Submission to the Government of Ontario Ministry of Finance Expert Committee

to Consider

Financial Advisory and Financial Planning Policy Alternatives

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Introduction

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to address the Ontario Ministry of Finance Expert Committee to Consider Financial Advisory and Financial Planning Policy Alternatives. In 2013, PIAC examined the necessary steps towards creating a regulatory framework that is consistent across Canada, so that all Canadians can benefit from financial planning with robust consumer protection.[1] During that review, PIAC noted outstanding issues in designing such regulation are: the standard of care of planners; disclosure of fee structures; definition of what constitutes financial planning; and whether similar rules should be applied to all financial advisors. As a result, the findings of that review will form the basis of the comments presented in this submission.

PIAC maintains the need for investor protection in Ontario is continuing to grow. This is due in part to the diminished availability of workplace pensions, as recently articulated by Canadian Foundation for Advancement of Investor Rights (FAIR).[2] What the increased number of Ontarians are finding upon arrival in the financial services industry is what PIAC contends is a largely self-serving arrangement. One can argue the current structure of the financial advice provisioning industry in Ontario is designed to benefit employers of those engaging in financial planning or the giving financial advice first, those engaging in financial planning or the giving financial advice in Ontario second, and only then investors and consumers.

PIAC suggests there are those within the financial planning industry who want to be recognized as a profession. Perhaps it would be prudent for the Expert Committee to consider proposing the necessary reforms to undertake what has been suggested by the Financial Planning Standards Coalition-a codification in law of the professional certification structure, governance and oversight mechanisms that already exist in practice, but are currently voluntary for the 22,000 certified or licensed financial planners in Canada.[3] PIAC estimates there are at least 8,900 certified or licensed financial planning professionals in Ontario.[4]

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[1] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*, at p. 4. Hereafter "Purse Strings Attached".

[2] Canadian Foundation for Advancement of Investor Rights (FAIR), *Submission under IIROC Notice 15-0145*, August 31, 2015.

[3] Financial Planning Standards Coalition (2015). *A Matter of Trust: Protecting Canadians' Financial Futures*. P. 4

[4] A September 2015 search of the Financial Planning Standards Council database indicated that an estimated 8,818 people in Ontario were a CFP® professional or were an FPSC Level 1® Certificant in Financial Planning. Participation in the FPSC database is voluntary and only shows practicing CFP professionals who chose to disclose their address and contact information. The database can be found at http://www.fpsc.ca/find-a-planner-certificant. According to a similar search conducted with the Institute of Advanced Financial Planners, there were at least 131 Registered Financial Planners operating in the province of Ontario. The database can be found at http://www.iafp.ca/findaplanner_detailed.php.

While it might be expedient to simply carve out those certified or licensed financial planners, PIAC contends this should not be the only approach considered by the Expert Committee. PIAC believes the Expert Committee should also consider proposals that would adequately address the challenges currently facing Ontario consumers participating in the remaining portion of the financial advice industry. Specifically, even if this consultation exercise produces limited proposals, PIAC believes Ontario consumers would benefit from increased clarification on at least the following issues:

- *Conflicts of interest disclosure* – Consumers should be clearly advised by those engaging in financial planning or the giving financial advice in Ontario when that individual is in a conflicted position.
- *Compensation disclosure* - Consumers should be clearly advised by those engaging in financial planning or the giving financial advice in Ontario on how that advice is being paid for and the full cost.
- *Limitation of the use of titles* – The dozens of titles in use by those engaging in financial planning or the giving financial advice in Ontario are confusing to consumers, and considered by many to be unnecessary.
- *Standard of Care* – If the Expert Committee could articulate and propose an improved standard of care to better align the expectations of many Ontario consumers with the current "suitability" standard, PIAC feels this would be a positive outcome for consumers.

PIAC is pleased to participate in this consultation process by providing the following responses to the questions posed by the Expert Committee in their *Initial Consultation Document*.

Questions to Consider

1. What activities are within the scope of financial planning? Is the provision of financial advice different from financial planning? If so, please explain the distinction.

Activities within the scope of financial planning

PIAC acknowledges that the collective product offerings of financial advisors may be more varied in scope than those of financial planners. However, when viewed at the one-on-one level, PIAC has found that many financial advisors are routinely providing consumers what is best described as investment product sales. In comparison, PIAC equates financial planning with a more holistic and considered approach, based on the provision of advice, along with referral to, or in some cases, provision of, certain services (investments, insurance, legal advice, etc.) to implement that advice.

The provision of financial planning, is, according to the Financial Planning Standards Council (FPSC), a disciplined, multi-step process of assessing in individual's current financial and personal circumstances against his future desired state and developing strategies to help meet his personal goals, needs and priorities in a way that aims to optimize the allocation of resources.[5] Financial planning takes into account the interrelationships among relevant financial planning areas in formulating appropriate strategies.[6] Financial planning is an ongoing process involving regular monitoring of an individual's progress toward meeting his personal goals, needs and priorities, a re-evaluation of financial strategies in place and recommended revisions, where necessary.[7] One key sign that true financial planning has been undertaken is the delivery of a comprehensive written financial plan to the customer (although to further confuse matters, financial advisers may present a document called a "financial plan" to customer as part of the sales process). PIAC in its "Purse Strings Attached" report generally agreed with this definition of "financial planning" and recommended regulation of financial planners as a discrete profession in accordance with these criteria.

Financial Advice vs. Financial Planning

Financial planning, therefore, is wider in ambit but with more defined tasks and is ideally less focused on the investment aspect and more on the financial planning aspects than a financial adviser role. What complicates the overlap of the seemingly distinctive area of financial planning with all other financial advisors is that many financial planners receive compensation either partly

[5] Financial Planning Standards Council (FPSC) and the Institut québécois de planification financier (IQPF) (2015), *Canadian Financial Planning: Definitions, Standards and Competencies*. P. 12.
[6] *Canadian Financial Planning: Definitions, Standards and Competencies*. P. 12.
[7] *Canadian Financial Planning: Definitions, Standards and Competencies*. P. 12.

or wholly for their planning services by embedded sales commissions on investment products – just like financial advisers. In addition, many financial advisers have begun to use the term or concepts of formal financial planning as a tool or marketing device to sell customers investments.

