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FAIR Submission to FSRA Consultation on proposed Principles of Conduct for Insurance Intermediaries ID 2022-007

Thank you for the opportunity to provide input on the proposed Principles of Conduct for Insurance Intermediaries Guidance. FAIR (Fair Association of Victims for Accident Insurance Reform) is a grassroots not-for-profit organization of Ontario's MVA (Motor Vehicle Accident) survivors. Our comments relate to auto insurance claims only.

The Financial Services Regulatory Authority of Ontario (FSRA) is said to “*protect the rights of consumers by promoting high standards of business conduct and transparency within the financial services we regulate. Information provided about these sectors will help you understand your rights, give you confidence in the choices you make and the process for filing complaints.*” We believe adequate guidelines for insurers and their intermediaries is part of creating market confidence.

FAIR recently send FSRA a letter in respect to the accessibility around this consultation, the language barriers present in the materials and the short window for consumers to respond. [1] While we appreciate that FSRA took steps to inform the public that the consultation included auto insurance intermediaries, it's notable that the banner at the top of the page still does not contain language that consumers normally use such as “car insurance” or “auto insurance”. P+C is an industry term so this remains an accessibility problem for consumers who would not use that wording to describe auto insurance.

FSRA Principles

We will use the following principles as the foundation for our approach to using guidance:

- **Accountable (Internal).** FSRA is accountable for guidance that supports delivery on its legislative mandate and its vision for financial safety, fairness and choice in Ontario.
- **Accountable (External).** Regulated persons must put in place processes, controls and procedures to appropriately meet the expectations expressed in FSRA's guidance.
- **Effective.** FSRA takes a principles-based approach to developing guidance that is supported by good governance practices, sectoral expertise and high professional standards.
- **Efficient.** FSRA seeks to develop and maintain guidance that is relevant, proportionate to risks being addressed and minimizes regulatory burden.
- **Adaptable.** FSRA responds to the dynamic nature of the regulated sectors by providing guidance that proactively identifies market trends requiring new or revised guidance.
- **Collaborative.** FSRA consults stakeholders regarding guidance that creates compliance obligations and cooperates with other regulators to identify opportunities for improvement and harmonization.
- **Transparent.** FSRA sets well-understood expectations for regulated persons through clear and organized guidance.

From FSRA Guidance Framework <https://www.fsrso.ca/regulation/guidance/fsra-guidance-framework>

We appreciate the wording above but the question is – is Principles-based regulation (PBR) going to translate into tangible action at FSRA who, as supervisor of these financial institutions [2] has not yet built the system to include consumers?

We are aware of the various efforts already made by FSRA to consider consumers from a front-end perspective (purchasing the product) and the recent pro-active introduction of Whistleblower protection for assistance to gather information. There remains a failure to empower claimants with real role in the interaction with the Regulator through access to information about insurers' intermediaries and about their own medical claims details through the Health Claims for Auto Insurance (HCAI). It is a missed opportunity, not just for claimants who should know where their claims dollars are being spent so they can better manage their recovery resources, but it is also a miss to shut off the voices of those who are the victims of insurer intermediary fraud through HCAI that they may not even know about.

It is a huge issue when regulatory follow-through is a missing piece to this important Conduct guidance. In other words, what are the consequences if the Regulator isn't considering outcomes for Consumers [3] who try to use the insurance product? How will Principles-based Regulation (PBR) fit into this construct to enhance or promote intermediaries to “place processes,

controls and procedures to appropriately meet the expectations expressed in FSRA's guidance" when the more precise prescriptive regulations weren't followed in the past anyway? In fact the dis-incentives to behave badly are long gone and consumers face a broken Tribunal system whose questionable decision-making processes are more the norm than not. [3a]

There appears to be pieces of regulation missing or not apparent when it comes to the auto insurance aspect of the intermediaries covered in this Guidance. It can be seen in the information available to consumers if they have an issue with an auto insurer. When we looked for meaningful oversight for Adjusters we could not easily identify whether or not an Adjuster was licensed because too much information was required on the FSRA website. [4] The information required to check for licensing was of the type insurers might have, Health Service Providers (HSP) might have through HCAI or that the Ontario Insurance Adjusters Association (OIAA) [5] would have. OIAA doesn't appear to provide a search engine that would supply Adjuster names and qualifications. We are aware that healthcare providers have individual College oversight that do have search engines that provide specific information about their members but where is that for Adjusters?

