in addition to meeting with clients to review and discuss know-your-client and investment suitability. We may consider this to be sufficient experience to meet the relevant investment management experience requirement for registration as an advising representative.
>
> "Other registered representatives may sell mostly or exclusively a limited number of model portfolios or "portfolio solutions" to clients based on their investment objectives, risk profile or other factors unique to the individual client. We may consider this sufficient experience to meet the relevant investment management experience requirement for registration as an associate advising representative"

In order to be accorded an advising registration the CSA looks to see relevant experience and professional qualifications and refers to these entry hurdles as being onerous. The FSRA's proposals clearly look to be a lesser standard. While the CSA's experience, educational and professional requirements are appropriate, the restriction of an advising registration to portfolio management and in particular to the restriction of a best interest standard to discretionary management are not.

If the FSRA is intent on harmonisation along minimum industry standards for product distribution it should also be concerned about developing higher standards and as such use the opportunity to expand the scope of advising registrations to include best interest standards.

6. Minimum standards, title usage and regulatory burden

The discussion of the importance and relevance of minimum standards is limited within *The Notice* and other documentation.

Specifying a minimum standard has benefits in terms of defining what the entry level requirements are for financial service registrants generally, irrespective of silo, as well as the objective of the standards themselves.

These minimum entry level standards may not necessarily be professional standards. This makes it difficult for professional bodies tying their designations, standards, competencies and educational profile to titles.

The text of *The Notice* states:

a. the "*primary objective of the framework is to create minimum standards for title usage, without creating unnecessary regulatory burden for title users"* and

b. "*Individual title users will be required to hold an approved credential from a FSRA-approved credentialing body, and will be required to meet conduct requirements and professional standards as set out by their respective credentialing body*

The Notice states that the framework is to create minimum standards for title usage without creating unnecessary regulatory burden.

It is unclear whether the "regulatory burden" referenced is that created specifically by Title regulation or additional regulation required to subsume Title protection and professional standards into the existing regulatory conduct framework.

Additionally, if harmonisation along minimum standards is the objective, that is to tie in all financial product advice across silos and regulators, then the exercise is not just about title usage but about one common and consistent standard for dealing registrations, irrespective of product or regulator. What is the minimum standard we can use to tie all these components together? This is different from what is the standard required for the provision of professional standards and competencies, which arguably are about either raising standards or setting separate standards for those wishing to represent such.

While regulation of conduct remains with the regulators and oversight of professional conduct remains with the professional bodies (will a credentialing SRO monitor professional standards) there is good reason to believe that FSRA regulation in this area will also be focused on limiting the need for regulatory change within the OSC and the SROs. If this is the case, and given there is consideration of allowing SROs to be credentialing bodies, then the minimum standards could well be those currently in existence in securities regulation.

The objective is therefore primarily harmonisation of minimum standards such that a title in one sphere translates to title use in others. The confounding problem is this assumes that minimum standards are already professional standards. This submission contends that current minimum standards are not in their totality professional standards, even though in part they may well be. This is especially so with respect to high level competencies, professional standards and ethical conduct. The CSA would appear to agree given in its refusal to enable best interest standards for all registrants and in its refusal to recognise non-discretionary advising as a specific registration capacity.

In truth, adhering to professional standards should already evince higher standards and a greater focus on processes and client focused outcomes. Those holding designations from professional bodies, who standards are higher than their regulators, should already act in accordance with the higher standard and be held to it. Minimum standards set by the FSRA might not translate into consistent minimum standards across the spectrum.

Regulatory burden may also not be the only burden. Advice based processes are not focused on transactional volume and transaction-based remuneration arguably conflicts with the foundational requirements of advice based processes. If we are to truly encourage professional financial advice we should also encourage investment in its foundations. Investment has both a cost and a return.

With respect to regulatory burden, if current OSC and SRO minimum standards are de facto equivalent to those noted in *The Notice*, the only additional burden for securities regulation is the costs of the credentialing process for a sum zero consumer outcome. Oversight of "professional standards" by regulators, determined by the rule, should incur no additional regulatory or firm burden if minimum standards are the same pre and post the rule.