The definition of the provision of "financial advice" is not entirely clear in Ontario, as it has not been legislatively defined, as such. However, the Ontario Securities Commission noted in 1992, while discussing the definition of "adviser"[8] in that Act that, "Providing mere financial information as to specific securities does not constitute the giving of advice, but providing an opinion on the wisdom or value or desirability of investing in specific securities does."[9] The advice must be given in the context of a business (to avoid regulating casual individual free advice) but the advice need not be given as part of a one to one relationship. Thus, a person offering seminars, newsletters and opinions in the media on specific investments was held by the OSC to be an "adviser".[10] Advisers must register under the Act, subject to any exemptions, and are required to disclose, amongst other things, personal interests in the securities touted or the receipt of commissions or remuneration from the promoter of the securities.

However, neither the OSC nor the Ontario government in other legislation has yet seen fit to regulate the titles of advisers further nor have they regulated the provision of advice about financial affairs and investments as a profession or based on a legal standard for the quality of the advice so given. In this environment, therefore, a number of self-titled persons operate dispensing "investment advice" or "financial advice" with the only requirements being registration via the *Securities Act* (with its resultant requirements) in relation to the sale, promotion of, or advice in relation to, securities. Other financial advice, therefore, is completely unregulated.

As this state of affairs has been largely the same since the rise of the provision of individual financial advice, it may be useful to consult the 2004 Ontario Securities Commission (OSC) *The Fair Dealing Model* concept paper for conceptual guidance in describing the various levels or types of financial advice and how they might be regulated should the provincial government consider regulating based on the provision of advice as opposed to by financial product sold.

In the concept paper, the OSC noted:

> "The Fair Dealing Model recognizes that dealings between investors and investment representatives are part of a relationship that has been established between those two parties. We propose to establish a regulatory regime that sets out a consistent framework within which such relationships can operate. That framework, to the extent practical, attempts to put the investor and the representative on a level playing field.

[8] See Securities Act, s. 2, definition: ""adviser" means a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities; ("conseiller")".
[9] *Canadian Shareholders Association (1992)*, 15 O.S.C.B. 617, at para 28.
[10] *Brian K. Costello* (2003), 26 OSCB 1617, at paras. 24-45.

For every account opened, people would need to choose one of three relationship types:

- In a **Self-Managed relationship**, the client places no reliance on the financial services provider other than transaction execution.

- In an **Advisory relationship**, the client is entitled to rely on objective, expert advice from the representative.

- In a **Managed-For-You relationship**, the client relies completely on the representative, who has full discretion and assumes a trustee-level responsibility for all investment decisions. "[11]

PIAC contends the provision of financial advice generally should be similar to what the OSC described below as an "Advisory relationship" – that is, a statutorily-defined "best interests" standard that requires proficiency and an avoidance (not just a disclosure of) conflicts of interest. Meanwhile, the provision of financial planning would likely contain the Advisory relationship characteristics, as well as elements of what the OSC outlines as the Made-For-You (a statutorily-defined fiduciary-like) relationship, given the increased trust placed in a financial planner to guide the consumer more completely in their financial affairs generally.

However, in PIAC's view, what is occurring at the moment in Ontario is that many consumers believe they are receiving objective, expert advice from their financial service representative – that is, they assume that they are at least in an "advisory relationship" as defined above. Unfortunately, what many are getting is transaction/execution model based on a weaker "know your client" (KYC) requirement (stemming from the securities regulation above as implemented by quasi-industry/regulatory bodies such as IIROC and MFDA) which requires the financial advisor only to provide advice for investments that are "suitable" to a client but not necessarily the best available for that client, largely as it allows conflicts of interest (in the form often of embedded commissions) with or without disclosure of such conflicts to the consumer.

In an effort to illuminate this point, PIAC provides the following table outlining the key characteristics of the three relationships proposed by the OSC in *The Fair Dealing Model*.

[11] Ontario Securities Commission (2004). *The Fair Dealing Model*. P. iv-v.

Key characteristics of the three relationships

Relationship	**Self-Managed**	**Advisory**	**Managed-For-You**
Client's level of reliance on firm and representative	Execution services only	Decisions made in reliance on objective, expert advice	Complete reliance within agreed limits
Responsibility for decisions	Client	Both client and representative	Representative
How conflicts are managed	Compensation and any conflicts of interest are transparent Duty to act honestly and in good faith	Compensation and any conflicts of interest are transparent Duty to act honestly and in good faith Advice must not be biased by compensation	Trustee level fiduciary duty (precludes certain forms of compensation without specific consent)
Investor education responsibilities	No responsibility beyond providing basic information	Representative has role to support client decisions	Client only needs to understand services provided
Typical examples	On-line trading services Salespeople	Financial planners Investment advisers	Financial planners Portfolio managers

Source: Ontario Securities Commission (2004). *The Fair Dealing Model*. P. 24.

PIAC contends if the Expert Committee were to propose a framework for all financial advisers (after defining "financial advice" broadly) employing the obligations outlined in the table above by the OSC in 2004, it would be a positive development for Ontario consumers. PIAC understands the Client Relationship Model II reforms were proposed in an effort to reinforce some of these key characteristics noted in the table above. However, some CRM II measures have yet to be implemented, while others have only been in effect for a limited time.

2. Is the current regulatory scheme governing those who engage in financial planning and/or the giving of financial advice adequate?

No. PIAC contends the current regulatory scheme governing financial planning or the provision of financial advice is inadequate. For financial planners, PIAC would argue, based on its Purse Strings Attached report that the provision of financial planning should be separately regulated as a profession with a particular services definition and separate standard of care.

