Ed Skwarek JD., LL.M.
135 Allan Street, Suite 610
Oakville, ON
eskwarek@yahoo.ca
Cell 289-681-8879

Mr. Mike Macoun, President
The Benefits Alliance Group
8800 Dufferin Street, Unit 304
Concord, ON

April 28, 2021

Dear Mike,

I am pleased to assist The Benefits Alliance Group through providing my interpretation of s. 3 of the Financial Professionals Title Protection Act ("Act").

Preliminary Comments

The Financial Services Regulatory Authority ("FSRA") has undertaken a principles-based approach to regulation ('PBR"), wherein evidence-based research and facts inform their decision making, policy development, and legislative processes. The Act and the draft rule are an example of the outcome of PBR. The Act and draft rule address immediate consumer and industry needs and is drafted to accommodate prospective developments not currently contemplated, absent the need to necessarily amend the rule or legislation – in effect, it becomes a living document, as opposed to static piece of legislation lacking the flexibility to accommodate change in an ever evolving environment. This is important, given change within the financial services sector is accelerating rapidly.

Brief Conclusion

S. 3 of the Act prohibits any individual from using the title Financial Advisor or a title that can be reasonably confused with the title Financial Advisor. This blanket prohibition does not apply to individuals who meet the contingent conditions set out in sub (a) and (b) of s.3 which stipulate that **if** the individual has an approved financial advising credential from an approved credentialing body, and the individual credential is in good standing, **then** they may use the title Financial Advisor.

Only individuals who satisfy the contingent conditions are permitted to use the title Financial Advisor, or another title comparable to the title Financial Advisor.

Meeting the contingent conditions does not compel the individual to use the title Financial Advisor.

The Act

S. 3 of the Act states:

> No individual shall use in Ontario the title "Financial Advisor", or "conseiller financier", an abbreviation of that title, an equivalent in another language or a title that could reasonably be confused with that title unless,
>
> a) the individual has obtained, from a credentialing body approved under section 4, a financial advising credential approved under subsection 7(2); and
> b) the individual's financial advising credential is in good standing, within the meaning set out in the Authority rules, with an approved credentialing body.

Analysis

The Act focuses on the title as opposed to the scope of what a Financial Advisor or Financial Planner does – it looks at the education and qualifications, and not at the practice to determine one's entitlement to use the title Financial Advisor. If one meets the conditions referenced in s. 3 (a) and (b) then the individual qualifies to use the title Financial Advisor. S. 2 of the Act replicates what is set out in section 3 but applies to the use of the title Financial Planner. The substance of the following analysis would apply equally to the title Financial Planner, but in this note I will focus on the title Financial Advisor.

If we look at the recital to s 3, it starts with prohibitive language, "no individual shall" and concludes with the permissive, "unless". This can also be read as an **if**/t**hen** statement. **If** an individual meets the requirements that follow the "unless" as set out in sub (a) and (b) - has an approved credential, from an approved credentialing body, and if the individual's credential is in good standing (the 'contingent conditions") – **then** the prohibition regarding the use of the title Financial Advisor no longer applies. In meeting the contingent conditions, what was once prohibited becomes permissive, but not mandatory.

But the recital goes further than simply prohibiting the use of the title Financial Advisor. The recital also prohibits the use of the French language equivalent, "conseiller financie, an abbreviation of that title, an equivalent in another language **or a title that can reasonably be confused with the title** …" [emphasis added].

The FSRA has included the additional language that captures titles likes Financial Advisor to ensure that the spirit of the title protection regime is respected and removes the possibility of

workarounds. The language in s. 3, "or a title that can reasonably be confused with the title …" is very broad in scope and must be interpreted liberally to support the purpose and maintain the integrity of the Act, including consumer/client protection. The limitation on the liberal interpretation is achieved through employing the permissive "unless" that precedes the contingent conditions that operationally allow for the use of the title and additional exceptions, thereby avoiding unintended consequences that could prove harmful to professionals operating in this area. A practical reading of this section would suggest that in meeting the contingent conditions, one is then able to use more than just the title Financial Advisor.

The permissive language, "unless" - that precedes the contingent conditions - limits the scope of the prohibitive language, "No individual shall". The balancing of interests achieved through the **if**/**then** scenario preserves the purpose of the Act without introducing the unintended consequence of disrupting the ability of stakeholders to carry on business in an effective and efficient manner.