In this instance the costs of the rule and the credentialing would be greater for professional bodies and those other regulators and sectors where minimum standards need to be raised. The costs and liabilities associated with the rule for professional credentialing bodies is uncertain, especially with respect to the realities of differing regulatory and professional standards that might enable members to adhere to a lesser Titles standard.

7. "The Notice" and The "Final report of the Expert Committee"

The consultation documents referenced the 2017 "FINANCIAL ADVISORY AND FINANCIAL PLANNING REGULATORY POLICY ALTERNATIVES" report.

This report commented on the lack of "high-quality Financial Planning or Financial Advice" and the "multitude of titles and credentials" that led consumers to be believe that financial planning and financial advice was held to a best interests standard. The report commented on the failure of the regulatory framework to address advice

They noted "three most glaring contributors to harm":

1. the lack of specific, harmonized regulation of financial planning and financial advice;
2. the confusing titles and credentials used by providers of financial planning and advisory services;
3. and the lack of an explicit obligation to act in the client's best interest.

The Committee also recommended that

- Individuals and firms should have "Financial Planning or Financial Advice activities regulated by their existing Regulator",
- that those "whose activities occur outside the current regulatory framework…have their Financial Planning and Financial Advice activities regulated by FSCO/FSRA."
- That the "OSC and FSCO/FSRA develop a harmonized regulatory framework governing Financial Product Sales and the provision of Financial Planning and Financial Advice services in Ontario.".

The committee also noted the "absence of a comprehensive regulatory framework" with respect to "duties of care, proficiency, quality standards and conflicts of interest". The committee also recommended a "universal Statutory Best Interest Duty that would apply to all individuals and firms providing Financial Planning or Financial Advice and Financial Product Sales in Ontario."

The current FSRA Notice falls short with respect to the committee's recommendations on a number of levels: the regulation of conduct under the proposed standards is undefined and uncertain, non-regulated activities are not addressed and a statutory best interests duty is not a recommendation.

8. International jurisdictions

Most professional designations and their associated professional bodies and/or organisations hold their members to a best interest standard, which is a fiduciary standard, and most international regulators have either a) already (and in many cases long since) moved to a best interest standard for the provision of investment advice, irrespective of whether this is discretionary or advisor, or b) have a separate designated category for the provision of investment advice. Indeed, even in those jurisdictions where a "client's interest first" approach is provided for, investment advice is a much more developed concept (New Zealand) than it is Canada.

In the US, the jurisdiction most similar to Canada's, where broker dealers are not held to a best interest standard for advice, only at the point of the transaction and for the transaction, registrants are not entitled to use the term advisor/er since this would misrepresent the nature of the service and violate the provisions of the relevant regulation (Regulation Best Interest).

If the current proposed Title protection regime were to proceed as is, it would solidify Ontario's regulation as being one with the lowest standards for the provision of financial advice and arguably the lowest investor protection.

If we look at the evolution of regulatory and legislative standards for the provision of personalised financial advice we see an evolution towards professionalism, education, higher competencies and standards of conduct. This evolution recognises one inexorable reality: the fundamental roots of advice are tied to exploring and defining the client's best interests.

But the international spectrum is not homogenous. It ranges from regimes that have either recently or long since instituted best interest standards to regimes that do not in certain capacities, but that do not allow registrants to use terms such as advisor when acting in those capacities.

An assessment of current international standards is provided below:

MIFID II

European regulation (article 4[17], MIFID II) specifically defines investment advice:

> (4) 'investment advice' means the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments;

And from "Understanding the definition of advice under MiFID"[18]

> "According to MiFID, investment advice means the provision of personal recommendations to a client, either upon his request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments (Article 4(4)). For the purposes of the definition of investment advice, that recommendation must be presented as suitable for that person or must be based on a consideration of the circumstances of that person (Article 52 of the MiFID Implementing Directive)."

[17] https://www.esma.europa.eu/databases-library/interactive-single-rulebook/clone-mifid-ii/article-4
[18] https://www.esma.europa.eu/sites/default/files/library/2015/11/10_293.pdf

Best interest standard: article 24 of MIFID has an explicit best interests standard[19]:

> Member States shall require that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in this Article and in Article 25.