Professional bodies for financial planners generally define financial planning as advice from an independent financial expert on at least the following six major financial determinants in life:

- Cash and debt planning
- Income Tax planning
- Investment planning
- Retirement and Financial Independence planning
- Insurance and Risk planning
- Estate planning[12]

Under the terms set out by financial planner organizations, financial planners are theoretically compelled to review all of these areas with clients and provide a written financial plan, which is then periodically reviewed for accuracy given the changes of life a financial circumstances of the client over time. Moreover, financial planners may assist with "implementing" the financial plan, through the purchase of investments to satisfy investment planning goals or referring clients to agents for insurance coverage. PIAC's Purse Strings Attached report recommended that these requirements be formalized in particular financial planner regulation, modeled largely on that in place in the Province of Quebec, which has already undertaken this process.

At present in Ontario in the absence of such legislation, however, PIAC suspects that many Ontarians are not receiving financial advice on all six of the financial determinants listed above, perhaps not even from a Certified Financial Planner (CFP). In 2013, the FPSC released a summary of their multi-year study entitled, *The Value of Financial Planning*. In their summary, the FPSC identified having an advisor provide planning for 3 planning components or more as "comprehensive planning."[13] Without having access to the data collected, PIAC can only speculate that 3 components was selected as the cut-off to be considered "comprehensive planning" due to the limited number of financial advisors in Canada who provide advice to their clients on 4 planning components or more. In this instance, the industry body that appears the most invested in the promotion of financial planning may have been reluctant to present this

[12] J. Lawford and Janet Lo (2009). "Holding the Purse Strings: Regulating Financial Planners," *Public Interest Advocacy Centre*. P. 32-33. The items listed here are also identified by the Financial Planning Standards Council (FPSC) and the Institut québécois de planification financier (IQPF) as "Fundamental Financial Planning Practices," according to their 2015 joint publication entitled, *Canadian Financial Planning: Definitions, Standards and Competencies*. P. 28.

[13] Financial Planning Standards Council (2013). *The Value of Financial Planning*. P. 4.

evidence in as objective a manner as possible. It is activity like this that can erode confidence the profession of financial advice provision can be trusted to regulate itself without further government oversight.

As for the much larger field of the provision of financial advice in Ontario, likewise a new paradigm must soon emerge; like financial planner regulation, financial advice regulation should commence with legislation that, at the least, requires: registration and licensing (with official titles); a move towards a statutory best-interests standard (whether that include immediately a full prohibition on embedded commissions or, at this stage, at the very least a full disclosure of such conflicts of interest) and a clear consumer redress mechanism. As the field of "financial advice" is very large with many entrenched players and numerous industry participants, it is likely that the Ministry should proceed in a deliberately staged fashion which nonetheless clearly outlines its ultimate vision of regulation (based on something like the OSC FDM above) so that market participants can transition smoothly. Consumers, however, should not be waiting for decades for this transition. We would suggest the government look to make substantial reforms within 5 years.

In 2013, PIAC concluded in its Purse Strings Attached report that: "Although the financial planning and financial advisor industries have recognized a need for reform of standards of care towards investors and have acknowledged the need for disclosure of, and transparency of, fee and commission structures, their progress towards solving the issue has been slow."[14] Since that time, it can be argued that little progress has been made toward providing Canadian consumers the additional protections they need while involved with those engaging in financial planning or the giving financial advice in Ontario. Moreover, the time remains ripe for provincial consumer and finance ministries to work towards a regulatory framework for financial advisors and, in addition, if thought beneficial, a regulatory regime for financial planners in each of the provinces.[15]

[14] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 42.

[15] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 42. See also J. Lawford and Janet Lo (2009). "Holding the Purse Strings: Regulating Financial Planners," *Public Interest Advocacy Centre*. P. 5-6.

3. What legal standard(s) should govern conflicts of interest and potential conflicts of interest that may arise in financial planning and the giving of financial advice?

As noted above, PIAC contends a statutory "best interests" standard, which need not be a fully-fledged fiduciary duty, but which will clearly lead advisers to avoid, and, where impossible to avoid, resolve conflicts of interest in favour of customers, is a reasoned next step for the benefit of consumers and the financial services industry. Preferably, PIAC would like this standard to be applicable to both financial planners and those who provide financial advice, with the possible addition of even more fiduciary-like standards upon financial planners holding themselves out as complete financial direction-givers.

According to author Barbara Freidberg, every financial planner is also a type of financial advisor, but every financial advisor is not necessarily a financial planner.[16] For instance, many individuals providing financial advice in Ontario are under no obligation to place their client's interest before their own. However, Certified Financial Planners are expected to adhere to a Code of Ethics whose first principle is the following:

> "A financial planner shall always place the client's interests first."[17]

The Securities and Exchange Commission (SEC) states "Some financial planners assess every aspect of your financial life—including saving, investments, insurance, taxes, retirement, and estate planning—and help you develop a detailed strategy or financial plan for meeting all your financial goals. Others call themselves financial planners, but they may only be able to recommend that you invest in a narrow range of products, and sometimes products that aren't securities."[18] This unfortunate ambiguity is also apparent in Ontario today.

Advisors who are only able to recommend that you invest in a narrow range of products are called "salespersons" under the B.C. and Manitoba securities acts.[19] While Ontario could travel down this road and define financial "salespeople" as only able to execute financial transactions while

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[16] See Friedberg, B. "Financial Advisor vs. Financial Planner." *Investopedia*. Blog Post, April 2, 2015. Online: <http://www.investopedia.com/articles/personal-finance/040215/financial-advisor-vs-financial-planner.asp#ixzz3jIDP1yuy>.

[17] FPSC and IQPF (2015). *Canadian Financial Planning: Definitions, Standards and Competencies*. P. 19.

