

CONSUMER ADVISORY PANEL

July 9, 2021

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

Re: Proposed Fraud and Abuse Strategy for the Auto Insurance Sector

The Financial Services Regulatory Authority of Ontario's **Consumer Advisory Panel** (the "CAP") is pleased to participate in the consultation for the Proposed Fraud and Abuse Strategy (the "Strategy") for the Auto Insurance Sector. The CAP is an initiative of FSRA to help inform FSRA's work and to ensure that consumer, member, and beneficiary perspectives inform FSRA's direction and decisions. This is a key priority for FSRA and an important part of FSRA's stakeholder engagement process. The CAP also supports FSRA's Consumer Office to provide an effective challenge function within FSRA.

This submission covers three elements of the Ministry of Finance (MOF) and FSRA's consultation:

1. MOF and FSRA's approach to the consultation process;
2. Framing of the consultation paper; and
3. Policy considerations for the proposed Fraud and Abuse Strategy.

While we appreciate the opportunity to provide feedback on this consultation, we are deeply concerned by the approach, framing, and substance of the consultation. For this reason, we have not responded directly to all consultation questions. Rather, we have directed our energy at highlighting the ways in which we have fundamental concerns on behalf of Ontarians.

Following consultation close, we understand that there may be an opportunity to meet with MOF and FSRA to discuss consultation responses. The CAP and Ontarians would welcome the opportunity to engage. We are concerned about the apparent emphasis on the interest of insurance companies and the lack of consideration of the interest of Ontario's motor vehicle drivers.

1. MOF and FSRA's Approach to the Consultation Process

The CAP believes that MOF and FSRA's approach to the consultation process will limit meaningful participation, especially from consumer stakeholders. This is an issue particularly given that the consultation has significant implications for Ontarians – about 10 million of whom are drivers. The proposal uses biased language and appears to assume that all Ontarians injured in a motor vehicle accident are participating in frauds. There is no consideration of how to improve the inadequate rehabilitation services to help the vast majority of innocent Ontarians injured in a motor vehicle accident. This focus on insurance companies' profits at the expense of Ontarians is putting big business first and ignoring the pleas for improvement by ordinary Ontarians. We urge the politicians to reconsider the interests of those who have lobbied for this change and to weigh against these lobbyist the interests of those who voted for them and their party.

To the best of the CAP's knowledge, MOF and FSRA have not hosted forums (e.g., roundtables or targeted discussions) for Ontarians to engage directly with interested stakeholders. It is a standard practice for consultation processes to include opportunities for stakeholders to meet with the relevant public-sector representatives to discuss the issues under consideration.

Moreover, it is often difficult for the voice of Ontarians to be represented in public consultations, especially when the mode of participation is a written submission. In this way, MOF and FSRA's consultation decisions have led to equity issues with respect to access to participation – insurance companies and their lobby groups have access, while the voice of Ontarians is all but silenced. Unlike the auto insurance industry, which can easily mobilize to represent its interests in the context of a public consultation, Ontarians are less well-positioned to advocate for regulatory changes. It is of concern to the CAP that the government and regulator have exacerbated equity issues that already exist in the system.

Further, the current framing of the issues, as set out in the consultation paper, also highlights the fact that MOF and FSRA do not fully understand the issues from an Ontarian's perspective (discussed in the next section). The key bias of the consultation paper (perhaps inadvertently) places an unfair burden on Ontarians to demonstrate that they are not the main perpetrators of fraud and abuse. When the approach to the consultation process (which limits consumer engagement) and framing of the consultation paper (which unfairly targets consumers) are considered together, it becomes clear that the Strategy is not truly intended to protect the rights and interests of Ontario's auto insurance consumers.

2. Framing of the Consultation Paper

The CAP's assessment is that the consultation paper approaches the topic of fraud and abuse from a problematic assumption: namely, that Ontarians are the principal perpetrators of fraud and abuse. As we discuss below, MOF and FSRA have not offered a definition of 'fraud and abuse' in the consultation paper, so it is unclear how this assumption can be made.

While the consultation paper states that the type, size, and scope of fraud and abuse must be quantified (p. 2), the framing of the consultation paper unjustly suggests that injured Ontarians are the main offenders. Consider the fact that the Strategy's proposed initiatives include giving insurers much more discretionary power to manage fraud and abuse. Can the primary interest of businesses to serve their shareholders be reconciled with the grant of trust by government of vulnerable Ontarians' health?