More importantly, where is specific information about the qualifications and regulations to govern Assessment centers under FSRA's oversight? How can quality be determined without adequate information needed to inform the public about their safety and their personal medical files at Insurer assessment centers? Why are assessment centers lumped in with Treatment Providers oversight? This speaks directly to the FSRA's ability and role to evaluate the regulated entity's "financial condition, conduct of business, corporate governance framework and overall risk profile; and assess its compliance with relevant legislation and supervisory requirements. The supervisor obtains the necessary information to conduct effective supervision of insurers and evaluate the insurance market" [6] FSRA relies on other regulators such as College oversight for licensed healthcare providers so where is the Assessment center Regulator? Is FSRA the sole oversight for multinational private equity firms who own large and very profitable medical Assessment companies operating in the insurance industry in Ontario?

Does FSRA have a plan to perform enforcement for Principles-based Regulation to ensure the fair treatment of Consumers? See our submission from April 29, 2022 on Principal-based Regulation [13].

For clarity we've addressed the individual points below:

1. Compliance / Outcomes: Intermediaries must comply with all applicable laws, regulations, rules and regulatory codes to which they are subject.

The Regulator can only know if there is intermediary compliance if and when outcomes are examined and that information can be found at the over-loaded Licensed Appeal Tribunal (LAT). There are reams of cases illustrating the unfair and unethical actions of Ontario's auto insurers articulated in the decisions on Canlii. Example: [7] These types of decisions ought be monitored and assessed against the expectations of the Regulator. [8]

2. Customers' interests: Intermediaries are expected to place Customers' interests ahead of their own. This includes when an Intermediary is developing, marketing, recommending, distributing and servicing products.

Ontario's auto insurers would get an F on this 'servicing product' point and our courts and the LAT Tribunal AABS are the repository of decisions that point this out. Overuse of the LAT AABS is an indicator itself of failure to comply with servicing. [9] Failure to provide claim documents, failure to conform to timelines, failure to properly present specifics of claims denials, all are documented in LAT AABS or in Superior Court of Ontario decisions.

3. Conflicts of interest: Intermediaries are expected to identify, disclose and manage any actual or potential conflict of interest that is associated with a transaction or recommendation. They are expected to avoid entering into or pursuing agreements for which conflicts of interest cannot be managed, or if they interfere with the fair treatment of Customers.

Auto insurance is, at its core, a delay and deny system that relies on biased, bogus and often harmful medical opinion evidence (reports and testimony) designed to blow off claims. Insurers have created a subset of medical assessors beholden to them financially and in the bargain have weakened faith in our justice system. The flawed medical evidence that often flows through the Wild West of IME Assessment centers undermines the insurer's own promise to put consumer interests first. By deflating injuries insurers also undermine faith in the insurance industry AND the oversight that allows this to continue. This is an abuse of Ontario's patients, our justice system and ultimately the taxpayers who pay when insurers don't.

4. Advice: When providing advice to or for a Customer, Intermediaries are expected to seek appropriate information from the Customer in order to understand and identify their unique needs. Intermediaries are expected to provide objective, accurate and thorough advice that enables the Customer to make an informed decision. Advice is expected to be suitable for the needs of the Customer based on the Customer's disclosed circumstances.

One only needs to look at the Ontario Claims Form OCF-1 permission to disclose personal medical information at Part 12, page 8 [10] of the initial paperwork required to bring forward an injury claim to see inappropriate information handling.

Adjusters are gathering excessive information from unsophisticated car crash survivors with the OCF-1 form and there are no meaningful safeguards in place to protect the interests of this vulnerable group if FSRA doesn't step up to do this.

5. Disclosure: Intermediaries are expected to provide Customers with objective, appropriate, relevant, timely and accurate information and explanations so that they can make informed decisions. Intermediaries are expected to:

- **Properly disclose the information to all necessary parties, including the insurer; and**
- **Disclose the information and explanations in a manner that is clear and understandable for Customers, regardless of the distribution model or medium used.**

Ontario's Auto Insurance legislation is not an understandable product so claimants start from a disadvantaged position when purchasing the product and again when accessing promised coverage. Consumers are left out of the process at Health Claims for Auto Insurance (HCAI) system for transmitting auto insurance claim forms between insurers and health care facilities and this is a disadvantage for them and the Regulator who suggests there is fraud at this level but isn't inviting the people who are purportedly being defrauded in on the process. There is an abundance of cases on the record at the LAT AABS that speaks to insurers' and their intermediaries' failure to "Disclose the information and explanations in a manner that is clear and understandable for Customers" the Regulator ought to explore.

6. Product and service promotion: Intermediaries are expected to ensure that products and services are promoted in a clear and fair manner. Regardless of the distribution model or medium used, Intermediaries are expected to ensure that promotions are not misleading, and are easy to understand. Product promotions are expected to disclose all necessary and appropriate information.

