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General Counsel's Office
Canadian Regulatory Organization of Canada
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Re: Proposal to Modernize the CIRO Arbitration Program

The Osgoode Investor Protection Clinic appreciates the opportunity to provide comments on the Proposal to Modernize the CIRO Arbitration Program.

By way of background, the Osgoode Investor Protection Clinic, the first clinic of its kind in Canada, is dedicated to providing free legal advice and services to retail investors across the country.

Since launching in 2016, we have worked with a wide range of clients who have suffered investment losses. From seniors whose adviser mismanaged their entire life savings on the cusp of their retirement to low-income investors whose advisers recommended leveraged loans, we have worked with vulnerable retail investors who need assistance in seeking redress but cannot afford a lawyer.

We are pleased to bring their voices on the Proposal to Modernize the CIRO Arbitration Program.

We appreciate your consideration of our comments; in the spirit of brevity, we have focused on those questions and topics where we think we can best offer a value add to the process.

Sincerely,

Brigitte Catellier, Associate Director
Bilal Ak, Student Caseworker
Shahaab Sherwani, Student Caseworker

Introductory Comments

The Osgoode Investor Protection Clinic ("IPC") commends CIRO for presenting thorough recommendations aimed at enhancing retail investors' access to a fair, timely, and affordable dispute resolution process through the Arbitration Program (the "Program"), ultimately helping to build trust in both capital markets and the financial services industry.

The IPC submitted a comment letter dated March 6, 2023, regarding the review of the Program and several of the challenges hindering retail investor access to justice have been addressed in CIRO's proposal:[1]

- Costs: The IPC emphasized the significant financial burden faced by retail investors when pursuing claims. To address this, the proposal includes several measures such as funding reasonable case management and mediation costs, setting reasonable arbitrators' fees, and referring self-represented litigants to pro bono legal assistance. This directly addresses concerns about the high costs associated with arbitration, making it more accessible for retail investors.

- Legal Representation: Recognizing the power imbalance between retail investors and institutions, the IPC recommended expanding representation and partnerships with legal clinics. The proposal acknowledges the importance of legal representation and includes provisions for referring unrepresented litigants to legal clinics and lawyers offering pro bono legal services. This commitment to facilitating access to legal assistance helps level the playing field for retail investors.

- Procedural Complexity: The IPC highlighted the need for clear and accessible procedures to avoid lengthy disputes caused by investor confusion. The proposal introduces case management for all claims as a tool to streamline the process, manage timelines, and provide guidance on procedural matters. This personalized approach could address procedural complexities on a case-by-case basis, enhancing efficiency and reduce confusion for retail investors.

- Limitation Periods: While not explicitly mentioned in the proposal, the IPC's recommendation to extend the limitation period for arbitration cases to six years was acknowledged as a point of discussion and further feedback (discussed further below).

In summary, CIRO's proposal demonstrates a commitment to addressing the key challenges hindering retail investor access to justice that were outlined in the Osgoode IPC's comment letter. By incorporating measures to reduce costs, facilitate legal representation, and streamline procedures through case management, the proposal aims to make the Program a more accessible and effective avenue for resolving investment disputes.

[1] Osgoode Investor Protection Clinic, "Review of the Investment Industry Regulatory Organization of Canada Arbitration Program" (March 6, 2023), Online: https://www.ciro.ca/media/3800/download?inline.

Over the past eight years, the IPC has supported retail investors' claims against their registered advisers before OBSI, handling 26 OBSI files to date, and Small Claims Courts. Drawing on our experience with these cases, we will offer recommendations on areas where the IPC can provide added value, including suggestions for changes we support or believe are necessary.

Consultation Question #1: Should the Program be extended to clients of mutual fund dealers?

Yes, the proposal to extend the Program to clients of both investment dealers and mutual fund dealers presents a logical step toward achieving consistency and reducing investor confusion.

Extending the Program to mutual fund dealers ensures that all CIRO clients have access to the same dispute resolution and enforcement mechanisms. This would promote fairness and equity, providing all investors with equal avenues to seek redress.

Additionally, investors may be confused if the dispute resolution process differs across CIRO divisions. Consolidating the arbitration program would make the process simpler and more intuitive for clients who may interact with both types of dealers over time, which was one of the advantages arising from the MFDA-IIROC amalgamation.

Consultation Question #2: Should the Program remain available for claims that fall outside OBSI's mandate/eligibility criteria?