[18] Securities and Exchange Commission (SEC). "*Investment Advisers: What You Need to Know Before Choosing One*." Online: <https://www.sec.gov/investor/pubs/invadvisers.htm>. See also David Marotta. "What is the Difference between an Investment Advisor and a Financial Planner," *Forbes*. June 24, 2015. Online: <http://www.forbes.com/sites/davidmarotta/2014/06/25/sec-qa-what-is-the-difference-between-an-investment-adviser-and-a-financial-planner/>.

[19] *Securities Act*, R.S.B.C. 1996, c. 418, s. 1(1) ("salesperson"); *Securities Act*, C.C.S.M. c. S50, s. 1(1) ("salesperson") (a salesperson means an individual employed by a dealer to trade securities on the dealer's behalf). Some commentators have suggested that "salesman" or "salesperson" be a required title for this narrow activity. See D. Marotta. "What is the Difference between an Investment Advisor and a Financial Planner," *Forbes*. June 24, 2015. Online: <http://www.forbes.com/sites/davidmarotta/2014/06/25/sec-qa-what-is-the-difference-between-an-investment-adviser-and-a-financial-planner/>.

other registered advisers are to provide the advice, PIAC suggests that this distinction likely would be largely overlooked in practice and it would be preferable to make the entire financial services industry simply have basic financial advice proficiency and licensing, on a reasonable standard, be the only category of regulation.

Once again, therefore, PIAC refers to the Expert Committee to the OSC's *The Fair Dealing Model*, which illustrated under the three relationship models proposed in that document, disclosure of all conflicts was the conflict management starting point.

Relationship	Conflict management requirements
Self-Managed	Disclosure of all conflicts
	No misrepresentations
Advisory	Disclosure of all conflicts
	No misrepresentations
	Conflicts not permitted to influence advice
Managed-For-You	No conflicts permitted without client's informed consent

Source: Ontario Securities Commission (2004). *The Fair Dealing Model*. P. 35.

PIAC supports at the very least the full disclosure of any conflict of interest held by those engaging in financial planning or the giving financial advice in Ontario. However, we strongly believe that disclosure is not a substitute for responsible practices undertaken by either financial planners who wish to be viewed as "professional" or by financial advisors. It is clear the current suitability standard applicable to those engaging in financial planning or the giving financial advice in Ontario is failing to serve the needs of Ontario investors. Any improvement to this standard, likely by defining a statutory best-interests standard but up to implementation of a legislated modified fiduciary requirement, as advocated by the Small Investor Protection Association (SIPA) and frequent financial services commentator John De Goey, would be necessary.[20]

[20] De Goey, J. *Submission to Expert Committee to Consider Financial Advisory and Financial Planning Policy Alternatives*, July 2015. P.4. See also Small Investor Protection Association, *Submission to Expert Committee to Consider Financial Advisory and Financial Planning Policy Alternatives*, August 2015. P.4.

4. To what extent, if at all, should the activities of those who engage in financial planning and/or giving financial advice be further regulated? Please consider the following in your response:

    a) Licensing and registration requirements;
    b) Education, training and ethical responsibilities;

In 2013, PIAC listed over 20 designating bodies in use within the Canadian financial services industry.[21] At the time, PIAC noted the Canadian financial services industry was in some ways similar to the medical profession - there are a series of specializations due to the complexities of the subject. In medicine, it is the human body, while in the financial services industry, it is the financial needs of consumers. However that is where the favorable comparison ends.

PIAC contends an essential question that needs addressing is as follows, are we licensing on the basis of product provision, or on the basis of service provision? PIAC suggests the current suitability standard employed by the financial advice industry is based on the suitability of the product. It is now abundantly clear that this approach does not protect consumers in a retail-like environment to the degree that is required, or to the degree consumers expect or assume. PIAC, therefore suggests the Expert Committee propose a framework so licensing occurs for the provision of service, instead of product.

In 1998, former Ontario Securities Commissioner Glorianne Stromberg, made the following comments on this provision of product versus service debate. She noted:

> "If we continue to maintain separate "product silos" and to center regulation on "product knowledge" instead of centering it on advisory relationships that are based on the assessment of a client's integrated need, the impact on consumer/investors of advice remaining tied to product-bias will be negative both in terms of direct costs and in terms of lost opportunity costs. There is no reason to permit this to happen."[22]

Ms. Stromberg also commented extensively on the need for licensing and registration reform, and PIAC contends much of what Ms. Stromberg had to say over 15 years ago remains applicable today. Ms. Stromberg argued, "Today's marketplace would be better served by a registration system that reflects the integration of function, product and advice that has occurred and that centers around advice-giving rather than product-licensing. The continued maintenance of the current registration requirements with separate regulatory bodies, centered around product distribution, is no longer necessary, appropriate or desirable."[23]

[21] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 11-12.
[22] Stromberg, G. (1998). *Investment Funds in Canada*. P. 72.
[23] Stromberg, G. (1998). *Investment Funds in Canada*. P. 69.

The registration frame work proposed by Ms. Stromberg centered on two concepts:

- requirements for a single registration with the Regulator; and
- requirements for a single membership in the Single SRO.[24]

Ms. Stromberg envisioned a single National SRO with membership requirements covering such matters as capital, insurance and bonding, education and proficiency, contingency fund participation, maintenance of books and records, supervisory procedures that would be tiered.[25] Ms. Stromberg concluded it should be possible to reduce the number of different categories of registration and membership without adversely affecting consumer protection.[26]

With regard to education and training under a single SRO, Ms. Stromberg offered the following analysis:

> "In this respect there would be fundamental basic provisions that apply across the board relating to matters such as entry-level education and proficiency requirements, basic good faith requirements, rules of fair practice and business conduct, financial and other reporting requirements, advertising, client confirmations and reporting, audit requirements including surprise audits, compliance reviews, and enforcement proceedings.
>
> The provisions for basic entry-level requirements, including those for education and proficiency, could take into account "equivalency" requirements that other self-regulatory professional bodies like The Law Society of Upper Canada and the CICA have. These equivalency requirements could satisfy some of the Single SRO's requirements although in some cases, such as in the case of insurance and bonding requirements, there would probably be a need to arrange for additional coverage."[27]

Ms. Stromberg concluded that the objective of the exercise would be to ensure that it does not make a difference to consumer/investors (at least from the perspective of adequate regulatory oversight and supervision) with whom they deal in terms of there being minimum requirements that must be adhered to or minimum redress remedies available in the event of problems.[28]

PIAC suggests to Expert Committee that the model presented by Ms. Stromberg be given serious consideration in relation to all providers of financial advice.

