The Legal Recognition of Financial Planners Through Title Protection

It's right for our Members, consumers, and the profession of financial planning.
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FPA TO FIGHT FOR LEGAL RECOGNITION OF FINANCIAL PLANNERS

FPA believes financial planning is an essential profession that has an important impact on society. Those who practice this critical vocation, including FPA Members across the nation, are in a position to provide a positive, life-altering influence for their clients and their clients' loved ones. But not everyone calling themselves a "financial planner" provides, or even offers, financial planning services.

That needs to change.

Over the past few years, the FPA Board of Directors, FPA Public Policy Council, and other industry groups have debated the merits of title protection that would ensure anyone professing to be a "financial planner" meets threshold competency and ethical standards. While others may want to continue debating the issue, the FPA Board of Directors unreservedly believes this is a fight worth pursuing, especially considering a recent FPA advocacy survey revealed that 78% of FPA Members want the title "financial planner" to be protected.

The FPA Board of Directors believes **the legal recognition of the term "financial planner" through title protection is an acknowledgment that anyone proclaiming to be a financial planner meets threshold standards that protect consumers and advances the financial planning profession.**

The push for title protection is a substantial advocacy issue that may require allocating resources and many years of planning and effort to realize. But FPA is ready to lead this push, which is why we are making the legal recognition of "financial planner" through title protection FPA's primary advocacy objective now and in the years to come. There are four central reasons for this steadfast commitment to the legal recognition of "financial planner" through title protection.

1. **Title protection of "financial planner" will distinguish financial planners from other financial service providers.** If federal and/or state policymakers continue to leave "financial planner" undefined, some will take liberties with the title – even if they are not providing financial planning services.

2. **Title protection will establish threshold standards for financial planners without creating an unnecessary regulatory burden for those using the title.** Title protection will address the lack of competency and ethical standards by some who represent themselves as financial planners.

3. **Title protection will enable consumers to identify and engage with a qualified financial planner.** Currently, the term "financial planner" can be used freely and without basis for marketing purposes, which leads to consumer confusion. Like physical and mental health, financial health is paramount to everyone's well-being. Consumers engaging a financial planner for comprehensive financial planning services must be able to trust that their financial health is the focus of the relationship.

4. **The legal recognition of the title financial planner is a critical step in recognizing financial planning as a distinct, essential profession.** Financial planning is a young profession that has yet to achieve the same level of recognition that other honorable professions have achieved, including medicine, law, and accounting. These recognized professions are deemed essential and beneficial to society. Like doctors, lawyers, and accountants, FPA believes financial planners are equally essential.

In the weeks and months ahead, FPA leaders will be engaging you and all stakeholders in discussions to explore the many potential strategies we may employ in this pursuit, including what the threshold standards to be called a "financial planner" should encompass. Everything is on the table, so this input will be critical in shaping how we proceed in the years ahead.

Please make no mistake about it. Title protection is a major undertaking that will likely take many years of hard work, perseverance, and, more importantly, unwavering leadership by FPA as the Association that is committed to the legal recognition of financial planners. We recognize that not everyone in financial services will share this same bold vision, and we accept that. But we know this is what's right for our Members, consumers, and the profession of financial planning.

We look forward to providing frequent updates on our progress and welcoming you to the table as we explore our pursuit of the legal recognition of the term "financial planner."

Sincerely,

Dennis J. Moore, MBA, CFP®
2022 FPA President

Resolving The Title Protection Quandary

SEPTEMBER 1, 2022 • **ERIC RASMUSSEN**

In 2022, it seems odd that the profession you belong to would be facing an existential crisis as simple as one enduring question, "What is a financial planner? And who gets to use the name?"

Lawyers and doctors and nurses and accountants don't have these problems, after all, even though those professions have certainly endured their own tumultuous histories. (In the Middle Ages, you might remember from school, surgery was performed by barbers—since they were the ones with the razors.)

This throwback argument over the name "financial planner" might seem like a tiring philosophical question by now. Yet it's had awfully real and dramatic ramifications this year—so real they led to the dissolution of a longtime advisory advocacy alliance.

In July, the Denver-based Financial Planning Association said it would be pursuing a multi-year advocacy effort to pursue legal recognition of the term "financial planner" through title protection. That meant, ideally, a legal definition would emerge so that anybody using the title meets certain standards that protect consumers and advance the profession.

"Right now, anybody can call themselves a financial planner, and that's the problem," said Patrick D. Mahoney, the FPA's chief executive officer, in an interview with *Financial Advisor* at the time. He added that 78% of the association's members want that protection.

Within a few weeks, the ramifications of its new mission became apparent when the association said it was leaving the Financial Planning Coalition, its longtime lobbying partnership with the CFP Board and the National Association of Personal Financial Advisors. FPA board chair Skip Schweiss said the association's new title focus was a major reason for the departure.

