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**FAIR submission to FSRA Proposed Principles-based regulation No. GR0014APP
ID 2022-006**

Thank you for the opportunity to provide input on the proposed Principles-based regulation (PBR) 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 who have struggled with access to recovery resources. Our comments relate to auto insurance only.

It's notable the FSRA embraced a principles-based regulation (PBR) and outcomes-focused approach to regulate and that this was done before the inception of the Consumer Advisory Panel and without consultation with the public.

PBR or Principles-based regulation may be consistent with FSRA's stated mission of *"public service through dynamic, principles-based and outcomes-focused regulation"* but it is hard to see consumers in that calculation from where we are today. We would question the resources available at FSRA to protect consumers when the PBR model relies on a Regulator having the ability to use vigorous investigatory powers when necessary and the requirement of regular and adequate compliance audits. We would have to assume that the required compliance audits of insurance companies have not taken place since we see no pro-active actions to improve insurer behavior. There are no decisions listed on the FSRA Enforcement Actions webpage [1] and no indicator that the almost 16,000 injured consumers (2021) who found it necessary to request a LAT AABS hearing have been noticed by FSRA.

The PBR model relies on FSRA's willingness to *"reference high-level, broadly stated principles, either in its guidance or its Rules, and identify desired outcomes to communicate its expectations of regulated entities"*. We see no evidence of FSRA's interest in outcomes for auto insurance claimants and would question how satisfactory outcomes could be identified or reached without consideration of the abysmal situation for claimants at the Licensed Appeal Tribunal (LAT) Auto Accident Benefits System (AABS). [2]

A Regulator in a principles-based system needs to have a capacity to identify and analyze information independently in order to focus on desired regulatory outcomes and objectives to be achieved. This can only be accomplished by having a complete picture of what the desired outcome is to start with. In terms of regulating Ontario auto insurers it cannot be said to be consumer-centric or to *"reflect the interests and needs of consumers"* unless those needs are identified and acknowledged. We have suggested that the LAT AABS system be monitored for both insurer compliance to treat customers fairly but also as a tool to understand why so few claimants are getting what they need for recovery and we have suggested action because some insurers are overusing the legal system in order to beat down claims. [3] It's important as well to look at what this failed Tribunal system is costing consumers in terms of ability to access recovery resources after a car crash. Attention should be paid to available legal decisions to get the full picture of how insurer compliance (or lack of) plays out for injured Ontarians. This will inform FSRA what should be done to course correct compliance through thoughtful guidance and instill confidence and trust in the insurance product.

Effective regulation includes the planning of policies, rules and laws that are supervised and supported by a convincing and tangible risk of enforcement action in order to generate an intended result. This means the focus should be on the impact of

PBR on consumers and in the case of auto insurance this means claimants. It also indicates that a level of pro-active, anticipatory stance will need to be taken by FSRA to make this guidance work because this type of regulation does have an inherent issue with blurred lines around expectations. Failing to follow through on regulation with enforcement creates increased uncertainty around a product consumers already find to be untrustworthy, complicated and difficult to navigate. In Ontario there already exists a mis-trust of the Regulator because most recognized ‘stakeholders’ are part of the industry rather than representing consumer interests. So statements such as *“FSRA’s risk assessment will consider the size, complexity, nature of the regulated entity, and where non-compliance or the inability to achieve the desired outcomes, will result in the most harm to consumers or pose the greatest threat to FSRA’s ability to execute against its statutory objects”* are viewed as an indication of favouring insurer interests over the best interests of the 10+ million drivers who rely on government to ensure auto insurance is a reliable product.

Wording such as *“FSRA is moving away from “prescriptive checklists” and encouraging entities to internalize regulatory requirements and work towards achieving desired regulatory outcomes based on their size, complexity, and risk profile”* does not inspire greater confidence, but instills a level of fear about where this adventure might end given there should be a solid base of trust underpinning PBR [4] and that simply doesn’t exist when it comes to Ontario auto insurers.

