



Canadian Foundation *for*
Advancement *of* Investor Rights
Fondation canadienne *pour* l'avancement
des droits *des* investisseurs

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RE: IIROC Notice 19-0076 Minor Contravention Program and Early Resolution Offers

FAIR Canada is pleased to offer comments on the proposed amendments to the Investment Industry Regulatory Organization of Canada (IIROC) Consolidated Enforcement, Examination and Approval Rules to adopt the Minor Contravention Program (MCP) and the proposed IIROC Staff Policy Statement on Early Resolution Offers (ERO) as described in IIROC Notice 19-0076 dated April 25, 2019.¹

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice for Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

Executive Summary

1. FAIR Canada is disappointed to learn that its earlier comments and recommendations as expressed in its letter to IIROC dated May 23, 2018 with respect to the MCP and ERO proposals have not been adopted and the concerns expressed with respect to the enforcement process alternatives have not been addressed. FAIR Canada remains unable to support the MCP and ERO proposals in their current form.

¹http://www.iiroc.ca/Documents/2019/62f49184-cbdf-4258-8d02-67f33c336d61_en.pdf

2. FAIR Canada remains concerned that the absence of sufficient historical data negatively impacts the transparency and accountability of IIROC's enforcement efforts and undermines public confidence in the the process of regulatory enforcement.
3. The MCP will not result in a public record of the Approved Person having been disciplined that is accessible by clients, prospective clients or prospective investment dealer employers of the Approved Person. FAIR Canada questions how such an outcome is in the public interest and consistent with IIROC's stated goals of protecting investors and supporting healthy Canadian capital markets.
4. FAIR Canada repeats its opposition to the ERO Staff Policy Statement in so much as it permits a discounted sanction in circumstances where there is not full disgorgement of any profits made and full compensation paid to investors for any losses, including interest and fees incurred. It should be a condition requisite for eligibility for resolution of a rule contravention by either MCP or ERO that any client harmed by the rule contravention has received full compensation for loss and that any commissions or fees incurred have been repaid to the client.
5. FAIR Canada repeats its recommendation that IIROC amend its Consolidated Rules to permit open court principles to apply to any hearings before the IIROC Hearing Committee to consider proposed settlements, whether pursuant to the MCP, the ERO Staff Policy Statement or otherwise.

IIROC's Response to FAIR Canada's Earlier Comments and Recommendations

IIROC Notice 19-0076 requests further comments on proposed amendments to IIROC's Consolidated Enforcement, Examination and Approval Rules (the Consolidated Rules) to adopt MCP and a Staff Policy on Early Resolution Offers (the Staff Policy Statement), that are intended to adopt two alternative forms of disciplinary action with certain modifications but otherwise as first proposed by IIROC Notice 18-0045 February 22, 2018. FAIR Canada provided comments on the original proposals as set out in IIROC Notice 18-0045 by letter dated May 23, 2018.² Having reviewed IIROC Notice 19-0076, **FAIR Canada is disappointed to learn that its comments with respect to the MCP and ERO proposals have not been adopted and the concerns expressed with respect to the enforcement process alternatives have not been addressed. FAIR Canada remains unable to support the MCP and ERO proposals in their current form.**

Insufficient Enforcement Data and Cost/Benefit Analysis

FAIR Canada's concerns have not been addressed regarding a lack of sufficient historic IIROC enforcement data to allow for a better assessment of potential impact of the proposals and the lack of a robust and thoughtful cost benefit analysis. **FAIR Canada remains concerned that the absence of sufficient historical data negatively impacts the transparency and accountability of IIROC's enforcement efforts and undermines public confidence in the the process of regulatory**

²<http://faircanada.ca/wp-content/uploads/2018/05/180523-Final-FAIR-Canada-Letter-to-IIROC-re-Enforcement-Alternativerative-Forms-of-Disciplinary-Action.pdf>

enforcement. We also remain concerned that the lack of sufficient data makes difficult a meaningful review and assessment of the effectiveness of enforcement by external stakeholders.

Minor Contravention Program

The purpose of the MCP as stated by IIROC is to address rule contraventions committed by individuals who work at IIROC regulated investment dealers in specific roles (Approved Persons) that “warrant a more meaningful response than a Cautionary Letter, but do not warrant the resources and costs associated with a formal disciplinary proceeding.” A rule contravention resolved pursuant to the MCP will not be considered a “formal disciplinary proceeding for purposes of National Instrument 33-109 Registration Information” nor will the Approved Person be required to disclose the rule contravention and penalty on an Approved Person’s registration records (Form 33-109).

The MCP as currently proposed will not result in a public record of the Approved Person having been disciplined by IIROC that is accessible by clients, prospective clients or prospective investment dealer employers of the Approved Person. An investor client will not be able to search on a publicly available database for a record of an Approved Person having a history of contraventions of IIROC rules that are resolved under the MCP. FAIR Canada questions how such an outcome is in the public interest and consistent with IIROC’s stated goals of protecting investors and supporting healthy Canadian capital markets.