The primary objective of the Act is to ensure that only individuals who meet the educational requirements can holdout using the title Financial Advisor. In order to preserve the spirit of the Act, the language employed in the drafting extends the prohibition to like titles that may reasonable confuse consumers/clients. For instance, in practise there are a number of titles that can easily infer an equivalency to that of Financial Advisor; Financial Consultant, Financial Adviser, Insurance Advisor, Insurance Professional, Funds Advisor, Investment Expert – the list can go on and on. Titles can be created that suggest an individual has the appropriate education and training to holdout with a title that consumers/clients may well equate to that of Financial Advisor. If allowed to do so, then the spirt and intent of the Act are compromised and would result in little to no protection for the title, title holders, or consumers/clients. But too restrictive a reading and interpretation would be costly and overly disruptive to existing and accepted practices. I will return to this last point momentarily.

The purpose of the Act is to establish a threshold for the use of the title Financial Advisor and to limit its use to those who have taken the necessary educational steps and demonstrate a commitment to enhanced professionalism. The result, consumers/clients can rely on the protected title as an indicator of the level of commitment and professionalism that distinguish the title holder from individuals who have not made a similar commitment to their education and professional development. A reasonable reading of the Act would suggest that the drafters want to ensure the spirit and purpose of the Act are observed with as little disruption as possible to acceptable business practices. The balancing of interests is critically important to the proper functioning of the Act and achieving the desired outcome.

Assume for the moment that the Investment Industry Regulatory Organization of Canada (IIROC) applies for and is granted credentialing status and that their licensing requirements are deemed sufficiently robust to qualify as an acceptable credential to use the title Financial Advisor. We note that individuals who have met the licensing requirements to provide advice to clients are known as "Investment Advisors" under IIROC rules, and holdout as such publicly. The question then becomes, would qualifying to use the title Financial Advisor mean that the

individual must use this title – the Act simply stipulates the contingent conditions to be met that would allow for the use of the title Financial Advisor. If s. 3 were interpreted narrowly to conclude that once one is qualified to use the title Financial Advisor, they must use that title, the consequences become significant. In this scenario, an IIROC registrant would no longer be able to call themselves an Investment Advisor. Furthermore, the term Investment Advisor as it appears in the IIROC rules and use with clients would not be permitted as it too closely resembles the title Financial Advisor.

A reading of the Act that would either require an individual to use the title Financial Advisor once they qualify, or so narrow a reading to conclude that even if an individual has met the contingent conditions they cannot use the title Investment Advisor due to consumer/client confusion, would be costly, disruptive and one would reasonably conclude is not the intention of the drafters. The result of such an interpretation would mean that IIROC would have to amend all rules to comply with the new limitations, individuals who currently holdout as Investment Advisor would have to change their operations, materials, and marketing to comply, and companies would also have to change their operations and marketing materials to comply. Consumer who have grown accustomed to working with their "Investment Advisor" would be confused by a change from that title to Financial Advisor.

The objective of the Act is not to force individuals to use the title Financial Advisor and complicate matters, add cost, or burden. The purpose is to protect the title Financial Advisor and related titles from misuse that mislead and confuses consumers/clients, placing them at risk. It follows, that if one has an approved credential, from an approved credentialing body, and the individual is in good standing, then not only are they qualified to use the title Financial Advisor, but additional reasonable titles would also be permissible.

Conclusion

Given the foregoing, an appropriate reading and application of sub (a) and (b) must conclude that the drafter's intention is that titles, in addition to Financial Advisor, be allowed. The inclusion of the language, "or a title that could reasonably be confused with that title…" is purposeful to ensure the avoidance of workarounds. As intentional is the inclusion of this language preceding the permissive language, "unless" in the recital. According, the logical interpretation is that the drafters intended that the prohibitions that fall between, "[n]o individual shall" and the permissive language, "unless" be deemed permissive if the contingent conditions set out in sub (a) and (b) are met.

Similar to the title Investment Advisor, there are other titles of common usage in the industry – for instance, Insurance Advisor, or Group Advisor. The use of these titles, like the title Investment Advisor are prohibited under s. 3 unless, the contingent conditions of sub (a) and (b) are met. If IIROC applies and becomes a credentialing body, then the title Investment Advisor would be acceptable as it has met the contingent conditions. Similarly, if the appropriate designation for Insurance Advisor and Group Advisor are approved, by an approved credentialing body, then they too have met the contingent conditions under the Act, and one

can reasonably conclude that these generally used industry titles that would be prohibited based on the reasonableness of them being confused with the title Financial Advisor is no longer applicable and is permissible. A narrow reading of the Act that would preclude the acceptance of supplemental titles that meet the contingent conditions established in s. 3 (a) and (b) would be harmful to the proper functioning of the Act and introduce unintended consequences that would needless harm market participants.

I hope this analysis is of assistance and should you need anything further, please don't hesitate in contacting me.

Sincerely,

Ed Skwarek JD., LL.M.