[24] Stromberg, G. (1998). *Investment Funds in Canada*. P. 70.
[25] Stromberg, G. (1998). *Investment Funds in Canada*. P. 71.
[26] Stromberg, G. (1998). *Investment Funds in Canada*. P. 71.
[27] Stromberg, G. (1998). *Investment Funds in Canada*. P. 71.
[28] Stromberg, G. (1998). *Investment Funds in Canada*. P. 71.

If the Expert Committee Suggests Certified Financial Planners be Held to Higher Standard

If the Expert committee decides to suggest financial planners be "carved-out" of the industry to be held to higher standard, then licensing, titles, proficiency, education, standard of care, redress, compensation and other regulatory matters for financial planners could be addressed in the manner PIAC recommended in its "Purse Strings Attached" report. These requirements were based largely on the Quebec regulatory model, with accommodation for the participation of present industry-based accreditation processes such as the CFP designation granted by the FPSC. Please refer to that report for the full details.

If the Expert Committee Suggests Financial Planners and Financial Advisors Should be Treated Equally

If the Expert Committee determines it would rather approach the financial adviser and financial planners as one regulated entity, at least for now, perhaps a dedicated Agency under the guise of the OSC needs to be considered to regulate financial planners and those providing financial advice in Ontario. PIAC proposes such an Agency would move beyond the OSC's current role by receiving the ability to provide compensation to investors through its enforcement proceedings.

Education and Good Governance Fund

PIAC contends that regardless what future action is suggested by the Expert Committee, a fund similar to the Education and Good Governance Fund (EGGF) administered by the *Autorité des marchés financiers* in the province of Québec should be considered. The EGGF supports projects focusing on investor protection and education, the promotion of good governance and the advancement of knowledge in all areas associated with the AMF's mission.[29] Community and public organizations, consumer associations, seniors groups and university researchers also have access to EGGF funding to launch their initiatives. Since its inception in 2004, the EGGF has allocated over $29 million to 191 projects.[30]

[29] *Autorité des marchés financiers*. "Education and Good Governance Fund (EGGF)." Online: https://www.lautorite.qc.ca/en/eggf-corpo.html

[30] *Autorité des marchés financiers*. "Education and Good Governance Fund (EGGF)." Online: https://www.lautorite.qc.ca/en/eggf-corpo.html

c) Titles and designations of individuals who engage in financial planning and/or the giving of financial advice;

PIAC has been vocal about the need to update the use of titles and designations used by those engaging in financial planning or the giving financial advice in Ontario. For instance, in 2013, in relation to the problem of distinguishing true "financial planners", PIAC stated:

> "for most Canadians, their experience with the financial planning industry does not involve actual financial planning at all. What it does include is a meeting with an individual who has a title that leads consumers to believe they are receiving financial planning advice. However, in reality consumers are dealing with financial salesperson who is employed by organizations to solicit a specific product or series of products. While it was noted previously that anyone can call themselves a financial planner in Canada, the notion that most individuals in the financial planning industry are merely salespeople is so prevalent that even most financial planning students don't bother completing the Certified Financial Planner designation."[31]

From current Ontario Securities Investor Advisory Panel member and York University instructor Alan Goldhar:

> "It's like graduating from medical school and then being allowed only to check temperatures and change bandaids…the industry has jobs for investment sales people, not for professional financial planners."[32]

PIAC suggests there should be as few titles as possible for Ontario consumers to navigate. A recent example underlining the overabundance of titles involves the Mutual Fund Dealers Association of Canada (MFDA). The MFDA initiated a consultation process in September, 2015, to considering rule proposals that would prohibit Approved Persons from using the title "financial planner" unless they have appropriate proficiency. Under the section of the bulletin explaining the proposal entitled, "Use of "Financial Planner" title by MFDA Approved Persons," no less than nine titles were described.[33]

Listed below are a few suggestions for the Expert committee to consider. PIAC has advocated for the introduction of a requirement for financial advisors and financial planners to choose between

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[31] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 27.

[32] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 27. See also, 'Financial Planning is Still about Selling,' *National Post*, October, 2009. Online; <http://www.financialpost.com/personal-finance/wealthy-boomer/story.html?id=2b669450-6b4f-42b0-9e21-c0834ab0e299>.

[33] Mutual Fund Dealers Association of Canada (MFDA). *Bulletin #0656-P - MFDA Consultation Paper on Standards for Use of the Title "Financial Planner."* September 2015. P. 4.

fee only (independent) and embedded fee (restricted) practice, [34] which is reflected in the following suggestions:

- Financial/Investment Salesperson
- Fee only (independent) Financial Advisor
- Embedded fee (restricted) Financial Advisor
- Fee only (independent) Certified Financial Planner
- Embedded fee (restricted) Certified Financial Planner[35]

d) Specific activities that should be included or excluded in a regulatory scheme;

PIAC contends that all activities currently regulated for those engaging in financial planning or the giving financial advice in Ontario should be considered for additional regulation. Moreover, PIAC suggests a review of recent reforms undertaken in other jurisdictions. The goal would be to ascertain if certain practices related to the provision of financial advice not regulated in Ontario have been regulated elsewhere. In addition, such a review would display the different approaches taken by jurisdictions to regulated activities. Furthermore, such a review could gauge the effectiveness of foreign regulations and contribute to a fulsome discussion on the need for a particular practice to be regulated, or regulated differently, in Ontario.