“FSRA will strive to be measured in its approach to compliance and enforcement, assuming good faith by the regulated entity” informs us that this is a ‘soft glove’ approach and it is part of this culture of accommodation for insurers who have not proven themselves trustworthy or efficient or fair in their dealings with the public overall. The willingness to *“slant the field in favour of firms and organizations that are really, truly interested in serving customers”* [5] begs the question – which auto insurer(s) is that?

We don’t support this regulatory approach for an industry that has left a trail of unhappy and impoverished injured customers to fend for themselves after a car crash. Ontario’s insurers have proven they are unable to adhere to prescriptive regulation and they often push the boundaries of common decency in their customer relationships [6] and in their rough treatment of patients in need of care. [7]

If insurers don’t follow the rules now when they are clear and prescriptive [8], why would they follow a more vague set of principles? This opens auto insurance up to less restrictions and results in not knowing with any certainty what is and isn’t acceptable practice. This can lead to regulatory creep, confusion about the standards and guidance and regulation extensions when insurers are left in the dark about what is expected of them or what constitutes compliance with legislation. PBR creates a Wild West climate where pushing boundaries will be worth trying because PBR does open that door and this can easily create a gap between internal guidance and published Principles resulting in more confusion.

The guidance itself is a wish-list of how this would ideally work and sets out very little detail on how FSRA intends to beef up the investigatory powers needed to enforce the vague principals, monitor the means insurers use to get to a desired point and the requirement of regular and adequate compliance audits.

We look forward to being part of further consultations on the application of PBR.

FAIR Association of Victims for Accident Insurance Reform

[1] **FSRA Enforcement Actions** <https://www.fsrao.ca/enforcement-and-monitoring/enforcement-actions>

[2] **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.

[3] **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/>

[4] “Yet, it is argued, trust is the ultimate paradox. Principles-based regulation can help to create trust, but the core elements of that trust have to already exist if principles-based regulation is ever to operate effectively, if indeed at all.” Julia Black, Forms and Paradoxes of Principles Based Regulation <https://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-13-Black.pdf>

[5] “With less regulation comes more opportunity for innovation and competition, which can give the industry a needed shot in the arm, he noted. “What we’re going to do through principles-based regulation is that we’re not going to create a level playing field, because I’m actually not interested in a level playing field. We’re going to slant the field in favour of firms and organizations that are really, truly interested in serving customers.” Tim Bzowey, Financial Services Regulatory Authority of Ontario (FSRA) executive vice president of auto/insurance (2019) <https://www.canadianunderwriter.ca/insurance/ontarios-regulator-explains-move-from-rules-to-principles-1004170185/>

[6] **Aviva Insurance Company of Canada v. Ebhodaghe**, 2021 ONSC 7343 (CanLII), <<https://canlii.ca/t/jk5f1>
An insurer demanded and actually got access to some of the following information: cell tower location data, bank account statements, a PC Financial Master Card, four different bank accounts, a Visa credit card and the Judge ascertained she had *“revealed all of her banking information in advance to Aviva”* while trying to prove her address and make her claim. The Judge described Aviva’s actions: *“I find that Aviva’s conduct in requesting entirely disproportionate and invasive documentary production ultimately prompted Ms. Ebhodaghe’s decision to disengage with the process. Given the nature of the requests, she can hardly be faulted.”*

[7] **Graul v. Kansal**, 2022 ONSC 1958 (CanLII), <<https://canlii.ca/t/jnn5r> [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] **Keshavarz v Aviva General Insurance**, 2022 CanLII 8683 (ON LAT), < <https://canlii.ca/t/jmd8h> *Need for Deterrence* [11] The applicant submits that the respondent has an obligation to adjust her file in good faith, which it failed to do, and this conduct needs to be deterred. I agree that the respondent has a duty to adjust her claim in good faith and decisions denying important benefits should be based on clear rationale. I also agree that the respondent’s conduct needs to be deterred.