

**Decision of the Board of Directors
of the Investment Industry Regulator of Canada**

**IN THE MATTER OF
An Application for Resignation by Jacob Securities Inc.**

Introduction

On November 28, 2018, having received and considered written submissions from the parties, the Investment Industry Regulatory Organization of Canada (IIROC)'s Board of Directors (the "Board")¹ conducted an oral hearing in relation to an application by Jacob Securities Inc. ("JSI") to resign its membership in IIROC.

After the hearing concluded, the Board deliberated about its decision, following which the Board unanimously concluded that it should exercise its discretion not to permit JSI to resign. Our reasons for that decision are set out below.

Background

JSI became a Dealer Member with IIROC in 2009. Beginning in May 2013, JSI was continuously designated by IIROC in "Early Warning Level 2" due to low risk-adjusted capital (RAC), having failed liquidity and profitability tests. From May 2013 through to November 2015, JSI was unable to remedy its financial deficiencies. There was ongoing concern about its potential insolvency.

On December 17, 2015, an IIROC Hearing Panel presided over an expedited hearing at which IIROC sought the immediate suspension of JSI's IIROC membership pursuant to Rule 20.45. While it was a contested hearing, JSI did not contest much of the evidence presented by IIROC; its argument was that a suspension was not an appropriate disposition. At the conclusion of the evidence and submissions, the Hearing Panel was satisfied that IIROC had established the requisite risk of imminent harm, and that the risk could not reasonably be averted by the appointment of a monitor. The Hearing Panel ordered JSI's immediate suspension, and subsequently provided written reasons dated January 14, 2016.²

In those reasons, the Hearing Panel stated that IIROC had established that "JSI's numerous deficiencies and its prolonged and pervasive inability to meet basic compliance and regulatory standards put the public at risk of imminent harm" and that "JSI continued to demonstrate an inability to appreciate or to remedy its numerous problems and it

¹ IIROC's President and Chief Executive Officer, Andrew Kriegler is a member of the Board but recused himself from participation in the Board's deliberations in relation to this matter. No other member of the Board is an officer or employee of IIROC.

² *Re Jacob Securities*, 2016 IIROC 03 ("Hearing Panel Decision").

continued to be in serious financial and operating difficulty”.³ The reasons close with reference to aspects of the Hearing Panel’s order that “require[d] JSI’s compliance with certain requirements and allow[ed] for IIROC to move with five days notice to JSI to re-attend before this Panel regarding JSI’s continued membership”.⁴

Subsequently, in 2017, IIROC concluded proceedings against JSI’s Ultimate Designated Person (“UDP”) and its Chief Compliance Officer (“CCO”), both by way of settlement agreement. JSI’s UDP, Sasha Jacob, admitted multiple failures to comply with IIROC’s requirements and agreed to a suspension from acting as UDP for three years and to pay a fine of \$100,000 and costs of \$10,000.⁵ JSI’s CCO admitted failing to supervise JSI and its employees and agreed to a permanent ban from acting as CCO and to pay a fine of \$25,000 and costs of \$5,000.⁶

Both of the items referenced by the Hearing Panel at the conclusion of its decision regarding JSI have relevance to the current hearing. On the question of post-hearing compliance, as its counsel emphasized, JSI has complied with each of the requirements imposed in the Hearing Panel’s order.⁷ On the possibility of coming before the Hearing Panel again to consider continued membership, in June 2018, IIROC Staff gave JSI notice of its intention to re-attend before the Hearing Panel to seek an order terminating JSI’s membership in IIROC. In its materials on the termination motion, IIROC Staff acknowledged that IIROC had not been advised of any client complaints against JSI but submitted that there was no reason for JSI to continue to hold rights and privileges of membership, and that no client harm would ensue from their termination.

After IIROC Staff notified JSI of its intention to seek termination of JSI’s membership, JSI notified IIROC of its intention to resign its membership. JSI has complied with the requirements for Dealer Member resignations under Rule 8.2 of the Dealer Member Rules.⁸ JSI has also paid all outstanding fees as required by Rule 8.7(a).⁹

³ Hearing Panel Decision, para. 19.

⁴ Hearing Panel Decision, para. 22.

⁵ *Re Jacob*, 2017 IIROC 17.

⁶ *Re Rutledge*, 2017 IIROC 50.

⁷ These were to immediately cease trading with the public (Hearing Panel’s order, para. 2), comply with IIROC Dealer Member Rule 600 throughout the suspension period (para. 3), preserve all books and records, including all hard copy and electronic records in its possession or control, including without limitation, any and all computer servers, hard drives and any other electronically-stored records in any form, for a period of 7 years, and make those records or such part of them as is requested, available to IIROC Staff on demand (para. 5) and pay any and all normal course outstanding IIROC and Canadian Investor Protection Fund fees (para. 7).

⁸ Rule 8.2 requires that a Dealer Member file a letter of resignation stating its reasons for resigning and file proof of solvency in the form of either (1) a balance sheet reported upon by the Dealer Member’s Auditor indicated that the Dealer Member has liquid assets sufficient to meet all its liabilities other than subordinated loans, if any, or (2) a report from the Dealer Member’s Auditor to that effect.

⁹ This Rule requires suspended, terminating or surrendering Dealer Members to fully pay all membership fees for the fiscal year in which the IIROC membership suspension, termination or surrender becomes effective.

IIROC Staff recommended that the Board not approve the resignation on the basis that it is not in the public interest that a suspended Dealer Member be permitted to resign. JSI maintained that it ought to be permitted to resign.

