IIAC ACCVM
Investment Industry Association of Canada Association canadienne du commerce des valeurs mobilières

March 6, 2023

GCOcomments@iiroc.ca

Investment Industry Regulatory Organization of Canada
Suite 2000, 121 King Street West
Toronto, ON M5H 3T9

To: General Counsel's Office

Dear Sirs/Mesdames,

Re: Review of IIROC Arbitration Program

The Investment Industry Association of Canada (IIAC) is the national association representing investment firms that provide products and services to Canadian retail and institutional investors.

Our members manufacture and distribute a variety of securities including ETFs, mutual funds, closed-end funds, and other exempt products. They provide a diverse array of portfolio management, advisory and non-advisory services. Our members service most retail investors in Canada.

The IIAC commends IIROC, now the New SRO, for its review of the Arbitration Program, which should be made available to mutual fund dealers as well.

The IIAC agrees that:

(i) The Arbitration Program continues to have the potential of offering a much-needed alternative dispute resolution forum for investor claims in Canada.

(ii) Investors are confused by the complexities of the current regulatory landscape in general, where multiple regulators are involved in regulation of different investment products and services.

Investors deserve viable options for the proper resolution of disputes, beyond the OBSI. It is agreed that the Program has significant distinctive features irrespective of that option.[1]

[1] An assessment of the OBSI's independence and concerns regarding potentially binding powers is beyond the scope of this submission.

A. Investors Deserve Dispute Resolution Options

With respect to certain other dispute resolution services available:

The AMF mediation model is unique and deserves further consideration. Both of FINRA's mediation and arbitration programs are interesting and compelling. In particular, the availability of:

- Mediations at any time before or during arbitration proceedings.
- Free or reduced cost telephonic or video conference mediation for claims under $100,000.
- A tiered approach with both procedures and fees differing depending on the size of the claim.
- A fee waiver to assist the parties in financial hardship.

B. Recommendations Made

The IIAC also agrees with several of the recommendations, or portions of the recommendations, made by the Working Group. These are listed at Schedule A enclosed.

We provide the following additional comments and suggestions[2]:

2. Written Resources for Program Participants

We disagree that individual claimants are disadvantaged in accessing documents that may be relevant and necessary to prove their case. As the standard of disclosure proposed is to be like that in civil litigation, the production of relevant documents is a requirement as opposed to a concern. In addition, civil litigation applies proportionality to secure "the just, most expeditious and least expensive determination of every civil proceeding on its merits" and "gives direction that are proportionate to the importance and complexity of the issues, and to the amount involved, the proceeding.[3]

This proportionality principle is applied to documents and examinations so that:

"In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable.

(b) the expense associated with answering the question or producing the document would be unjustified.

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice.

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source.

[2] With reference to the paragraph numbering in the Working Group recommendations.
[3] *Courts of Justice Act*, R.R.O 1990, Regulation 194, *Rules of Civil Procedure*, Rule 1.04 (1), (1.1)

"In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person."[4]

Relevant documents are tailored to the issues raised, size and complexity of the proceeding, so that guidance from an arbitrator may be helpful as opposed to a list of common questions and common categories of documents.

3. Quality of Arbitration

All Program arbitrators should have their qualifications reviewed and approved by committee which includes users of the Program. Specific, practical knowledge of securities laws including the specific issues relevant to a given proceeding should be a requirement.

6. Length of Arbitration and Delays

The value of timely resolution is acknowledged. A mandate of quick resolution must be meaningfully balanced with the size of claim and complexity of issues to ensure an investor's dispute is fully and fairly considered. The allowance for reasonable delays is included in Recommendation 6. Appropriate internal complaint review processes should **not** be classified as reasonable delay.

7. Parties' Representation

Co-ordination with pro-bono clinics for the benefit of unrepresented claimants is strongly supported.

12. Tailored Procedural Tools

Though we agree with the principle of tailored procedures responsive to the different needs of the parties, we recommend its application be amended as follows:

i) An expert report that has not been subject to oral examination should not be admissible, or alternatively, should be given little to no weight. The exchange of written expert reports, without oral evidence, is not beneficial to a fair and just result.

ii) The parties have the obligation to put the appropriate witnesses forward in support of their claims including the proper representative of the firm. The opposing party can summons any 'missing' or other witness. The arbitrator can also draw an adverse inference if a material witness is not called. There is no need for the arbitrator to direct the parties regarding their witness selection and it may be inappropriate for the arbitrator to do so.

