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<u>Request for Comment – Enforcement Alternative Forms of Disciplinary Action</u>

Harold Geller and MBC Law Corporation are pleased to offer comments in response to IIROC's consultation its proposal for Enforcement Alternative Forms of Disciplinary Action Notice 18 – 0045.

We recognize and support IIROC's general reconsideration of how wrongdoings are addressed in a fair and proportionate manner intended to inspire confidence and deter wrongdoing. Appropriate tools are necessary. Streamlining disciplinary action arising from so-called minor contraventions are appropriate if, and only if, the proposal reflects the needs of consumer protection. So too, "early resolution" is commendable if, and only if, that too reflects the needs of consumer protection.

We refer to and agree with the comments of FAIR and Kenmar.

Given the limited resources available to those who represent investors and the asymmetric funding available to industry, IIROC is urged to take considerable care in seeking out further informed comments to counterweight the influence of the submissions of industry. Furthermore, the industry has direct input into the formation of policies such as this proposal, through representation on IIROC committees. Unfortunately, IIROC has not seen the benefit of involving the average investor or their advocates in the formation of policies prior to publication or in its committee structures. The undeniable and avoidable result is unintended bias by IIROC in policy formation.

Survey as proxies for investor input has very limited value for policy formation. Unequivocally, empirical evidence shows the consumer panel surveys are weak and often misleading proxy for direct input from engage consumers and their advocates. Often panel surveys are used by communities to avoid meaningful input and find support for management's agendas. To be clear, we do not believe this bias is an intended act by IIROC, but again, as a regulator it is incumbent upon IIROC to take further steps to

counterweight the influence of industry and its own governance to ensure fair and full consideration of IIROC policy including the proposed policy.

The proposal has important regulatory and industry considerations, but fails to address IIROC's mandate with respect to the protection of investors. IIROC appears to have focused on industry concerns and the appearance of regulatory "progress" without any meaningful or with inadequate consideration of how the proposals are good for (or in fact, harm) the investor. As a result, we oppose the present proposal.

1. The proposals fail to address the need for public notice of contraventions for both general and specific deterrence purposes.
2. The proposals address fail to address the need for investors who may have been harmed by the so-called minor contraventions to receive notice in a timely manner of the breach and the related potential harm that they have suffered.
3. The proposals focus on providing mitigating factors for discipline, but fails to address the long-overdue consideration of aggravating factors.
4. At the very least, consideration of the empirical evidence and the evolving recognition of the asymmetric power balance between advisors/dealers on one side and investors on the other, as well as the aggravating factors related to vulnerable investors, is a serious gap in the overall disciplinary process of IIROC and, in particular, in these proposals.

Recommendation

A further consideration is the opportunity for IIROC to support investor protection by adopting similar measures as are used in No Contest Settlements. A requirement for the more lenient penalties under this proposal, as with the No Contest Settlements, is requiring investor compensation as a term of the settlement. Early resolution should include not only admission of wrongdoing but immediate and fair compensation for the harm done.

We recognize that IIROC has no experience or expertise in calculating investor losses and either negotiating or determining fair investor compensation. Thus, it is essential for any remediation plan that: 1) all affected investors are notified of the potential that they may have suffered harm as a result of the contravention(s), 2) that an independent person or body, on an independent basis, review proposed remediation and provide an opinion on the fairness of the remediation proposal.

Two potential sources for an independent review are: 1) OBSI; and 2) lawyers who specialize in the area and do not represent IIROC dealer members or licensed representatives. Without a fair remediation plan, those licensed by IIROC should be excluded from Alternative Disciplinary Action. It is important to note that industry-side experts cannot fulfill this role; this is not a criticism of such expert's intent; it is a

recognition that industry experts suffer from the same disabling unintentional bias as those who comment on behalf of industry.

Also, prior to consideration of an Early Resolution, the respondent's practices should be reviewed holistically with respect to potential contraventions similarly affecting other investors. A unique breach may have little systemic importance. A common breach has systemic significance such that the value of general deterrence is negated by an Alternative Disciplinary Action. Again, this is an opportunity for IIROC to robustly pursue its investor protection mandate in a proportionate and fair manner.

Conclusion

While the proposals in IIROC 18 – 0045 include elements of some value, as presently proposed, and in totality, they are premature or untenable given the inadequate consideration of consumer protection.

If IIROC sees fit to seek further community input, through a roundtable or other common regulatory tool, then we look forward to providing further commentary.

Yours truly,

Harold Geller

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