As stated in the 2018 IIROC Enforcement Report³ (the Report), IIROC is a public interest regulator that has as its goals protecting investors and supporting healthy Canadian capital markets. Enforcement plays a key role in IIROC’s pursuit of these goals. According to the Report, IIROC’s Enforcement Department works to ensure timely identification, investigation and prosecution of regulatory misconduct. The Report further states that IIROC’s vision is to be known for its integrity, transparency and balanced solutions and that its actions are driven by sound, intelligent deliberation and consultation.

IIROC’s MCP proposal states that MCP Agreements would only be used in cases where the rule contravention results in “limited or no harm to clients or other market participants”, and “limited or no harm to market integrity or the reputation of the marketplace”, and results in “limited or no benefit to the firm or individual” who engaged in the conduct, or “any related parties”. How are investor clients of the Approved Person and Dealer Member involved, and other members of the public, able to assess sufficient information to determine whether the exercise of judgment by IIROC staff in entering into a MCP Agreement in any particular case truly meets these criteria? IIROC’s MCP proposal establishes a procedure for approval of the MCP Agreement that is conducted behind closed doors and is inaccessible to the public. Moreover, any report on the contravention committed is summarized by IIROC staff and published only on a no-names basis in consolidated quarterly and annual reports. **There is a deficiency in the transparency and accountability inherent to the MCP Agreement approval process that makes it difficult for the**

³http://www.iroc.ca/news/Documents/IIROC2018EnforcementReport_en.pdf

public to have confidence that the process is being carried out in the public interest.

In addition, the MCP as proposed may result in legal challenges due to failure to comply with open court principles of law. Open court is a fundamental principle of justice in common law. Generally, the principle requires that proceedings be open to the public, and that publicity as to those proceedings be uninhibited. The legitimacy of the process depends upon it. Fairness and public confidence in the system are at stake. IIROC exercises delegated regulatory authority pursuant to orders issued pursuant to securities law by statutorily authorized regulatory bodies (the securities commissions) and as such IIROC is arguably carrying out a statutory power of decision when it engages in the enforcement of regulatory requirements. As such, it must conduct such proceedings in accordance with principles of fundamental justice, including open court principles.

The policy rationale offered for the MCP in IIROC Notice 19-0076 is that the MCP is being introduced in order to provide a more efficient means to resolve cases that cannot be addressed by way of a Cautionary Letter but do not warrant formal disciplinary action. **FAIR Canada doesn't agree with IIROC adopting an enforcement procedure where public knowledge of a registrants misconduct is traded away for the sake of "efficiency". It is FAIR Canada's position that such a procedure is inconsistent with the goals of protecting investors and supporting healthy Canadian capital markets.**

For these reasons, FAIR Canada repeats its opposition to the MCP amendments to the Consolidated Rules as proposed.

Early Resolution Offers

As stated in our previous comment letter, FAIR Canada is concerned about whether the proposed Staff Policy on Early Resolution Offers (the ERO Staff Policy Statement) will encourage IIROC to seek to resolve cases before it has sufficient knowledge of the facts and circumstances to fully understand the misconduct. So long as IIROC settlement hearings are held *in camera*, there can be little confidence in this process from a public interest perspective.

FAIR Canada repeats its opposition to the ERO Staff Policy Statement in so much as it permits a discounted sanction be imposed in circumstances where there is not full disgorgement of any profits made and full compensation paid to investors for any losses, including interest and fees incurred for negligent, unsuitable or wrongful advice or behaviour.

FAIR Canada repeats its recommendation that IIROC amend its Consolidated Rules to permit open court principles to apply to hearings before the IIROC Hearing Committee to consider proposed settlements, whether pursuant to the ERO Staff Policy Statement or otherwise. It is problematic for IIROC to continue to follow a process of closed-door *in camera* enforcement hearings where settlements that have been negotiated by IIROC staff are presented to the Hearing Committee for approval. FAIR Canada recommends that IIROC should address this issue in a manner consistent with its stated vision of being known for its "integrity, transparency and fair and balanced solutions."

Compensation to Clients for Losses & Disgorgement of Commissions/Fees

It should be a condition requisite for eligibility for resolution of a rule contravention by either MCP or ERO that any client harmed by the rule contravention has received full compensation for loss and that any commissions or fees earned as a result of the misconduct have been repaid to the client.

Investors Support for FAIR Canada Submission

FAIR Canada has shared this comment letter with the Small Investor Protection Association (SIPA) and with Kenmar Associates. Both of these investor protection advocacy organizations share and support the comments and concerns of FAIR Canada expressed herein.

We thank you for the opportunity to provide our comments and views in this response. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 647-256-6693 / ermanno.pascutto@faircanada.ca or Douglas Walker at 647-256-6690 / douglas.wallker@faircanada.ca

Sincerely,



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Executive Director
Canadian Foundation for Advancement of Investor Rights

c.c. Small Investor Protection Association (SIPA)
Kenmar Associates