More specific reasons were left for observers to figure out. But some of the fissures among the coalition partners have become obvious. In making the announcement about title protection, the association notably failed to tie the definition of "financial planner" to the CFP marks, whose holders the association claims to represent. People behind the scenes said there was a strategy issue as

well: The CFP Board wants to fight the title battle on the federal level, not in the states, which could lead to a patchwork of regulations and a burden on advisors whose clientele increasingly stretch beyond their states' borders.

The Financial Planning Coalition's likely foundering is dramatic, since the financial planning industry is smaller and has fewer lobbyists than its likely opponents in the insurance and banking industries, says Duane Thompson, an FPA lobbying vet. Those other industries are likely going to move heaven and earth to make sure their people's hands aren't bound by cumbersome title rules. The CFP Board officially bemoaned the coalition's loss of the 19,000-member Financial Planning Association, saying it would be better if the financial advice industry could continue speaking with one voice.

Loaded Questions

The title question itself is extremely thorny. The FPA suggests its work would likely require advocacy efforts at the state and federal levels through both legislation and appeals to agencies like the Securities and Exchange Commission, though Mahoney was spare with details in July. If past battles over fiduciary roles are any indication, however, there will likely be much pushback from banks, lawyers, accountants and insurance agents over who can use the title "financial planner," especially if anyone tries to marginalize those who do business a certain way, say by making commissions or otherwise merely recommending suitable securities or business deals.

"There's an approach we can take federally and there's an approach we can do state by state," Mahoney said, being cautious not to say who it would pertain to. "And on behalf of our members, we're open to either approach." He added that his group wouldn't likely introduce any legislation until 2024.

The FPA said it was making title protection the strategic focus of its advocacy for several reasons. "If federal and/or state policy makers continue to leave 'financial planner' undefined, some will take liberties with the title, even if they are not providing financial planning services," the FPA announced. "Title protection will establish minimum standards for financial planners without creating an unnecessary regulatory burden for those meeting the standards."

The association added that, since the profession is young, it doesn't get the same degree of name recognition afforded medicine, law and accounting.

"Presently, there are no minimum standards for competency and ethics for those professing to be financial planners," said Dennis Moore, the FPA's 2022 president, in a statement. "Some

credentialing bodies have their own prescribed standards, but policy makers have established nothing at the state or federal level."

"Our thinking is to approach this legislatively," Mahoney told *Financial Advisor*. "But we're not touching licensing, we're not touching regulation, per se. This is just documenting, wherever we need to, the phrase 'financial planner' and giving it the title and protection it deserves. … I will run into [members] and they'll say, 'I do everything I'm supposed to do. I adhere to all the ethics requirements. I adhere to good standards, I keep up to date on my competencies. … I do a good job for my clients, and that person down the street doesn't do any of that and they still call themselves a financial planner. Help me protect my ability to make a living as a planner.' This has been brewing for a long time."

Michael Kitces, a co-founder of the XY Planning Network and a frequent FPA critic, said in a series of Twitter posts on the day of the announcement that it was good news. However, he noted the lack of specificity about who the FPA was going to lobby and who it was going to lobby for—as well as when and how and what yardsticks the group would be using to bestow the name "financial planner" on any given professional—left many unanswered questions.

The XY Planning Network itself notably took the battle to the SEC in a petition last year. In September 2021, the network filed two petitions asking the SEC to reconsider a rule it proposed in 2007 about financial planning titles and the automatic triggering of fiduciary investment adviser registration. The network also called on regulators "to modernize Section 208(c) of the Advisers Act and better define in today's environment what constitutes 'investment counsel' services that would necessitate not just registration as an investment advisor but a requirement to principally be in the business of advice in order to market one's services as such."

Kitces noted on Twitter: "In the end 'title protection' almost inevitably requires some regulator to license the term (so those not eligible are restricted from using it), and some regulator to enforce it (so standards and their regulatory burden are inevitable)."

He also noted that the FPA was silent about making the CFP marks the benchmark for the "financial planner" title, even though the association is a membership for CFPs. "Is FPA really considering some other/additional designation to rally around?"

Youth And Its Discontents

Thompson, the former FPA lobbyist (and now a senior policy analyst at Fi360 and president at Potomac Strategies) says the youth of the industry is part of the problem. Financial planning as a

profession emerged from a welter of different talents and professions once governed under different regulatory regimes, when people of diverse backgrounds, including insurance agents and stockbrokers, melted out of the woods to form a new profession in the ’80s and ’90s. (He notes that a lot of the profession’s creation had to do with the fallout of the 1986 tax reform, when a lot of newly useless tax shelters had to be scuttled and clients sought help and answers from their “financial counsel.”)

“Financial planners were Johnny-come-latelies,” Thompson says, “after most of what services they provide were regulated under other regulatory silos. A lot of them came out of the insurance industry because their clients had sophisticated questions that kind of bridged the area between estate planning and investment planning and insurance issues.”

Existing laws on the books didn’t seem to address this new type of pro, Thompson says. The name “stockbroker” fell out of vogue, and more generic names popped up, he says, while professionals settled on “financial advisor” and “financial planner.”