The following is taken from "The Expanding Boundaries of MiFID's Duty to Act in the Client's Best Interest: The Italian Case"[20]

> "MiFID II confirms, in line with its predecessors, that investment firms shall act in accordance with their clients' best interest. Investment firms may be held liable in case they do not comply with this overarching fiduciary-style duty."
>
> "The basis of the conduct of business rules is an encompassing fiduciary duty (also referred to as a duty of loyalty or a duty of care) for the services provider to act "honestly, fairly and professionally in accordance with the best interests of its clients". This general duty is both an umbrella principle, which has been further developed in a range of more detailed conduct of business rules and a catch all principle, ensuring that conduct which is not regulated in more detail by specific conduct of business rules, is still covered by this general fiduciary duty."

European regulation not only has a best interest standard for advice but has separate channels of registration and service representation for those wishing to provide independent financial advisors. Those representing as independent financial advisors are not allowed to receive transactional remuneration[21].

> "any portfolio manager or firm which says they provide you with independent financial advice will no longer be able to accept or retain payments (fees, commissions or any other monetary benefit) or non-monetary benefits that they receive from a third party for a service they carry out on your behalf. Where they receive any payments from third parties in relation to the provision of investment advice or portfolio management to you, they have to pass it on to you."

Europe has a diverse range of differing regulations but MIFID sets the minimum standards. These minimum standards have a duty that includes professionalism and best interests, that provide for alternative registrations capable of providing higher level investment advice.

The US

The US "Regulation Best Interest: The Broker-Dealer Standard of Conduct[22]" is one that supports the business model of broker-dealers with their "different services", and "compensation models when providing investment recommendations or investment advisory

[19] https://www.esma.europa.eu/databases-library/interactive-single-rulebook/clone-mifid-ii/article-24
[20] Enriques, Luca and Gargantini, Matteo, The Expanding Boundaries of MiFID's Duty to Act in the Client's Best Interest: The Italian Case (December 15, 2017). The Italian Law Journal (Forthcoming), Available at SSRN: https://ssrn.com/abstract=3088832
[21]https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-726_enhanced_protection_for_retail_investors_-_mifid_ii_and_mifir.pdf
[22] https://www.sec.gov/rules/final/2019/34-86031.pdf

services to customers. Broker-dealers typically provide transaction-specific recommendations and receive."

The US regulation requires a disclosure "that the firm or representative is acting in a broker-dealer capacity" and "must disclose all material facts relating to conflicts of interest associated with the recommendation that might incline a broker-dealer to make a recommendation that is not disinterested, including, for example, conflicts associated with proprietary products, payments from third parties, and compensation arrangements."

> "a broker-dealer must exercise reasonable diligence, care, and skill when making a recommendation…have a reasonable basis to believe that the recommendation is in the customer's best interest and does not place the broker-dealer's interest ahead of the retail customer's interest."

This is very similar to the Canadian Client Focused Reforms with the exception that the US regulation states a best interest standard while at the same time requiring disclosure that the registrant and firm is acting in a broker-dealer capacity.

> *"The enhancements contained in Regulation Best Interest are designed to improve investor protection by enhancing the quality of broker-dealer recommendations to retail customers and reducing the potential harm to retail customers that may be caused by conflicts of interest.*"

The US does not shy away from fiduciary duties even with respect to broker dealers and their narrow scope of engagement:

> "At the time a recommendation is made, key elements of the Regulation Best Interest standard of conduct that applies to broker-dealers will be similar to key elements of the fiduciary standard for investment advisers. Importantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor."
>
> "Regulation Best Interest, as adopted, incorporates Care and Conflict of Interest Obligations substantially similar to the fiduciary duties of care and loyalty under Section 206(1) and (2) of the Advisers Act, even if not in the same manner as the 913 Study recommendations or identical to the duties under the Advisers Act"

But it addresses the difference between and advising model and a dealing model:

> "There are also key differences between Regulation Best Interest and the Advisers Act fiduciary standard that reflect the distinction between the services and relationships typically offered under the two business models. For example, an investment adviser's fiduciary duty generally includes a duty to provide ongoing advice and monitoring while Regulation Best Interest imposes no such duty and instead requires that a broker-dealer act in the retail customer's best interest at the time a recommendation is made. "
>
> "This difference reflects the generally ongoing nature of the advisory relationship, and the Commission's view that, within the scope of the agreed adviser-client relationship,

> investment advisers' fiduciary duty generally applies to the entire relationship. In contrast, the provision of recommendations in a broker dealer relationship is generally transactional and episodic, and therefore the final rule requires that broker-dealers act in the best interest of their retail customers at the time a recommendation is made".

