CFA Societies Canada

Canadian Advocacy Council

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March 6, 2023

VIA EMAIL

New Self-Regulatory Organization of Canada
General Counsel's Office
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GCOcomments@iiroc.ca

Re: *Review of the IIROC Arbitration Program* **(the "Consultation")**

The Canadian Advocacy Council of CFA Societies Canada[1] (the "**CAC**") appreciates the opportunity to provide the following general comments on the Consultation regarding the IIROC Arbitration Program (the "**Program**").

We are generally supportive of many of the recommendations set out in the IIROC Arbitration Program Working Group Recommendations **(**the **"WG Recommendations")**. In particular, we are in favour of the recommendation to increase the award limit to $5 million to improve the efficacy and accessibility of the Program.

An overarching theme throughout our comments in this response is the desire for greater transparency on the functioning of the Program going forward. In addition to accessibility, costs, and procedures which were all identified in the WG Recommendations as major areas for making the Program more viable, more transparency on the implementation of the Program would help all interested parties ensure the Program is serving its purpose.

As a further overarching comment, we were surprised by the Consultation's lack of specific discussion and considerations relating to the Program's efficacy or appropriateness for older and/or vulnerable investors. Specific consideration of this population and their challenges and needs would be consistent with other comparable and recent approaches to securities policy revision, such as the recent revisions to NI 31-103, and CSA Staff Notice 31-354 - *Suggested Practices for Engaging with Older and Vulnerable Clients*, requiring that registrant firms be mindful of the diverse circumstance and needs of investors, especially those who are older or vulnerable, and conduct the investigations as appropriate to ensure that a justified complaint is not abandoned as a result of a prolonged and unduly complex process.

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[1] The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 20,000 Canadian CFA Charterholders. The council includes investment professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit www.cfacanada.org to access the advocacy work of the CAC.

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors' interests come first, markets function at their best, and economies grow. There are more than 190,000 CFA Charterholders worldwide in 160 markets. CFA Institute has nine offices worldwide and there are 160 local societies. For more information, visit www.cfainstitute.org or follow us on LinkedIn and Twitter at @CFAInstitute.

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In consideration of the Consultation and its questions, we query whether the data relied on (or a summary of same) in forming the WG Recommendations could be available for wider consumption. We would query for instance whether the recommendation to raise the compensation limit to $5 million is a result of case-specific factors, and if so, how many cases over the study period in the data were limited by the current ceiling. Further, our comments to the Consultation would have benefited from availability of the data and an examination of the same. Data such as how many individuals are accessing the Program, which adjudicators are most active, and statistics on award amounts would help inform future comments on the Program. This is even more important in light of the tiered structure for claims proposed in the WG Recommendations. We believe it would be beneficial to see regular public reporting going forward of how many claims fall into each of these tiers to better assess the efficacy of the Program and potential needs for policy revision or alternative mechanisms.

Whether the Program remains available only for the former IIROC division of the New Self-Regulatory Organization of Canada ("**New SRO**") or whether it is adopted across both divisions, stakeholders would benefit from the transparency that would arise from an Annual Report on the functioning of the Program. Annual reports have become commonplace for most other major regulatory functions, and believe that benchmark should be met for the Program on an annual basis going forward.

Similarly, we would like to see a standard review period instituted for the Program such that these evaluations can be done on a regular instead of an ad hoc basis. Furthermore, we would be eager to see a renewed review of the Program following if and when OBSI receives binding authority, including whether that development then demands any changes to the Program. Particularly for Tier 1 claims as defined in the WG Recommendations, it is unclear whether an adversarial arbitration program would be appropriate for self-represented investors when OBSI could in future offer a binding and independent evaluation of their claims, particularly considering the barriers to accessibility presented by the costs of often-necessary elements of an arbitration process, such as expert witnesses.

We are strongly in favour of the greater transparency surrounding the roster of arbitrators proposed in the WG Recommendations. To continue to improve the transparency and accountability of the Program, it may also be beneficial to conduct periodic reviews of the arbitrator roster and to provide greater clarity on the relevant prior experience of those individuals in matters involving adjudication and the assessment of investor compensation claims.

We find the 2-year limitation period to be at the very low end of an admittedly wide spectrum of limitation periods across Canada. With OBSI able to review claims within 6-years and the general requirement for advisors/securities registrants to maintain records for 7 years, we don't see a compelling policy reason for such a restrictive limitation period. Intertwined with this concern is a worry about a retail client's ability to navigate the array of dispute resolution options within the relevant period, and the potential for investor confusion across mechanisms and limitation periods.

For clients who do not retain expertise or legal representation, there are significant headwinds in both understanding all available options (whether internal dispute resolution, the OBSI, or the

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Arbitration Program) and in selecting the most appropriate option given the substance and size of their potential claim. While a solution to this challenge may exceed the current mandate of the Program, we would be in favour of a pre-adjudication mechanism to triage claims and assist clients with ensuring that their claim is being brought via the most appropriate and cost-effective avenue of redress. We believe something of this nature would be instrumental in helping mitigate investor confusion with the process.

With respect to Tier 1 and 2 claims as defined in the WG Recommendations, we support the implementation of a mandatory mediation requirement. The Financial Industry Regulatory Authority ("**FINRA**") has provided a useful precedent with the performance of its own mediation program which has maintained an 80% success rate[2]. Particularly for smaller claim amounts, an adversarial setting is not the most expeditious or resource-efficient setting in which to resolve claims. While we support the imposition of mandatory mediation, the waiving of the mediation fee for up to only one hour doesn't reflect a realistic expectation for how long the average claim may take to resolve. In line with our request for greater transparency above, statistics on the success of the mandatory mediation component would also be useful to give investors some information to manage their expectations when participating in mediation.

Concluding Remarks

The CAC is encouraged by many ideas outlined in the WG Recommendations, which we believe will contribute to making the Program more accessible and viable for investors going forward. The increased reward limit in particular has the potential to open the Program up to a swath of harmed investors which have previously only had access to recourse from the court system. We note for the sake of consistency and the minimization of investor confusion the need for clarity on whether (and if so, when) the Program will be available to the mutual fund division of the New SRO.

As detailed in our comments, we believe the Program would also benefit by embracing the principle of transparency with respect to the ongoing use and operation of the Program, the categorization of claims within the tiered structure, and the success of the mandatory mediation component. Whether through an Annual Report as we suggest or another structure, enhanced data on the functioning of the Program will be instrumental in evaluating its performance and ensuring its continued and enhanced efficacy.

We thank you for the opportunity to provide these comments and would be happy to address any questions you may have. Please feel free to contact us at cac@cfacanada.org on this or any other issue in future.

(Signed) *The Canadian Advocacy Council of CFA Societies Canada*

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[2] Online: FINRA<https://www.finra.org/arbitration-mediation/mediation-overview>