For instance, in April 2010, the Australian government announced the *Future of Financial Advice* (FOFA) reforms, created to "tackle conflicts of interest that have threatened the quality of financial advice that has been provided to Australian investors."[36] The FOFA package included a number of proposed changes, including a prospective ban on conflicted remuneration structures, a statutory fiduciary duty, and the expanded availability of low-cost "simple advice."[37]

Other jurisdictions that recently reviewed practices related to financial planning and the provision of financial advice include the United Kingdom and the United States. In the United Kingdom, the

[34] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 4.

[35] In "Purse Strings Attached: Towards a Financial Planning Framework," PIAC referred to fee-only financial planners and those who give financial advice as "independent." Those financial planners and financial advice providers who collect embedded fees were referred to as "restricted."

[36] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 19. From Chris Bowen, Minister for Financial Services, Superannuation and Corporate Law, Overhaul of Financial Advice (26 April 2010), online: Australian Treasury <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/036.htm&pageID=003&min=ceba&Year=&DocType=0>.

[37] Bowen, Chris. Minister for Financial Services, Superannuation and Corporate Law, Overhaul of Financial Advice (26 April 2010), online: Australian Treasury <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/036.htm&pageID=003&min=ceba&Year=&DocType=0>.

Retail Distribution Review (RDR), initiated in June 2006, included a controversial ban on commissions set by product providers for all personal recommendations provided to a retail client. The RDR also requires investment firms to describe their advice to clients as either "independent" or restricted," and this distinction influenced the recommendations made by PIAC in 2013.[38]

In the United States, there are numerous debates regarding various practices related to the provision of financial advice. Arguably the most prevalent is the different standards of care that currently apply to investment advisers and broker-dealers. This was highlighted in a 2011 study released by the Securities and Exchange Commission (SEC) on the effectiveness of existing legal or regulatory standards of care for providers of personalized investment advice to retail clients.[39] The SEC recommended the creation of a uniform fiduciary standard that would apply to both investment advisors and broker-dealers providing personalized investment advice to retail customers.[40] A proposal addressing the SEC recommendation is currently under consideration by the United States Department of Labour.[41]

e) Costs and other burdens of regulation;

It has been brought to PIAC's attention that many of those engaging in financial planning or the giving financial advice in Ontario are already apprehensive of changes to their industry that have already been decided, such as the implementation of the second part of the Customer Relationship Model project (CRM2).[42] Advocis, the Financial Advisors Association of Canada, said new regulations will have a particularly profound effect on small and medium-sized advisers, many of whom may be forced out of business as a result.[43] It commissioned a study by

[38] The standard for independent advice is that a personal recommendation is:

> (a) based on a comprehensive and fair analysis of the relevant market, and
> (b) unbiased and unrestricted.

Restricted advice is a personal recommendation concerning a retail investment product that is not independent advice in that it is "restricted" in some way. An advisor's key responsibility would be to disclose the restricted nature of that advice and be fair, clear and not misleading in how they describe their advice services.

[39] Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers* (2011), online: SEC <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>

[40] Timothy Spangler, "SEC Delays Uniform Fiduciary Duty Standard for Brokers," Forbes (18 January 2012), online: Forbes < http://www.forbes.com/sites/timothyspangler/2012/01/18/sec-delays-uniform-fiduciary-duty-standard-for-brokers/>.

[41] Employee Benefits Security Administration (EBSA). *Definition of the Term Fiduciary; Conflict of Interest Rule-Retirement Investment Advice*. EBSA-2010-0050-0204. Online: <http://www.regulations.gov/#!documentDetail;D=EBSA-2010-0050-0204>.

[42] Pett, David. "The Incredible Shrinking Advisor: How Onerous New Rules are Driving Away Financial Planners in Droves." *Financial Post*, January 30, 2015.

[43] Pett, David. "The Incredible Shrinking Advisor: How Onerous New Rules are Driving Away Financial Planners in Droves." *Financial Post*, January 30, 2015.

PricewaterhouseCoopers last year that found the number of advisers in the United Kingdom fell by 25% when commissions on retail investment products were banned and new professional education requirements were introduced.[44]

Thus, PIAC envisions any amendment to the current duty-of-care model in favour of something more stringent will be completed in the face of criticism from a number of industry stakeholders.

PIAC for its part views the cost of regulation in two ways. From the consumer prospective, it would be difficult to overestimate the amount it has cost Ontario investors to interact with those who engage in financial planning or the giving financial advice in Ontario under the current regulatory structure. In other words, financial advisers and planners have been able to have the negative externalities of poor or negligent advice and outright fraud stemming from a largely unregulated industry fall almost wholly upon consumers. In addition, such externalities could include also lost opportunities had consumers appropriately changed products, or their service delivery, or had disclosure mechanisms such as those proposed by the OSC's *The Fair Dealing Model* been implemented. Therefore, it is PIAC's view that Ontario investors have already and continually borne a major cost burden and it would be appropriate if any changes that are recommended by the Expert Committee fell more equally on the industry.

In 1998, former Ontario Securities Commissioner Glorianne Stromberg, made the following comments on the costs of the regulatory regime to Canadian consumers, when she noted:

> "The cost of continued, multi-jurisdictional, multi-layered, fragmented regulation is too great a burden on Canadians and is not meeting the integrated financial planning and investment advisory needs of the consumer/investor."[45]

It may be naïve to hold the view that those engaging in financial planning or the giving financial advice in Ontario will not find a method to pass on the cost, real or imagined, of any proposed regulatory change. However, PIAC suggests there will be costs associated with any proposed change to the regulatory framework applicable to those engaging in financial planning or the giving financial advice in Ontario. In the end, it is very likely the consumer, whether they deserved the additional burden or not, will pay these increased costs. However, if these costs are the final payment to ensure there is a greater balance of fairness between Ontario investors and those engaging in financial planning or the giving financial advice, than it will be a bill worth paying for the consumer and the industry.