For example, one of MOF's considerations, in the context of establishing expectations for insurers' fraud and abuse management plans, is as follows: "Provide clarity that insurers have the primary responsibility to manage fraud and abuse effectively, by establishing fraud and abuse management expectations" (pp. 9-10). It would be reasonable for insurers to have this "primary responsibility" only if consumers were the presumptive offenders. This assumption by the government flies in the face of personal experience and without empirical basis (which we discuss further below).

The framing of the consultation paper is particularly problematic given that MOF and FSRA have not offered a definition of 'fraud and abuse'. Setting a definition is intended to be one of the Strategy's potential initiatives (p. 4). However, the framing of the consultation paper – and the proposed initiatives that follow from the framing – inappropriately presupposes a definition and assumes that Ontario drivers significantly contribute to fraud and abuse. It is incumbent on MOF and FSRA to either set out an objective and defensible definition, or revisit the foundational assumptions underlying the proposed Strategy.

Moreover, and putting the definitional issue aside, the consultation paper offers no empirical evidence to support the claim that Ontarians are the principal perpetrators of fraud and abuse (even if we assume there is an accepted definition). It is irresponsible for MOF and FSRA to both (i) acknowledge that more data is needed to understand the scope of the issue and (ii) propose initiatives that work from the assumption that Ontarians — but not insurers — are the problem. We all know Ontarians who have been injured in motor vehicle accidents – these individuals should not be assumed to be fraudsters.

Given the lack of empirical evidence, the consultation paper's assumption unfairly puts the onus on Ontario's motor vehicle victims to demonstrate that they have not perpetrated fraud and abuse. It is unclear why Ontarians must shoulder this evidentiary burden. Rather, MOF and FSRA must appropriately scope the issue before proposing initiatives that could harm or undermine consumers' rights and interests.

Again, we urge MOF and FSRA to reconsider the foundational assumptions of the Strategy. If the regulatory approach to fraud and abuse is built on underexplored and unsupported assumptions about the nature of fraud and abuse in Ontario, the Strategy's initiatives will fail to achieve what ultimately matters: protecting the rights and interests of auto insurance consumers.

3. Policy Considerations for the Fraud and Abuse Strategy

In this section, the CAP will outline a set of policy considerations that should inform the Strategy. From the CAP's perspective, many of these policy considerations – which focus on Ontarians – were ignored or understated in the consultation paper. Given the framing of the consultation paper, this is not a surprise: if consumers are understood to be principally responsible for fraud and abuse, their interests are bound to be inadequately represented in the Strategy.

We implore MOF and FSRA to consider and explore the following six issues in the context of the Strategy:

- a) Fairness
- b) Consumer Vulnerability
- c) Accountability
- d) Transparency
- e) Value for Money
- f) Trust

If the Strategy is to adequately protect the rights and interests of consumers, these issues must serve as its pillars.

It is important to note that *privacy and data protection* is a main theme discussed throughout this section. The CAP urges MOF and FSRA to carefully investigate the privacy implications of the Strategy's proposed initiatives, including (but not limited to):

- “Improve use of data in the industry's fraud and abuse management activities by enabling better collection, analysis and reporting of relevant data / information” (pp. 5-6);
- “Mandate insured's cooperation with insurer F&A investigations” (pp. 6-7); and

- “Establish expectations for fraud and abuse management plans” (pp. 9-10).

MOF and FSRA must consider the Strategy’s approach to privacy and data protection in the context of the Ministry of Government and Consumer Services’ (MGCS) current public consultation on [Modernizing Privacy in Ontario](#). The CAP understands that the government is “considering the possibility of a provincial privacy and data protection law that would offer individuals more control over their personal information and how it is collected, used, transferred and safeguarded by private sector organizations.”¹ The CAP also understands that the Information and Privacy Commissioner of Ontario (IPC) may “provide oversight of a made-in-Ontario private sector privacy law.”²

A made-in-Ontario private sector privacy law would have implications for insurers. Accordingly, the Strategy must not neglect this broader government initiative. Relatedly, MOF and FSRA must consider IPC involvement before proceeding with the Strategy. In fact, the IPC Strategic Priorities 2021-2025 include a provisional priority, (*Provisional*) *Made-in-Ontario Private Sector Privacy Law*, in case a private sector privacy law is introduced in Ontario:

Develop the foundational building blocks and oversight mechanisms for implementing Ontario’s private sector privacy law in a manner that protects privacy, supports responsible innovation, and accords with our province’s unique circumstances and economic reality.³

As both MGCS’s public consultation and the IPC’s provisional priority demonstrate, the landscape of privacy and data protection is changing in Ontario. It is imperative that the Strategy is responsive to this changing landscape and takes the privacy of Ontarians in the auto insurance sector seriously.

a) Fairness

The principle of fairness must be central to the Strategy. This means that the Strategy must be sensitive to the power imbalances that exist between insurers and consumers. Consider the fact that the conception of fraud that exists for Ontarians is more punitive than the conception of fraud that exists for insurers. When an injured Ontarian makes an insurance claim that is rejected, it is considered an instance of fraud. However, when an insurer’s incorrect decision to deny benefits is overturned – thus providing the

¹ Government of Ontario, “Strengthening privacy protection in Ontario”: <https://www.ontario.ca/page/strengthening-privacy-protection-ontario>.