The Board understood that this is the first time a suspended Dealer Member has sought to resort to the voluntary resignation process. Because the situation was unprecedented, the Board took the extraordinary steps of hiring outside counsel to advise on procedure, and of considering both written and oral submissions at a hearing before the full Board.¹⁰

Principles

Counsel for the parties very substantially assisted the Board through their helpful and concise written and oral submissions. Their agreement on the governing legal principles allowed the hearing to proceed efficiently and promoted the Board's ability to focus on the key issues before it.

The Board accepted – as did the parties – that the Board has the discretion to decline to accept JSI's resignation. This discretion arises under IIROC's General By-Law, which provides that a Dealer Member's resignation "shall become effective when approved by the Board, in accordance with the Rules".¹¹ The Dealer Member Rules provide that a resignation becomes effective upon receipt of proof of solvency requirements being met and that the resigning Dealer Member is not indebted to IIROC and is not the subject of a complaint or investigation "[u]nless the Board of Directors, in its discretion otherwise declares".¹²

The parties agreed that where those technical requirements are met, Rule 8.5 – the same provision that makes explicit the existence of the discretion – also places the onus on IIROC Staff to persuade the Board to exercise its discretion not to accept a resignation.

The parties also agreed that in exercising its discretion, the Board must act in good faith and in the public interest.

There was no question about whether the Board was acting in good faith in the manner in which it addressed this matter, which included hiring outside counsel, the recusal of the only IIROC officer who also sits as a Director, seeking and reviewing written submissions and engaging with counsel during their oral submissions.

The more difficult question is what the public interest requires.

The duty to act in the public interest is at the foundation of the Canadian securities regulation regime. It is also essential to IIROC's role within that regime. IIROC's Recognition Orders make that express:

¹⁰ As noted in footnote 1 above, Mr. Kriegler recused himself from participation in the Board's deliberations.

¹¹ IIROC By-Law No. 1 ("General By-Law"), section 3.8.

¹² Dealer Member Rules, Rule 8.5.

IIROC must regulate to serve the public interest in protecting investors and market integrity. It must articulate and ensure it meets a clear public interest mandate for its regulatory functions.

Key issue

Has IIROC Staff met its onus of persuading the Board that it should exercise its discretion not to accept the resignation of JSI, a suspended Dealer Member that has met the requirements set out in Rule 8.2?

Essentially, JSI sought to avoid the pending termination motion by resigning.

JSI's position was that IIROC's proceedings against it and its principal, namesake and UDP, Mr. Jacob, are a matter of public record. JSI submitted that it would be unfair to the firm now to subject it – and for that matter, Mr. Jacob – to a second round of condemnation and negative publicity that termination would attract given that the firm has done nothing wrong since the suspension.

JSI submitted that an accepted resignation would not imply that the firm has been absolved of wrongdoing; it would be neutral and the matter of JSI's previous suspension would remain within the public domain and knowledge.

In its written submissions, IIROC Staff argued that there is no reason to accept the resignation and no reason not to seek termination. Given that the onus rests on IIROC in this matter, the Board was not persuaded by this argument. To the contrary, the Board concluded that in order to exercise its discretion not to accept JSI's resignation, there must be an affirmative reason for not accepting the resignation.

IIROC Staff's oral submissions emphasized the importance of sending a public signal that reflects JSI's misconduct. The concern was that a resignation could be seen as a benign departure from the industry rather than the compelled departure because of misconduct that termination would imply. In making this submission, IIROC Staff likened the matter to the requirement at the individual level to indicate whether an individual registrant was terminated for cause or resigned voluntarily.

Ultimately, the arguments advanced on behalf of JSI and on by IIROC Staff clarified the issue relating to the public interest. That issue can be put this way: Is it in the public interest to reject JSI's efforts to avoid the negative signal and publicity associated with possible termination by refusing to accept their resignation?

Before considering the public interest issue, one final point is necessary. The Board did not accept IIROC Staff's submission that the Hearing Panel's provision for a future termination motion required that the Board leave the matter to that proceeding rather than considering JSI's resignation. Instead, the Board was persuaded by JSI's submission

that it was up to the Board to determine whether rejecting the resignation was in the public interest.

The Board came to this conclusion in part because IIROC might have never brought the termination motion, and in part because of Rule 8.5's stipulation that a resignation shall be effective once technical requirements are met unless IIROC Staff can satisfy the Board that the resignation would not be in the public interest.

Disposition

In determining whether to exercise its discretion not to accept JHSI's resignation, the Board accepted that it must reach an independent decision; that is, the Board will not leave the matter to the Hearing Panel. However, in applying the onus and determining where the public interest lies in these circumstances, the Board placed significant weight on the Hearing Panel's reasons.

The fact that the Board was required to exercise its discretion whether or not to accept JSI's resignation did not render the Hearing Panel Decision irrelevant. It is clear from the facts found by the Hearing Panel that JSI's misconduct was very serious, and indeed the Hearing Panel contemplated hearing a subsequent motion by IIROC Staff to seek termination of JSI's membership. By providing for possibility of a future motion to terminate JSI, the Hearing Panel explicitly contemplated that it may be appropriate for JSI to be subjected to another round of public condemnation for its misconduct.

The Board did not disagree with the Hearing Panel's approach: JSI engaged in serious and repeated misconduct, and it is in the public interest that the strong signal of condemnation of that behaviour be sent by not accepting the resignation and by allowing the termination motion to proceed.

In essence, the Board agreed with counsel for JSI that the outcome of the termination motion may well be to send a negative signal about JSI's conduct, but the Board did not believe this to be unfair; rather, especially in light of the Hearing Panel's explicit decision to entertain a future motion to terminate JSI's membership, the Board concluded that JSI's original misconduct invited this turn of events, or, put differently, this negative signal.

For these reasons, the Board declined to accept JSI's resignation.

DATED at Montréal, Québec, this 4th day of February, 2019.

“Paul D. Allison”

Paul D. Allison
Chair,
Board of Directors