Yes, we believe there is value in maintaining the Program for claims that fall outside of OBSI's mandate or eligibility criteria. We also believe there is value in maintaining the Program for claims that fall within OBSI's mandate or eligibility criteria.

The OBSI process is distinct from the Program in several keyways. Beyond its pro bono nature and dollar threshold, OBSI's investigative role does not involve adjudication. As a pro bono legal clinic providing legal representation, we have observed significant differences between these two processes.

In an OBSI claim, legal representation of retail investors is highly limited. Our role typically involves drafting the complaint and supporting the investigation behind the scenes. However, we are not involved in the investigation of the defendant adviser. We do not participate in interviews with the defendant and have no access to the evidence requested or received. In this sense, we are largely dependent on the investigation conducted by OBSI.

In contrast, the arbitration process is generally driven by legal counsel, who manage all aspects of the process, including evidentiary matters and arguments. Both plaintiff and defendant counsel communicate directly, with full transparency as to the evidentiary process. We have experienced the IIROC Arbitration process with a file that our Clinic supported. We have observed the significant differences of the more formal process leads, particularly as to the opportunity for the parties to engage in settlement discussions.

From our experience, civil courts are not an optimal venue for retail investor claims that exceed the Small Claims Court threshold, mainly due to lengthy timelines and high costs. An enhanced

arbitration program would provide a unique and accessible option for a larger number of retail investors seeking resolution.

Finally, as a matter of policy, we believe it is essential to preserve the choices available to harmed investors and ensure that the Program remains accessible for as many claimants as possible. We believe that the Program is a crucial component of ensuring access to justice for retail investors seeking compensation for alleged wrongdoing by their advisers.

Consultation Question #3: Is the proposed range, between $350,000 (and potentially $500,000) to $1,000,000, appropriate for arbitration claims involving investor disputes in Canada?

We support the decision to set the upper limit at $1,000,000. Setting the upper award limit at $1,000,000 effectively bridges the gap between the maximum allowable award and the complexities of disputes that would otherwise necessitate a court proceeding, thereby enhancing the program's reach and relevance. However, we recommend a substantial revision to the lower limit by advocating for its removal. This revision would ensure that investors with claims below $350,000 also have the option of arbitration, providing a necessary alternative when neither Small Claims Court nor OBSI processes are suitable for their specific circumstances. Again, we would highlight that each of these processes are significantly distinct and together support access to justice for retain investors seeking compensation for losses due to misconduct.

Upper Award Limit

We agree with the cautious approach taken in the proposal that refrains from entirely removing the limit or raising it to $5,000,000. We concur that such high limits could introduce significant risks and consequences, including reputational risks and the inescapable finality of arbitration decisions which lack an appeal process. These concerns warrant a more measured adjustment to the award limits to balance effectively between accessibility to arbitration and the management of potential risks associated with high-value disputes.

Moreover, since most claims have historically reached the current maximum limit of $500,000 and claims exceeding $1,000,000 are rare, this data supports the suggestion to raise the cap to $1,000,000. This adjustment seems sufficient to cover a large portion of claims without overly exposing the program to the increased risks associated with higher limits.

Lower Award Limit

CIRO has expressed that their main concern with setting the starting point for arbitration claims at $350,000, which creates an overlap with OBSI's upper limit, is the potential confusion it may cause for investors. However, we believe that the inherent differences between OBSI and the Program, which cater to distinct needs within the investor community, are clear enough to mitigate the risk of confusion.

OBSI's process, while valuable for its investigative approach and lack of cost to the claimant, does not allow for direct confrontation or cross-examination of evidence, which can be crucial in complex disputes. This limitation can leave some investors, particularly those with claims that

require a more adversarial process to uncover pertinent evidence, without a viable, cost-effective avenue for resolution outside of expensive litigation.

Given the limitations observed in both OBSI's process and civil courts, especially concerning the high costs and lengthy timelines in courts for claims that exceed the Small Claims Court threshold, an arbitration program with no minimum claim limit would significantly improve access to justice. It would offer a more appropriate, efficient, and accessible option for a larger number of retail investors.

Consultation Question #4: Should the limitation period be extended and what would be the appropriate limitation period for arbitration claims in the Program?

We believe that extending the limitation period to six years is the most appropriate course of action. A six-year limitation period would address several key concerns and align with broader principles of fairness and accessibility for investors.