The Advisers Act of 1940 was specific in describing only the phrase “investment counsel.” The law on the books says, “It shall be unlawful for any person registered under section 203 of this title to represent that he is an investment counselor to use the name ‘investment counsel’ as descriptive of his business unless (1) his or its principal business consists of acting as investment adviser, and (2) a substantial part of his or its business consists of rendering investment supervisory services.”

By “investment adviser,” the law “means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities … .”

Unfortunately, Thompson says, the English language is so robust that new phrases often pop up when the old ones get stale. That’s going to make the FPA’s task more daunting, he says—because if the title “financial planning” gets regulated like “investment counselor,” people in other industries might coalesce around something else that’s official-sounding.

The end goal is crystal clear. “What you’re trying to do here is build barriers to entry,” he says. Even if the FPA is successful in getting federal or state laws enacted that said you could only practice with the title “financial planner,” that still requires you to define it.

There have been various thoughts on the matter. Does it include accountants and lawyers? The SEC released one note in 1987 that said even pension consultants and advisors to entertainers and athletes were doing work that often fell under the heading of "investment advisor."

In 1990, Rick Boucher, a Virginia Democrat in the House of Representatives, tried to pass legislation that would require anyone offering investment advice to pay to register with the SEC. Boucher and other legislators sought to address the problem after millions of Americans had seen their life savings decimated by tax reform, which had eliminated tax breaks for many limited partnerships, and the savings and loan crisis. Various requirements were debated but the so-called Boucher Bill never gained traction.

In 2010, the Dodd-Frank Act called for a study to determine the effectiveness of state and federal regulations to protect consumers from those who hold themselves out as "financial planners" through the use of misleading titles and designations. The Government Accountability Office heeded the call and said in a 2011 report that most of what financial planners do is already regulated—and that a specific layer of regulation just for financial planners seemed unwarranted.

Indeed, Thompson says, the only thing not regulated is somebody who does everything at once: sales, insurance advice, investment advice and estate planning. That means some financial planners end up holding three or more licenses and the field gets regulated piecemeal.

"The Investment Advisers Act [of 1940], it's a little bit of a hybrid because they basically defined someone as an investment advisor if they give advice on securities for compensation as part of a going business. So that's more functional. That's the emphasis there because as we know well, there's all kinds of titles … wealth manager, financial advisor, financial planner, investment advisor, investment counselor, you name it."

Oh, Canada

Some professional associations are looking up north to Canada as both a model and a cautionary tale of what happens when you win title protection for financial planners.

The Financial Services Regulatory Authority of Ontario in April said it had approved FP Canada and the Institute for Advanced Financial Education as the first two credentialing bodies that could officially christen people as "financial planners" and "financial advisors" in Ontario. By making it official, the authority said it will "make it easier for these individuals to communicate their value to consumers and validate their education and expertise," according to Huston Loke, the executive vice president of market conduct at FSRA, speaking in a press release.

But here's where it gets bad, say CFP partisans: There are five different credentials in the Canadian version that allow you to use the title: Besides CFP, you can get over the hump with four other marks: the PFP (the Personal Financial Planner license), the QAFP (the Qualified Associate Financial Planner marks), the CLU (the Chartered Life Underwriter mark), or the RRC (the Registered Retirement Consultant credential).

Financial advisors get prickly about marks, especially those they feel are "less than" the certifications they deem more sophisticated. (Ask anybody who remembers the "CFP lite" associate license controversy from two decades ago.) The worry is that different marks are going to be lesser marks, and the name "financial planner" would thus be watered down if title protection isn't firmly tied down.

Convincing the planning profession to agree on a common standard is difficult enough. Persuading public authorities to buy in is yet another mountain to climb.

Paradise Lost

Was the financial planning profession once poised to achieve title protection only to let it slip away? That's something perceptive observers believe.

In an interview with *Financial Advisor*, Michael Kitces says that the battle for the "financial planner" protection was actually won in 2005—right before it was lost, ironically in one of the FPA's greatest triumphs. "In 2005, the FPA actually got the SEC to issue title protection for 'financial planner,'" he says. "It literally existed. We had it."

But then, he says, the FPA challenged the protection and had it vacated in its fight with the SEC over the Merrill Lynch rule, which said broker-dealers were not investment advisors but also let them offer fee-based accounts and advice without having to register with the SEC under the '40 Act. In essence, the FPA had to make a trade-off to protect members, Kitces says. (The SEC lost an FPA lawsuit when the Merrill Lynch rule was struck down by the U.S. Court of Appeals in 2007.)

"The FPA ultimately decided that it was worth challenging and vacating the rule of title protection to protect their members who were charging assets under management as RIAs and didn't want to have to compete with broker-dealers charging assets under management without being fiduciaries," he says. The aftermath of that lawsuit was the birth of the hybrid movement, he says, and the FPA didn't pursue title protection for 15 more years.

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These were the motivations behind the XY Planning Network's petitions last year to reinstate the protection that existed in 2005. He wants the FPA to go on record supporting this petition and asks why it hasn't happened.

"The big question from everyone now is, 'What exactly is the game plan?'" he asks. "It's not actually title protection unless some regulator enforces it."