[44] Pett, David. "The Incredible Shrinking Advisor: How Onerous New Rules are Driving Away Financial Planners in Droves." *Financial Post*, January 30, 2015.
[45] Stromberg, G. (1998). *Investment Funds in Canada*. P. 36.

f) Regulation of compensation; and

In *Purse Strings Attached: Towards a Financial Planning Framework*, PIAC discussed the notion of applying a statutory fiduciary standard to all financial planners under all circumstances. At the time, PIAC concluded, however, "Canada may only be ready for a legal framework where the advisor is allowed to choose between offering "independent" and "restricted" financial planning or financial advice."[46]

In the past, PIAC has suggested the preliminary step of the introduction of a requirement for financial advisors and financial planners to choose between fee only (independent) and embedded fee (restricted) practice.[47] Along with this choice is a disclosure of the difference to clients in instances where advisors offer both models of remuneration. This disclosure is to occur before a client agrees to use the services offered by the planner.

Given the costs of the embedded compensation model to consumers, providing an opportunity for consumers to make the choice and then actually creating points at which they were forced to consciously exercise that choice, would appear to be the right course.

As a result, PIAC has also suggested the introduction of a triggering mechanism for client to re-visit the compensation method of their financial planner every five years or when their investments reach a certain monetary size.[48] The creation of a tax credit for those persons who employ a fee-only financial planner in order to incent investors to move to the fee-only (independent model) was also raised for consideration by policymakers.

PIAC suggests there is no reason why this proposed arrangement could not be applicable to both those engaging in financial planning or the giving financial advice in Ontario.

g) Complaints and discipline mechanisms.

Any proposed complaint and discipline mechanism considered by the Expert Committee should be larger in scope than just a complaint-driven scheme. The entity, whether an existing SRO or a new creation, should have an investigative capacity to ensure compliance. In addition, how complaints are dealt with and the matter of reporting them to the Single SRO, the Regulator and the public is one that needs to be addressed. As Ms. Stromberg suggested in 1998, "The lack of an adequate complaints mechanism combined with lack of disclosure to the public about problem

[46] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 41.
[47] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 4.
[48] Bishop, J. and John Lawford (2013). "Purse Strings Attached: Towards a Financial Planning Framework." *Public Interest Advocacy Centre*. P. 5.

firms and/or representatives is another example of the knowledge gap that exists and that operates to the disadvantage of consumer/investors."[49]

Moreover, the Expert Committee should consider including provisions to provide binding restitution to investors if they experienced significant financial loss due to inappropriate activity. In many instances, a disciplinary body has found the activity of a financial service professional, their immediate supervisor, and their employer to be in violation of established guidelines. However, while these individuals receive fines and temporary suspensions, the majority return to work in the same field within a few weeks or months. Meanwhile, investors who have lost considerable sums have few avenues available to them to recoup their losses.

Again, PIAC was impressed by the comments of Ms. Stromberg on the matter of existing penalties in 1998:

> "Most people do not think that the consequences of breaching the rules of a self-regulatory organization or the provisions of applicable legislation are serious enough. They do not think that the consequences of breaching such rules operate either as a deterrent to doing so or as an incentive to ensure compliance by others with the rules. Furthermore, the consequences do not offer any recompense to people who have suffered loss as a result of the failure to comply with the rules."[50]

PIAC acknowledges the presence of the Ombudsman for Banking Services and Investments (OBSI) as well as the arbitration program offered by IIROC. The challenge with an investor raising a complaint with the OBSI is the non-binding nature of the process. In PIAC's view this is becoming an irritant on the OBSI's effectiveness since participants in the scheme are becoming more likely to ignore an OBSI recommendation.

For instance, Ellen Roseman reported five investment firms turned down compensation for customers' losses in 2014, citing OBSI's latest annual report.[51] In 2013, OBSI pointed to six firms that failed to cover $750,000 in client losses, while in 2012, the OBSI highlighted 10 firms that failed to cover $1.37 million in client losses.[52] Once an investment firm chooses to ignore the recommendation, the OBSI has no authority to do anything except publicly release the identity of the firm.

Alternatively, there is evidence suggesting that instead of ignoring an OBSI recommendation, some investment firms have simply settled complaints for amounts well below OBSI's recommendation.[53] This tactic by investment firms to manipulate investors into accepting reduced offers while threatening to simply walk away from OBSI recommendation is predatory. PIAC implores the Expert Committee to recommend action to counter this unfortunate trend, such as providing OBSI with order making power.

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[49] Stromberg, G. (1998). *Investment Funds in Canada*. P. 84.
[50] Stromberg, G. (1998). *Investment Funds in Canada*. P. 85.
[51] Roseman, E. "Time to Give Ombudsman More Power." *Toronto Star*, February 25, 2015.
[52] Roseman, E. "Time to Give Ombudsman More Power." *Toronto Star*, February 25, 2015.
[53] Roseman, E. "Time to Give Ombudsman More Power." *Toronto Star*, February 25, 2015.

On the occasion an OBSI recommendation is ignored, affected Canadian investors outside of Quebec can either seek legal action or initiate the IIROC Arbitration Program. However, both of these options involve legal costs, which are a disincentive to proceed.

A financial services firm may offer an investor funds if an investor complaint to a body such as IIROC reveals activity requiring disciplinary action. However, it has been found that some inappropriate activity by a financial advisor can affect multiple investors simultaneously, and not all affected investors complain. Therefore, PIAC requests the Expert Committee consider a complaint resolution scheme where the decisions are binding.

Moreover, PIAC's contends under a new or amended complaint resolution scheme, each individual investor affected by inappropriate activity proven through a disciplinary proceeding, should be eligible for funds from an offending party.[54] This applicability to each affected investor should not hinge on whether the person launched a complaint. The cost of initiating such a complaint process should be low to allow investors greater opportunity to defend their interest.