[4] Supra at Footnote 3, Rule 29.2.03

iii) The suggested tiers of claims are sensible though Tier 3, 'above $250,000' is broad and will need to be applied with due regard to the varying size and complexity of the claims.

13. Set Timeframes

There is value to the principle of establishing different timeframes for different claims. The principle must reasonably apply so that aggressive timeframes do not compromise the quality of the decision or recommendation an investor receives.

C. Recommendations for Further Consultation

16. Award Limit

The $500,000 cap is unnecessary and inadequate. Assuming the program has the appropriate design, application and expertise, there is no need for a limit. The Program should remain open to claims under $500,000 irrespective of OBSI services.

The credibility of the Program will inform support for award limits.

17. The 90-day Requirement

The 90-day requirement should remain in place.

In efforts to save the client resources, the client should attempt to resolve the dispute directly with their dealer prior to initiating arbitration.

Shortening complaint response time from 90-days presents significant challenges regarding:

- ability to appropriately investigate the matter and provide a response; and
- creation of a hierarchy as to response times for complaint handling with various regulators.

Investor complaints deserve careful consideration. A sensible and attentive investigation of an investor complaint, which often involves communications with multiple individuals, and analysis of multiple accounts, requires at least 90 days or more, as reflected in both NI 31-103 and New SRO rules. A 90 day or more investigation period recognizes the importance of the issues to the investor by allowing for appropriate investigation and therefore maximizing the opportunity for resolution without further expense.

With proper design, application and attention, this Arbitration Program will provide great benefit to investors. We encourage you to continue in your efforts.

Sincerely,

Laura Paglia

Laura Paglia
President and Chief Executive Officer
Investment Industry Association of Canada

Schedule A: Recommendations[5]

Part 1: Recommendations for Immediate Implementation

1. Program Accessibility and Awareness

Recommendation Summary:

(1) Redraft and redesign Program materials, avoid legal jargon and use plain language.

(2) Increase public awareness about the Program through social media and professional outreach.

(3) Use an alternative name for the Program to reflect its independence.

2. Written Resources for Program Participants

Create written guidance to assist self-represented and all other Program participants with the arbitration process.

3. Quality of Arbitration

Provide more quality control and transparency about the arbitration roster.

The quality of the Program largely depends on the quality of arbitrators.

Arbitrators should possess case management and people management skills.

The Program arbitrators should possess both adjudication experience and subject matter expertise in the financial/securities industry.

The arbitration roster with focused arbitrators' bios should be made publicly available (including on service providers' and IIROC's websites) and provided to the parties when entering the Program.

4. Selecting Arbitrators and Setting Rules of Procedure

Allow parties to select their own arbitrator outside of the service providers' roster.

Develop specialized rules and practices specifically tailored for the Program.

The Program however does not have to be limited to any exclusive service provider in terms of the parties' choice of an arbitrator.

Provide parties with the full list of available arbitrators (instead of limiting the list to five arbitrators).

[5] With reference to the paragraph numbering in the Working Group recommendations.

Allow the parties to select an arbitrator of their choice not on the service providers' roster (as long as the arbitrator is qualified, approved by IIROC and accepts the service provider's engagement terms).

Develop a process and encourage the parties to interview potential arbitrators before making their selection.

5. Place of Arbitration

Provide alternative means of participation for the parties who may be unable or disadvantaged to participate in-person due to the location of the arbitration hearing.

6. Parties' Representation

Permit claimants to represent themselves and, where permitted by law and authorized by the arbitrator, be represented by an agent other than a lawyer.

Part 2: Recommendations for a Pilot Program

9. Tiered Approach

Address different needs of the parties through tailored procedural tools, set timeframes and tiered system of costs.

10. Case Management

Implement case management to make the Program more efficient, fair, and tailored to specific parties' needs.

11. Mediation

Implement mandatory mediation at the outset for smaller claims and encourage voluntary mediation for all other claims throughout the process.

Mandatory mediation for smaller claims at the outset of the arbitration process and optional mediation for all other cases at any stage.

12. Tailored Procedural Tools

Develop tailored procedures responsive to different needs of the parties.

Preliminary conferences and mediation.

Fee waivers.

Fee subsidy.

Available funding through IIROC Restricted Fund.