May 31, 2019

Charles Corlett
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Dear Mr. Corlett,

Re: Proposed Rule Amendments for Minor Contravention Program (MCP) and Policy Statement on Early Resolution Offers

I am writing on behalf of the OSC's Investor Advisory Panel (IAP) to comment on the April 25, 2019 Rules Notice and Request for Comment 19-0076. The IAP is an initiative by the Ontario Securities Commission to enable investor concerns and voices to be represented in its rule development and policymaking process. This letter is further to our comment letter of April 26, 2018 (2018 letter) with respect to the initial consultation by IIROC for a Minor Contravention Program and an Early Resolution Program as set out in Notice 18-0045.

Consultation process

Before addressing the specific proposed new rule amendments, we would like to comment on the consultation process associated with these proposals.

In February 2018, IIROC requested input on its proposals for alternative forms of disciplinary action. IIROC received nine comment letters, including our 2018 letter. These letters almost unanimously did not support the proposals and identified many common issues of concern.

At a subsequent roundtable hosted by IIROC, several stakeholders, including representatives from the IAP, reiterated many of the reservations and concerns raised in the comment letters.

Notwithstanding these widespread concerns, IIROC is still proceeding with the original proposal, subject only to three amendments (removing Dealer eligibility for MCP, increasing the fixed fine to $5,000, and requiring the approval of an MCP sanction by a hearing panel consisting of one public member). Significantly, IIROC chose not to amend

the original proposal to reflect the broad consensus among commentators that an MCP sanction should be made public and should be disclosed on Form 33-109F4.

IIROC appears to be justifying this decision based on its interpretation of the results of a survey conducted on its behalf involving 1,011 investors across Canada. It is not apparent to us, however, that the survey responses support the non-disclosure of MCP sanctions given that 56% of investors surveyed felt that the names of firms and individuals in *all* cases should be published.

Furthermore, though we agree that polling the public is useful for some purposes, interpretation of the results must be qualified by the chronically low level of financial knowledge and understanding exhibited by the public in nearly all surveys. Therefore, we believe, IIROC should place at least as much weight on informed stakeholder input as on general public survey results when evaluating feedback regarding complex or technical regulatory issues.

New proposals

Turning now to the specific proposals, we acknowledge the merits of fairly resolving discipline matters in a timely and efficient manner. Nevertheless, there are certain core principles – such as transparency and accountability – that should not be compromised in the pursuit of efficiency or timeliness. As noted below, it is not clear that the MCP will yield greater efficiency; but there is no doubt that it will compromise these core principles.

We also have some concerns with the revised proposal for an Early Resolution Offer program, though these are more practical in nature than principles-based.

Minor Contravention Program

The IAP continues to question the need for, and implications of, this program. Notwithstanding requests contained in our 2018 letter and those of other commentators, IIROC has provided no analysis of the number of disciplinary matters that will be impacted by the proposed changes. The absence of this analysis undermines IIROC's assertion that the MCP will increase the efficiency of discipline case resolution. We would have thought that the business case necessary to validate this assertion would include a quantitative analysis calculating the savings from the proposed changes. Accordingly, we renew here our request for information on the number, nature and anticipated savings of enforcement cases that will be eligible for the MCP.

The proposals that an MCP will not be considered a disciplinary proceeding for the purposes of NI 33-109 and need not be publicly reported are, in our view, significant shortcomings. If the MCP is implemented in this manner, only IIROC would have a record of the Approved Persons subjected to an MCP sanction, at least initially. It is

unclear whether the Approved Person's firm would be given this information – presumably they will, but we request clarification of this point.

Also, it is proposed that the CSA and other self-regulatory organizations would have access to MCP information, but we are unclear how this would occur. Will the information be provided only on request, or by means of a database available to regulators, or will information about every MCP sanction be forwarded automatically by IIROC to other regulators?

What is clear is that the public will not be aware that an Approved Person has been the subject of an MCP sanction, and this concerns us for a number of reasons. How can IIROC assert this proposal is in the public interest when the public – the stakeholder group often most directly impacted by the wrongdoing – is kept unaware of each MCP sanction? In effect, the proposal creates a "secret" disciplinary record that potentially can be considered by all stakeholders to evaluate the Approved Person's proficiency and trustworthiness – by all, that is, except the public.

This is the main reason why we believe the proposal not to disclose an MCP record is ill-conceived, but there is another. The proposal states that IIROC staff would treat a previous MCP sanction as an aggravating factor in any subsequent disciplinary proceeding of an Approved Person. If so, the MCP sanction will have to be disclosed at the subsequent hearing and that would constitute the first time the complainant will become aware of the "secret" disciplinary record. Such disclosure would be disconcerting to the aggrieved client and could potentially give rise to civil liability for the Approved Person's firm, and maybe even IIROC, for non-disclosure of this information.

It is a bad bargain if IIROC trades away public disclosure, transparency and accountability in order to encourage quicker settlements. The fixed fine and elimination of formal proceedings contemplated by the MCP should be more than enough incentive to induce more timely settlements.

Early Resolution Offers

As noted in our 2018 letter, we have no issue with incenting cooperation in order to facilitate quicker settlements. However, given that IIROC already can offer such incentives (we note the proposed program will not require any new or additional CSA signoffs), the necessity for an Early Resolution Offer program remains unclear.

Furthermore, we question IIROC's unsubstantiated assertion that fixing the incentive at a 30% discount will encourage participation. We are concerned that it may instead promote unintended outcomes.

For one thing, individuals whose conduct is in question may henceforth be inclined to withhold any information unless and until offered a 30% penalty discount to cooperate. On this basis it is possible that the Early Resolution Offer program will act to effectively cap all future IIROC settlement sanctions at 70% of their previous level.

Also, we question the merits of prescribing a fixed discount percentage, particularly one that appears to have been arbitrarily determined, to apply in every Early Resolution Offer. There may be instances when a discount lower, or higher, than 30% would be more appropriate. We therefore believe that IIROC's existing Credit for Cooperation program – which allows discipline staff the discretion to offer discounts commensurate with the nature, extent and timeliness of the cooperation provided – is a better alternative than the proposed Early Resolution Offer program.

We appreciate this opportunity to comment once again on the proposals. Please let us know if you require any further information or clarification from us.

Yours truly,

Neil Gross
Chair, Investor Advisory Panel