Addressing Complexity and Accessibility for Vulnerable Populations

In our experience, of the main challenges faced by wronged investors is the complexity of financial products and disputes, which can often make it difficult for investors to fully comprehend their rights and the available avenues for redress. This issue is particularly prevalent among vulnerable populations, including seniors, who may not immediately recognize that they have been wronged or may not have the capacity to act swiftly due to personal or financial constraints. A six-year limitation period would provide these individuals with additional time to seek resolution, ensuring that they are not unfairly excluded from pursuing claims simply because they were unaware of their rights or unable to act promptly. This would help address systemic barriers that disproportionately affect older investors and would promote greater access to justice for all demographics.

Mitigating Power Imbalances Between Investors and Dealers

A longer limitation period would also help mitigate the power imbalance that often exists between investors, particularly those who may have been wronged, and CIRO dealers, who typically have greater resources, expertise, and access to legal support. Many investors are not equipped with the same level of knowledge or financial means to navigate complex disputes, and they may be unaware of potential claims or unable to pursue them within a shorter timeframe. By extending the limitation period, investors would be afforded more time to fully evaluate their cases, seek legal counsel if necessary, and pursue a fair resolution. This would promote fairness within the system, offering all parties—particularly those who may have been disadvantaged or misled—a more reasonable timeframe to assert their rights and resolve their disputes. In turn, it would also decrease confusion and provide greater clarity for investors who may feel overwhelmed by the intricacies of the dispute resolution process.

Aligning with Other Dispute Resolution Mechanisms for Consistency

As noted in the consultation, other dispute resolution mechanisms, such as OBSI and FINRA arbitration, have longer limitation periods (e.g., six years). Aligning the limitation periods would

reduce confusion for investors, who may be navigating multiple systems and trying to understand the various timelines that apply to their specific claims. A consistent approach would foster a more harmonious and streamlined investor complaint process as a whole, enabling investors to better understand their rights and the procedures they must follow.

Additional Recommendation: An Appeal Process

Given the proposed increased monetary jurisdiction of the Program, implementing an appeal process is essential. As a matter of policy, without a fair appeal process, the Program may lack institutional credibility. Questionable decisions by an arbitrator or new facts emerging after a decision may remain unaddressed, potentially resulting in an unjust outcome. Furthermore, similar to cases adjudicated by the OBSI and court systems—from small claims to superior court—which include a review process, the Program should also offer this procedural safeguard to maintain its integrity as a cost-effective alternative to traditional litigation.

Additionally, echoing the concerns raised by the IIROC Arbitration Program Working Group, the absence of an appeal mechanism, combined with the publication of arbitration decisions, could have significant precedential consequences for the parties involved.[2] Since these decisions will be made public, questionable rulings by an arbitrator or new information emerging after the fact may go uncorrected, potentially leading to unjust outcomes that future parties could rely on.

It is important to note that introducing an appeals process does not negate the inherent advantages of arbitration over litigation. Arbitration remains distinctively advantageous; it allows more control over the choice of arbitrator, offers privacy from media exposure, and ensures a quicker resolution compared to the protracted delays often experienced in court proceedings. Arbitration is generally less costly because it is designed as a summary procedure—unless specifically stipulated in the agreement, parties do not have the right to discovery, which in litigation adds significant costs and time due to extensive motions and document exchanges.

Thus, adding an appeals process, while bringing arbitration closer to the procedural rigor of litigation, does not strip away its benefits. Instead, it enhances the fairness and robustness of the arbitration process, making it a more viable and credible alternative for resolving disputes.

Additional Recommendation: Publish a CIRO Arbitration Brief

We recommend that CIRO publish a plain-language, user friendly document that compares OBSI, CIRO Arbitration, and Civil Courts, providing retail investors with an easily understandable overview of their options for seeking compensation. Our Clinic would welcome an opportunity to support CIRO in drafting this document, in line with our purpose to promote investor education.

Based on our experience, we have found that many retail investors are not fully aware of the key differences between these three avenues, which often leads to confusion when deciding which

[2] IIROC Working Group, "IIROC Arbitration Program Working Group Recommendations" (July 2022), at 35, online: https://www.ciro.ca/sites/default/files/legacy/2022-12/Arbitration-Program-Working-Group-Recommendations-%28Appendix%29_EN-%28final%29.pdf.

route to pursue. A simple, accessible comparison would help alleviate some of this confusion, allowing investors to make more informed decisions about how to proceed with their claims. Additionally, this could contribute to more effective decision-making by investors and reduce the risk of them choosing a process that may not be suitable for their particular situation.