The best interest standard is clearly denoted as being limited to the moment of the recommendation.

The Relationship Summary Proposal included a proposed rule that would have restricted broker-dealers and their associated persons (unless they were registered as, or supervised persons of, an investment adviser), when communicating with a retail investor, from using the term "adviser" or "advisor" as part of a name or title ("Titling Restrictions").323

Importantly the US rule has a specific comment with respect to the use of terms advisor and adviser for transactional based relationships:

> "the use of the term "adviser" and "advisor" in a name or title by (1) a broker-dealer that is not also registered as an investment adviser or (2) an associated person that is not also a supervised person of an investment adviser, to be a violation of the capacity disclosure requirement under the Disclosure Obligation as discussed further below."
>
> "Given that the titles "adviser" and "advisor" are closely related to the statutory term "investment adviser," their use by broker-dealers can have the effect of erroneously conveying to investors that they are regulated as investment advisers, and have the business model, including the services and fee structures, of an investment adviser. Such potential effect undermines the objective of the capacity disclosure requirement under Regulation Best Interest to enable a retail customer to more easily identify and understand their relationship. "
>
> "When a broker-dealer or an associated person uses the name or title "adviser" or "advisor" there are few circumstances in which that broker-dealer or associated person would not violate the capacity disclosure requirement because the name or title directly conflicts with the information that the firm or professional would be acting in a broker-dealer capacity. Therefore, use of the titles "adviser" and "advisor" by broker-dealers and their financial professionals would undermine the objectives of the capacity disclosure requirement by potentially confusing a retail customer as to type of firm and/or professional they are engaging, particularly since "investment adviser" is defined by statute separately from "broker" or "dealer.""

What is clear from the US regulation is that a) there is much greater transparency and honesty with respect to communications about the scope and accountabilities of advice, b) it recognises the fiduciary duties of agency even if narrowly specified and c) it does not condone the use of titles that would misrepresent either the scope of the service or the accountability of the service. In this respect the FSRA Notice is deficient but only because of deficiencies in Canadian securities regulation.

CFA Institute Comments Re: Regulation Best Interest (RIN 3235-AM35; File No. S7-07-18)[23]

The CFA Institutes submission to the consultation on the US's Regulation Best Interests is worth reviewing:

> " we recognize that conflicted advice and the investor confusion created by different standards of conduct used by advice providers has very real costs for investors. Over the years, we have encouraged the SEC to remedy these problems by adopting a uniform fiduciary duty standard for all who provide personalized investment advice to retail investors. ..We do worry that as proposed, the best interest standard (the "Proposed Standard") does little to clarify the boundaries of the solely incidental advice exemption for broker-dealers from nonincidental personalized investment advice. "
>
> "The standards of conduct that apply to broker-dealers and investment advisers has confused investors for many years, as have the actual services they can expect to receive from each….In fact, some investors do not know whether the suitability or fiduciary duty standard is higher. Given these hurdles, retail investors need clear and direct statements that educate them about conduct standards and help them distinguish between these standards and the services to which they attach. Otherwise, the significance of any new standard for broker-dealers will be lost on the average retail investor.
>
> "creating a broker-dealer standard for the provision of personalized advice requires guidance of what constitutes "personalized. Without such clarification, investors and broker dealers, alike, will remain confused about the boundaries of certain actions and the extension of applicable standards. "
>
> " investors will lack the clarity for knowing if the advice they receive is for their financial wellbeing, or is driven, instead, by the financial wellbeing of the broker and the financial firm that is selling them financial products. We therefore encourage the SEC to issue administrative guidance on the definition of "investment adviser" in section 202(a)(11) of the Advisers Act to clarify that providing personalized investment advice brings one within the definition."
>
> "The SEC reasons that the nature of the broker-dealer business model (and that it does not provide for ongoing relationships with its customers) does not warrant a fiduciary standard. Even if the SEC believes that broker-dealer advice is episodic, we would argue that should not preclude a fiduciary standard attaching at the time recommendations are made."
>
> "And perhaps of more concern is that if enacted, there will be two standards for providing personalized investment advice — one through securities recommendations and the second through a more-traditional advice model."
>
> "Regulation Best Interest requires that when making a recommendation of any securities transaction or investment strategy involving securities, broker-dealers must act in the best interest of retail customers at the time the recommendations are made and without placing their own financial or other interests ahead of their customers'.