It is not "a clear and fair manner" to fail to inform consumers that they are at significant risk of being denied the coverage they paid for. When at least 1/3 of all claims end up in our court systems and with coverage very difficult to access, insurers should be obligated, as should FSRA, to inform the public that we have a blended private/public system of coverage and that if seriously injured there is a high likelihood they will end up on Ontario's inadequate social supports.

7. Claims, complaints handling, and dispute resolution: Intermediaries are expected to handle or cooperate in the handling of claims, complaints and disputes in a timely and fair manner.

Around 16,000 injured Ontario claimants had to request a hearing to get the benefits they paid for in 2021. [\[11\]](#) This is an unacceptable level of denials driven by the lack of safeguards for consumers against deceptive practices by the insurer they paid to help them in a time of need. Where is FSRA's regulatory follow-through for insurers who employ their biased medical 'expert' hired guns to undermine claims and whose testimony is sought by the same insurer's legal representatives who ought to know better? Again, evidence of this massive failure to stand behind the product by way of manipulating medical evidence, the justice system and through using our courts as a club to beat down claims can be monitored through the LAT AABS and through review of Superior Court decisions listed on Canlii.

8. Protection of personal and confidential information: Intermediaries are expected to take necessary and appropriate measures to protect and manage personal and confidential information. They must comply with all applicable privacy legislation.

Customers should be confident that Intermediaries:

- **Only collect and retain information that is necessary and appropriate for the fulfillment of the service or product provided; and**
- **Use and disclose the information only for purposes and for the duration for which the Customer has given consent or as required by law.**

We fail to see how the current permission to disclose information on the required OCF forms, especially one that requires a claimant must agree to in order to even start a claim for injury, could possibly conform to existing or past privacy requirements. While we respect that FSRA is working on improving the standard OCF forms we feel that the permission to disclose portion, at Part 12, on page 8 of the OCF-1 should be immediately suspended from use. Until FSRA gets a more complete picture of what is happening with Ontario's vulnerable claimant information and sets some minimal standards about the use of this information, every person who fills out this form is vulnerable to abuse. Use of this coercive form should not imply that the MVA survivor (who more likely than not has had assistance to fill out the form) has made or was able to make an informed decision to share an extraordinary amount of information about themselves for an indefinite period of time.

9. Competence: Intermediaries are expected to maintain an appropriate level of professional knowledge, and should stay current through continuing education to ensure the fair treatment of Customers. Where applicable, continuing education requirements must be fulfilled. Intermediaries are expected to not misrepresent their level of competence or conduct business beyond their level of professional knowledge and experience, and duties must match training/education.

It would be very difficult to tell what knowledge and experience many of the intermediaries possess given the lack of information available to consumers about the intermediaries they must interact with during the course of an injury claim. OIAA doesn't appear to provide a search engine that would supply names and qualifications of Adjusters and FSRA's oversight of assessment centers appears to have no regulation boundaries or any significant information for the public to consider. This is a hole in the oversight fabric of FSRA.

10. Oversight: Intermediaries with contractual or regulatory oversight obligations are also responsible for the conduct of any employee or third party involved in the marketing, distribution or servicing of an insurance product. Intermediaries are expected to have tools at their disposal such as policies and procedures, training and control mechanisms to ensure the fair treatment of Customers is achieved in relation to their oversight obligations.

See above information about the murky and/or non-existent oversight in question 9.

“As the regulator responsible for promoting high standards of business conduct¹³, FSRA has an obligation to ensure that insurers and intermediaries are treating customers fairly.” We would ask what FSRA is doing to monitor that level of insurer ‘fairness’? The IAIS gives clear direction under ICP Guidance 1.4 [12] about steps to be taken to ensure this takes place. The responsibility of the Supervisor is to aim for a fair system and when that is found lacking a “supervisor initiates or proposes changes in legislation where current responsibilities, objectives or powers are not sufficient to meet the intended supervisory outcomes”. And the direction to take is also clear with: “When the supervisory outcomes may not be achieved with the current legislation, the supervisor should initiate or propose changes in legislation.”

Lack of public trust matters when applying Principles-based Regulation. [13] Will FSRA, as Regulator, review outcomes for car crash survivors? And will the Regulator take appropriate action to ensure Ontario’s 10 million drivers are not taken advantage of by unscrupulous insurers and their intermediaries who fail to put customer’s needs before their bottom line in order to restore that trust?