[54] In the instance an affected investor can no longer be found, the funds could be contributed to a fund similar to the Education and Good Governance Fund (EGGF) proposed by PIAC on page 14 of this submission. The EGGF is administered by the *Autorité des marchés financiers* in the province of Québec.

5. What harm(s) and/or benefit(s) do consumers experience in the current environment? Please provide specific evidence to support your views where available.

In PIAC's view, the onus lays squarely on the investor to identify wrongdoing, seek out avenues for resolution, and attempt to obtain redress, in a relationship between an investor and those engaging in financial planning or the giving financial advice in Ontario. At a time when more investors are apparently entering into relationships with financial service providers, studies show investors are not as financially literate as they could be.[55] PIAC simply asks the Expert Committee if the situation has to remain this way.

As a result, PIAC suggests the Expert Committee consider recommendations that remove some of the onus described above away from individual investors and place some of the responsibility for identifying wrongdoing and seeking redress on another entity for the benefit of investors.

6. Should consumers have access to a central registry of information regarding individuals and entities that engage in financial planning and the giving of financial advice including their complaint or discipline history?

PIAC would consider the creation of such a registry a positive development. Responsibility for registration should fall upon those engaging in financial planning or the giving financial advice in Ontario. Non-registration should be an offence and any such requirement must prohibit any operation in these endeavours without registration. This responsibility also should be extended to individuals in the insurance industry selling similar products to those usually found in the financial services industry (e.g., segregated funds). This form of regulatory arbitrage should be addressed in any measure recommended by the Expert Committee.

Moreover, the legal responsibility for any improvement up to a legislated fiduciary relationship should not end with those engaging in financial planning or the giving financial advice in Ontario. Employers (including dealer-brokers) should also be liable for enforcement measures when a fiduciary relationship between those engaging in financial planning or the giving financial advice in Ontario and an investor is violated. It is the employers of those engaging in financial planning or the giving financial advice in Ontario who often are applying such expectations upon their employees as "asset quotas" which may provide negative incentives to avoid ethical and legal responsibilities to clients.

Take a recent case from the annals of the Investment Industry Regulatory Organization of Canada (IIROC) as an example. A BMO Investorline registered representative agreed to a fine and

[55] Ontario Securities Commission (2013). *Strengthening Investor Protection in Ontario - Speaking with Ontarians***.** Investor Advisory Panel. P. vi. Online <https://www.osc.gov.on.ca/en/Investors_nr_20130318_iap-adviser-investor-relationship.htm>. Ontarian investors lack confidence about their financial literacy–only 11% describe themselves as 'very confident'. Confidence is lower among female investors, and young investors.

suspension by IIROC for forging the signature of a client that was requires for a transfer process.[56] IIROC wouldn't comment on whether BMO Investorline faced a separate disciplinary hearing. As Manulife Advisor Monica Weissmann noted,

> "The dealership will not be penalized and the bank will do anything to protect itself. They [IIROC] have to have somebody to hang the guilt on and the broker is always the link of least resistance. [BMO Investorline] is just a sub-division of the bank. To take on them is to take on the bank. How many times did IIROC take on any bank and eventually succeed?"[57]

A second IIROC investigation reveals an employee and a former branch manager at RBC Dominion Securities were both found guilty of violating IIROC rules. As a result, 37 investors lost over $600,000 between 2010 and 2012.[58] While the employees were subject to a total of $50,000 in fines and $5,500 in costs, the investment representative was suspended for 4 months, while the former manager received no suspension at all.[59] RBC Dominion Securities received a $90,000 fine, but to PIAC's knowledge, only the individual investor who was identified in the IIROC Settlement Agreement as submitting a complaint was compensated for their investment loss.[60] Moreover, according to IIROC enforcement decision involving the branch manager, the investments in questions were not sold until after the complaint was launched.[61] Thus, in theory at least, those 37 investors could still be holding on to the recommended investment product if someone had not complained. This, even though the company in this case, RBC Dominion Securities, expressed concern as early as April 2010.[62]

PIAC anticipates that a statutorily-clarified rule of employer liability for standards breaches of their employees largely would eliminate such occurrences as employers made better efforts to perform due diligence with regard to the conduct of their employees.

[56] W. Ashworth. "IIROC case highlights power of the banks." *Wealth Professional*. August 27, 2015. Online: <http://www.wealthprofessional.ca/news/iiroc-case-highlights-power-of-the-banks-195274.aspx>.
[57] W. Ashworth. "IIROC case highlights power of the banks." *Wealth Professional*. August 27, 2015. Online: <http://www.wealthprofessional.ca/news/iiroc-case-highlights-power-of-the-banks-195274.aspx>.
[58] Investment Industry Regulatory Organization of Canada (IIROC). *2015 IIROC 29,* Para. 5.
[59] Investment Industry Regulatory Organization of Canada (IIROC). *2015 IIROC 29,* Paras. 30-35.
[60] Investment Industry Regulatory Organization of Canada (IIROC). *2014 IIROC 25*, Paras. 21-22.
[61] Investment Industry Regulatory Organization of Canada (IIROC). *2015 IIROC 29,* Para. 5.
[62] Investment Industry Regulatory Organization of Canada (IIROC). *2014 IIROC 25*, Para. 39, 42-44.

Final Word

From PIAC's perspective, it appears some designating bodies remain reluctant to embrace the need for changes that are necessary in the financial advice industry in Ontario. PIAC feels the suggestions provided here would contribute to the more effective operation of the financial advice industry for all stakeholders. PIAC's suggestions were provided in an effort to help re-"balance the scales" in the relationship between consumers and those engaging in financial planning or the giving financial advice in Ontario. As a result, PIAC believes even if a few of the measures proposed here become elements of a future regulatory reform package, it is possible the public's trust in the financial advice industry in Ontario could improve over time.

It is with these thoughts in mind that PIAC intends to continue monitoring the financial services industry in Canada and advocate for policy changes that will benefit consumers. We would also be very pleased to participate in any future consultations on the regulation of financial advice in Ontario.