[23] https://www.cfainstitute.org/-/media/documents/comment-letter/2015-2019/20180807-3.ashx

> " Reg. BI is more of a "suitability-plus" standard, rather than a true "best interest" one, and should be considered as such."

The UK

UK regulators upgraded advisor standards and duties in the Retail Distribution Review (RDR) effective 2012, and at the same time moved to professionalise financial advice and remove transaction remuneration. The UK also has a best interest standard with a legislative fiduciary intent supported by regulatory rule:

The best interest standard is noted as a specific rule, COBS 2.1.1 in UK regulations:

> The client's best interests rule
>
> (1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

A review of the RDR to date is due shortly[24].

The UK does not protect titles but does require that advisors meet professional standards[25], hold a statement of professional standing issued by an accredited body, hold an appropriate qualification and are required to meet ethical requirements. Accreditation bodies must apply for accreditation and are subject to annual independent audit and ongoing regulatory monitoring among a number of other requirements.

These bodies do not grant titles. The regulator is responsible for adviser registration via their firms who must apply for approved person status for their advisors.

Australia

Australia like the UK has introduced best interest standards for financial advice and removed transactional/product remuneration. They have also recently raised professional standards of financial advisers over and established a Financial Advisor and Ethics Authority.

The following is from the FASEA website[26]:

> The Corporations Amendment (Professional Standards of Financial Advisers) Act 2017 established the Financial Adviser Standards and Ethics Authority (FASEA) in April 2017, to set the education, training and ethical standards of licensed financial advisers in Australia.
>
> New Entrants are required to hold an Approved Degree before they commence their Work and Training (Professional Year) requirement. They must be mid way through their Professional Year before they are eligible to sit the Financial Adviser exam and commence using the term Provisional Financial Adviser or Provisional Financial Planner.

[24] https://www.fca.org.uk/publications/calls-input/evaluation-rdr-famr
[25] https://www.fca.org.uk/firms/professional-standards-advisers
[26] https://www.fasea.gov.au/

> Existing Advisers have until 1 January 2022, to pass the Financial Adviser Exam and until 1 January 2026, to reach an education standard equivalent to an Approved Degree.

As with *The Notice*, Australia has now protected the terms financial planner and financial adviser.

The code of ethics[27]

The following is taken from FASEA's new code of ethics which sets a high comparative benchmark for standard setting:

> "The Code seeks to impose ethical duties that go above the requirements of the law and it is designed to encourage and embed higher standards of behaviour and professionalism in the financial advice industry."
>
> "Collectively, financial planners and advisers are members of an evolving profession. As such, while you may have formerly provided a commercial service, you should be committed to offering a professional service "
>
> The changes to education, training and ethical standards are intended to bring a new focus to the requirement that the professional practice of financial planning and financial advice is centred on the best interests of the client.
>
> The Code requires financial advisers to act in a way that demonstrates, realises and promotes the following five values: (a) Trustworthiness; (b) Competence; (c) Honesty; (d) Fairness; and (e) Diligence
>
> Section 961B of the Act imposes an obligation on persons who provide personal advice to a retail client to act in the best interests of the client in connection with the advice. The ethical duty in Standard 2 to act with integrity is a broad ethical obligation. It is based on a more professional relationship between the relevant provider and the client, where the relevant provider has a duty to look more widely at what the client's interests are.
>
> To comply with the ethical duty, it will not be enough for you to limit your inquiries to the information provided by the client; you will need to inquire more widely into the client's circumstances.
>
> All advice and financial product recommendations that you give to a client must be in the best interests of the client and appropriate to the client's individual circumstances.
>
> Individually and in cooperation with peers, you must uphold and promote the ethical standards of the profession and hold each other accountable for the protection of the public interest.

New Zealand

New Zealand is the country most similar to Canada and specifically Ontario with respect to standards of conduct, in particular the divide between discretionary investment services subject

[27] https://www.fasea.gov.au/wp-content/uploads/2019/12/FASEA-Financial-Planners-and-Advisers-Code-of-Ethics-2019-Guidance-1.pdf

to a best interest standard[28], and financial adviser services subject to a clients interests first standard.