² [Modernizing Privacy in Ontario: Empowering Ontarians and Enabling the Digital Economy \(White Paper\)](#), p. 33.

³ [IPC Strategic Priorities 2021-2025](#), p. 4.

Ontarian with benefits – it is not the case that the insurer’s incorrect denial of benefits is viewed as an instance of fraud. In both scenarios, it may simply be the case that the party under consideration (i.e., an Ontarian or insurer) has made an incorrect judgment about the benefits that should be provided. However, the fact that an injured Ontarian’s incorrect judgment counts as fraud, but the insurer’s incorrect judgment does not count as fraud, highlights a problematic inconsistency. Fairness requires consistency. Fairness means listening to Ontarians.

Moreover, the fact that auto insurance is mandatory for drivers in Ontario must guide the Strategy’s treatment of Ontarians, and all policy and regulatory efforts in auto insurance. Drivers do not have the ability to opt out of auto insurance. Accordingly, the features built into having auto insurance must not take advantage of Ontarians’ lack of choice. For example, a proposed initiative that is central to the Strategy – which we discuss throughout this submission – is improving use of data in the industry’s fraud and abuse management activities by enabling better collection, analysis and reporting of relevant data / information (pp. 5-6). There are legitimate privacy- and security-related issues associated with insurers having greater access to Ontarians’ data. If Ontarians are required to give up a significant amount of privacy in order to simply drive, MOF and FSRA would be unfairly exploiting Ontarians’ lack of choice.

b) Consumer Vulnerability

The issue of Ontarians’ vulnerability is not discussed in the consultation paper. It should, however, be foundational to the Strategy. Not all groups of consumers are equally impacted by policy and regulatory changes. In the context of the Strategy, MOF and FSRA must undertake a careful analysis of how different regulatory levers and instruments would impact different groups of consumers.

The claims process is already challenging for many Ontarians, especially Ontarians who have suffered an injury in an auto accident. If the Strategy’s initiatives give insurers significant power to accuse Ontarians of fraud and abuse, this could result in legitimate claimants facing unreasonable additional scrutiny in order to receive their benefits and treatment. The CAP is concerned that the timeliness, fairness, and effectiveness of the claims process could be further damaged through inelegant approaches to deterring fraud and abuse. As a result, vulnerable Ontarians who do not have the resources and support (e.g., legal representation) to fight back against mistreatment will be those who suffer the greatest harm. While deterring and removing fraud and abuse is a laudable policy objective, that objective cannot be achieved at the expense of vulnerable members of our community.

c) Accountability

The issue of insurer accountability must be further explored by MOF and FSRA. As we noted while discussing the consultation paper's framing, the Strategy must demand that all parties – including insurers – be held accountable for their (direct or indirect) role in fraud and abuse.

The direction of the Strategy appears to give insurers a significant amount of discretion to deem claims as fraud and abuse. However, if insurers have the discretion to accuse victims of fraud and abuse, then the fraud and abuse for which the *insurers* are responsible will not be managed. In other words, insurer-led or -facilitated fraud and abuse may not be appropriately self-managed.

The Strategy cannot advance initiatives that allow insurers to operate with limited oversight. While further data is required to appropriately quantify the type, size, and scope of fraud and abuse in Ontario, it seems improbable that insurers do not play a role. The Strategy's actions regarding insurer oversight and accountability warrant further thought from MOF as system steward and from FSRA as the protector of the public interest.

d) Transparency

As we have discussed throughout our submission, the Strategy's proposed initiatives involve insurers collecting and using Ontarians' private data. In addition to some of the concerns raised above (e.g., fairness), there is a distinct issue related to transparency. If a similar privacy intrusion were made by the government, then Conservative and conservative values would be offended. Instead the government is downloading this privacy intrusion to international insurers, thus by stealth, the private data of Ontarians is being given to big business. Should Ontarians trust international insurers with so much more of their private data?

