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Charles Corlett
Director, Enforcement Litigation
Investment Industry Regulatory Organization of Canada
Suite 2000, 121 King Street West
Toronto, Ontario M5H 3T9
ccorlett@iiroc.ca

Market Regulation
Ontario Securities Commission
Suite 1903, Box 55
20 Queen Street West
Toronto, Ontario M5H 3S8
marketregulation@osc.gov.on.ca

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

The following represents my comments on the proposed Minor Contravention Program and Early Resolution Offers being considered by IIROC.

With respect to the Minor Contravention Program it is unclear whether or not the program will include issues associated with "serious" misconduct. Serious misconduct according to the UK's FCA is defined as misconduct "that could cause harm" and is "misconduct resulting from a lack of integrity, serious failings in a firm's systems and controls including governance and senior managers' failings or mis-selling of unsuitable products to consumers"[1].

The FCA's "Investigation Opening Criteria" note that not all breaches of "rules and requirements constitute serious misconduct", especially when technical or minor and can effectively be dealt with by other means. The MCP terms make no such distinction, referring only to "technical", "isolated", "limited or no harm". Mis-selling qualified as serious misconduct under the FCA's terms could quite easily fit within these parameters; unsuitable leverage in a rising market for instance.

It is also worth pointing out that misconduct is framed by regulation and not necessarily by the deed itself. A great many transactions in Canada's retail advisory area would be deemed serious misconduct under FCA rules for the simple fact that standards governing advice (best interests) and remuneration (commissions banned) are different. Conflicts of interest lower the barriers and make it more difficult to separate out individual from firm liability. Likewise many of those who possess a professional designation may be in a similar position in certain circumstances. To what extent will individuals and firms be allowed to impair professional standards?

[1] https://www.fca.org.uk/about/enforcement/investigation-opening-criteria

The additional risk with the MCP program is that it risks shielding from public view a great deal of information regarding industry standards of advice and the professional standards of firms and advisors in the open market place. The market place is supposedly protected by regulators' public interest mandates and transactional relationships require a higher level of "buyer beware".

In their Approach to Enforcement (Final Report), the FCA also note that "severe penalties and sanctions alone are not enough to reduce and prevent serious misconduct" and that the other side of the stick is increasing the likelihood of detection[2]. Part of their approach therefore is to encourage firms to "voluntarily account for and redress misconduct by imposing lower sanctions" and to impose more severe sanctions for those who fail to address them. The benefits of early detection are to "prevent harm before it occurs", and issues are more likely to be "contained and ringfenced, making the investigation quicker" with "speedy remediation of harm". Firms and individuals "should not wait for an investigation to end before acting in a way they think is right". This does not seem to the objective of the IIROC proposals which seem to offer the MCP and ERO without firm/advisor admission of culpability and without evidence of voluntary remediation and redress.

In IIROC Notice 19-0076 the focus is more on addressing "wrongdoing in a fair and proportionate manner" and lacks the threat of earlier detection and tougher sanctions for those who do not wish to voluntarily account for and redress misconduct. The emphasis seems to be leniency alone rather than a door left open for entities and individuals to escape a higher level of pressure later. The objective of the FCA is towards encouraging better market conduct at an earlier point. In other, and in my, words, "learn from your mistakes, show us that you understand what you or the individual has done wrong and prevent it from happening in the future". A system dependent on conflicts of interest and regulated by the transaction is much more difficult to encourage this type of action.

The FCA's approach also seems more focused on the wider system than the infraction in and of itself. If the infraction can be used to improve market conduct then the incentives come into play, but for no other reason.

With respect to the provision of personalised financial advice, the Canadian retail financial services market place remains one with high sales targets and strong conflicts of interest that mitigate the ability to realistically implement a Minor Contravention Program that will both work to improve market conduct and serve to protect the public interest.

Critically the MCP notice appears to be provided to individuals before they appear willing to accept the facts, the liabilities and the penalties. It would make more sense that the MCP only be provided to those who admit whatever infraction and have looked to fully redress the error. No such requirement is implied or made explicit. I also question whether an MCP notice should even require a one-member hearing panel if indeed the issue is minor or technical. If a hearing panel is required it presumably implies more serious misconduct and/or disagreement over the facts, liabilities and penalties of the investigation.

[2] https://www.fca.org.uk/publication/corporate/our-approach-enforcement-final-report-feedback-statement.pdf

With regard to the Early Resolution Offers, again with respect to the UK's FCA the onus should be on providing an incentive to address the misconduct early on and to improve market conduct[3] going forward. Partial or no agreement can render the offer of a discount void.

In the IIROC proposal it notes that despite the offer of discounts in negotiations the "settlement process has (hitherto) not been significantly impacted". I see no issue in formalising an early resolution offer, but such offers should only be made to those persons and entities that have made a clear effort to accept the facts, provide redress and adjust market conduct going forward. Otherwise I fail to see how the EROs will facilitate improved market conduct and "efficiency" in its broadest sense. Surely the objective should not be quick investigations but improved market conduct and enhanced trust and accountability in the system. Quick investigations should be the carrot after the fact and not before or without.

I also agree and support most of the points noted in Kenmar's and FAIR Canada's submission on the MCP and ERO proposal.

In conclusion IIROC's proposals are more transactional in nature, looking to be fair and proportionate to wrongdoing as opposed to encouraging improved market conduct and higher levels of accountability and redress for errors and misconduct by firms and individuals. They also risk impairing consumers' ability to assess standards and professionalism of advice in a market-place still regulated by the transaction with high levels of conflicts of interest in transaction remuneration.

On the face of it early settlement offers make sense, but the context and the intent and the balancing penalties need to match. The fact that firms are not currently accepting the facts, the liabilities and the penalties does not bode for future market conduct with a set of proposals that look to facilitate quicker resolution of impaired outcomes.

Thank you for the opportunity to respond to the above noted consultation and Notice.

Kind regards

Yours sincerely

Andrew Teasdale, CFA, BA Hons Econ

[3] https://gowlingwlg.com/en/insights-resources/articles/2019/conduct-risk-is-your-framework-fca-compatible/