Recent changes to registration has resulted in a harmonisation of Authorised Financial Advisers (AFAs), Registered Financial Advisors (RFAs) dealing with insurance and mortgages and Qualifying Financial Entities (QFEs), organisations like banks and their staff. Previously only AFAs needed to be registered and hold required qualifications and this has been extended to RFAs and staff of QFEs. RFAs were restricted with respect to the provision of investment advice.

The New Zealand approach with respect to defining advice is however much more thorough and widens the scope to planning activities surrounding transactions. Note excerpts from the recent 2019 Financial Services Legislation Amendment Act 2019[29]

"A person gives **financial advice** if the person:

- Makes a recommendation or gives an opinion about acquiring or disposing of (or not acquiring or disposing of) a financial advice product; or
- Makes a recommendation or gives an opinion about switching funds within a managed investment scheme; or
- Designs an investment plan for a person that purports to be based on (a) an analysis of the person's current and future overall financial situation (including investment needs); and (b) the identification of the person's investment goals; and includes 1 or more recommendations or opinions on how to realise 1 or more of those goals; or
- Provides financial planning of a kind prescribed by the regulations."

The advice is regulated if given in the ordinary course of business. New Zealand follows a "duty to give priority to client's interests" (431K of the 2019 Act).

[28] http://www.legislation.govt.nz/act/public/2013/0069/latest/DLM4091637.html
[29] http://www.legislation.govt.nz/act/public/2019/0008/latest/whole.html

9. Conclusion/summary

This submission is supportive of attempts to harmonise advice within Ontario amongst the various disparate providers and silos of product and advice provision.

It is supportive of the focus on the professionalisation of advice and its standards, and on the recognition of financial planning as a centrepiece and gateway of financial advice.

It is supportive of the exploration of titles, standards and duties and of the addition of the term professional to existing duties of financial services registrants.

It is unsupportive of a) the failure to include a best interest standard for title holders in professional advising capacities and b) to meaningfully challenge existing regulatory deficiencies with respect to the definition, scope and responsibilities of advice and advising per se.

Yet, at the same time the submission is aware of a general and historical regulatory failure to properly define and accommodate personalised financial advice and to explore options and means of furthering the development of the market place for the provision of objective professional financial advice. Ontario regulation of advice is vague, poorly calibrated and defined and generally not fit for the purpose of professional advice definition. It clearly lags standards evinced in a great many other jurisdictions.

The Notice, as is, misses an important opportunity to expand the definition of financial advice to one that includes a best interest standard. The Notice would do well to incorporate the representations of both consumer and credible professional bodies, academic research and international best practises in establishing a truly professional standard for these important titles. This would be the better option supportive of both competitive market outcomes and investor protection.

A bifurcation of The Notice's objectives with respect to a) harmonisation of minimum standards for transactional relationships and b) the development of professional advice standards with fiduciary duties (AKA a best interest standard) may be a more practical solution to the FSRA's joint industry rationalisation and consumer focused imperatives.

The issue The Notice addresses, which is that of confusion over titles and the lack of a regulatory framework to hold title use to account is not the main issue of importance to consumer confidence. This is in fact the quality, the objectivity and independence of advice itself with respect to consumer outcomes.

The issues associated with The Notice are complex and nuanced. There are in fact three components under consideration:

1. Financial professionals, their competence, standards and ethics;

2. Titles, their protection and regulation; and

3. Financial advice and financial advising in the context of best interest standards.

As is, The Notice and the Client Focused Reforms place Ontario at the lower end of the global regulatory league table with respect to both investor protection and the development, modernisation and exploration of regulatory evolution.

As is, The Notice and its representation of confidence in professional advice is in conflict with existing securities registration capacities that have long differentiated a wide divide between the transactional discretionary and the dealing advisory. In this context it is also in conflict with the recent Client Focused Reforms that have placed addressing misleading titles as one of the key tenets of reform.

The fact that The Notice is in conflict with existing regulation is a positive reminder of the need for change and the potential for revolutionary change in Canada's retail financial services market-place.

Yours faithfully

Kind regards

Andrew Teasdale, CFA.