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[1] <http://www.fairassociation.ca/wp-content/uploads/2022/04/FAIR-letter-to-FSRA-lack-of-Consumer-inclusion-April-11-2022.pdf>

[2] **ICP 9 Supervisory Review and Reporting** 9.0 Introductory Guidance <https://www.iaisweb.org/icp-online-tool/13520-icp-9-supervisory-review-and-reporting/>

[3] **Insureye Car Insurance Reviews** <https://insureye.com/Reviews/Auto-Insurance-Reviews#results>

[3a] Sharma v. Allstate Insurance <<https://canlii.ca/t/jm4ms> terms ‘erred in law’, ‘erred in applying the law’, ‘applied the wrong legal test’: Judge in regards to a LAT decision

[4] **FSRA Search adjusters** <http://adjusterslicence.fsco.gov.on.ca/adjusters.aspx>

Fill in the adjuster’s license number, last name or city/town. (To limit your search results, you can fill in both last name and city).

Why isn’t there a public master list? How are claimants supposed to get their license number or know what town they live in?

[5] <https://www.oiaa.com/about-us/mission-values/>

[6] **International Association of Insurance Supervisors (IAIS)** Insurance Core Principles ICP 9 Supervisory Review and Reporting

The supervisor uses off-site monitoring and on-site inspections to: examine the business of each insurer; evaluate its financial condition, conduct of business, corporate governance framework and overall risk profile; and assess its compliance with relevant legislation and supervisory requirements. The supervisor obtains the necessary information to conduct effective supervision of insurers and evaluate the insurance market. <https://www.iaisweb.org/icp-online-tool/13520-icp-9-supervisory-review-and-reporting/>

[7] **Graul v. Kansal**, 2022 ONSC 1958 (CanLII), <<https://canlii.ca/t/jn5r> [426] Trial judges will always need expert evidence in some areas. Those exceptional individuals who assist the courts need to be paid. But they also need to understand their role is to assist the court, not the party who pays them. I encourage Dr. Freedman and Dr. Mitchell to focus their exceptional medical knowledge and experience on the patients that need them and to forgo this well-paid role. If they intend to carry on this line of work, I recommend that they familiarize themselves with the principles of expert evidence set out in *R. v. France*, 2017 ONSC 2040, [36 C.R. \(7th\) 293](https://www.ontariocourts.ca/decisions/2017/03/30/2017ONC2040), [439] While Dr. Freedman’s report is not in evidence, the cross-examination disclosed that he failed to clarify Mr. Graul’s many deficits in his report. His explanation was that there were no requirements for him to be so clear and he left it to other neuropsychologists who might have access to his raw data to understand his report. That manner of reporting is of no use to the court from an independent expert whose role is to assist the court. It is more the role of a biased, paid expert trying to hide real and significant evidence from the court. []

[8] **Canlii LAT AABS Decisions (newest)**

<https://www.canlii.org/en/on/onlat/#search/type=decision&cclid=onlat&sort=decisionDateDesc&id=AABS&origType=decision&origCclid=onlat>

[9] **2021: Another Year of the LAT (and it isn’t getting faster)** “Delay continues to be a massive issue at the LAT. Each step in the proceeding is taking longer and longer as the years go by, and the number of Applications (and insurer denials) continues to rise.” <https://otlablog.com/2021-another-year-of-the-lat-and-it-isnt-getting-faster/>

[10] **OCF-1** page 8 <https://www.fsrao.ca/media/6446/download>

[11] **Tribunals Ontario - 2020-2021 Annual Report** https://tribunalsontario.ca/documents/TO/Tribunals_Ontario_2020-2021_Annual_Report.pdf pages 50-51 **LAT was unable to meet all of its performance measures due to increases in the number of appeals/applications received and resource challenges. LAT is actively working to address this issue in the next fiscal year.

[12] **IAIS ICP 1 Objectives, Powers and Responsibilities of the Supervisor**

[-] 1.4 The supervisor initiates or proposes changes in legislation where current responsibilities, objectives or powers are not sufficient to meet the intended supervisory outcomes.

1.4.1 It is important that supervisory responsibilities, objectives and powers are aligned with actual challenges faced by the insurance market to effectively protect policyholders, maintain a fair, safe and stable insurance market and contribute to financial stability

1.4.2 Market changes can mean that the legislation is no longer adequate for the supervisor to achieve its intended outcomes. The supervisor may identify changes in the economy, society or business environment in general that affect insurance supervisions that are not currently or sufficiently addressed by legislation. When the supervisory outcomes may not be achieved with the current legislation, the supervisor should initiate or propose changes in legislation.

1.4.3 If supervisory responsibilities, objectives or powers assigned by primary legislation become obsolete, the supervisor should initiate or propose changes to the legislation.

<https://www.iaisweb.org/icp-online-tool/13512-icp-1-objectives-powers-and-responsibilities-of-the-supervisor/>

[13] **FAIR submission to FSRA Proposed Principles-based regulation No. GR0014APP** <http://www.fairassociation.ca/wp-content/uploads/2022/04/FAIR-Submission-on-Principals-Based-Regulation-Guidance-No.-GR0014APP-April-29-2022.pdf>