MOF and FSRA should consider the fact that transparency emerged as a key theme in the [*Final Report of the Residents' Reference Panel on Automotive Insurance in Ontario*](#):

Greater transparency is needed throughout the system. The panel's report highlights the importance of enhancing transparency across all elements of the system. From purchasing to renewing, from making a claim to escalating a complaint, and from understanding how premiums are calculated to articulating the difference between mandatory and optional coverage, the recommendations

all point to the need for greater clarity about a product that all Ontario drivers are required to purchase.⁴

We encourage MOF and FSRA to explore the relationship between accountability and transparency. As discussed in the previous subsection, insurer accountability is central to the success of the Strategy. However, in those cases where insurers are provided greater latitude to manage fraud and abuse, transparency is non-negotiable. More specifically, insurers must be transparent with the Ontarians about their actions.

For example, if the Strategy relies on insurers collecting and using additional Ontarians' private data, there must be clarity regarding how and why that information is being used. If the purpose of such data is the deterrence or removal of alleged fraud and abuse, there must be a clear link between the data required from Ontarians and the functional role that data serves to deter or remove fraud and abuse (and, moreover, achieve meaningful consumer outcomes). It must not be a mystery to Ontarians why insurers are collecting certain pieces of information and how that information is being used.

Relatedly, the Strategy's initiatives should not be used as an opportunity for insurers to expand their access to data that can then be used to strengthen other parts of their business. If the role of data is to deter fraud and abuse, for example, then there must be safeguards in place to prevent the inappropriate use of information.

e) Value for Money

Auto insurance consumers care about value for money – what they are able to get (value) for what they pay (money). The importance of this issue was highlighted in a FSRA consumer survey on auto insurance in 2020 and in the form of a guiding principle in the [*Final Report of the Residents' Reference Panel on Automotive Insurance in Ontario*](#):

Providing value for money. The auto insurance system should be efficient and should constantly strive to implement innovations that support cost-effective options. New approaches and options should be encouraged, especially when they reduce costs and provide consumers with greater choice.⁵

Some the Strategy's potential initiatives have significant value-for-money implications. For example, again consider the proposed initiative that focuses on insurers collecting and using consumer data. If the Strategy results in additional consumer data being

⁴ Final Report of the Residents' Reference Panel on Automotive Insurance in Ontario, p. 8.

⁵ Ibid., p. 16.

collected and used by insurers – which, as discussed in the context of fairness, is potentially problematic – there must be a clear acknowledgment regarding what Ontarians are *actually* paying for auto insurance. Ontarians’ data has value, and it is unfair to ask law-abiding drivers to give up their personal data without first recognizing the value of that data, clearly articulating how the data will be used, and providing meaningful compensation to the producers of that data in return.

In these circumstances, best-practice disclosures would be required to ensure that Ontarians are willingly and voluntarily providing their personal information and understand risks. Insurers’ extensive collection and use of personal information cannot simply be a requirement of buying auto insurance, which is a mandatory product.

f) Trust

Finally, the Strategy must acknowledge the level of trust (or distrust) that exists between many consumers and insurers. As the [*Final Report of the Residents’ Reference Panel on Automotive Insurance in Ontario*](#) notes, consumers’ trust in the auto insurance system has been eroded.⁶ This must be acknowledged as a starting point in the context of the Strategy.

The direction of the Strategy indicates that insurers will be given significant power to manage fraud and abuse. However, from the perspective of Ontarians, it is unclear why insurers deserve additional power. On what basis have insurers earned the trust from Ontario consumers that is required for additional power? From our perspective and the perspective of the Residents’ Reference Panel, the requisite trust does not exist.

Furthermore, the fact that the issues previously outlined – fairness, consumer vulnerability, accountability, transparency, and value for money – have not been appropriately built into the Strategy demonstrates that a foundation for trust is not being established. If the Strategy fails to take these issues seriously, it will further erode trust between consumers and insurers – which was tenuous to begin with.

Conclusion

To conclude, we hope that MOF and FSRA will take seriously the concerns raised in this submission. While we ardently support the deterrence and removal of legitimate fraud and abuse from Ontario’s auto insurance system, we urge MOF and FSRA to reconsider the assumptions made and the foundations of the Strategy. We urge the

⁶ Ibid., 8.

legislature to question why this proposal presumes that Ontarians are fraudsters and grants our private data to international insurers.

We hope that MOF and FSRA will consider opportunities for interested stakeholders – such as the CAP – to engage directly on these issues. The Strategy has significant implications for auto insurance consumers and, therefore, most Ontarians. This makes the consumer voice a vital part of this consultation process and the emerging Strategy.

We appreciate the opportunity to comment on this public consultation, and we hope that our feedback will contribute to reshaping and strengthening MOF and FSRA's approach.

Sincerely,

Consumer Advisory Panel