

May 1, 2023  
General Counsel's Office  
New Self-Regulatory Organization of Canada  
[GCOcomments@iroc.ca](mailto:GCOcomments@iroc.ca)

VIA EMAIL

**Re: *Proposal on Distributing Funds Disgorged and Collected through New SRO  
Disciplinary Proceedings to Harmed Investors (the "Consultation")***

The Canadian Advocacy Council of CFA Societies Canada<sup>1</sup> (the "CAC") appreciates the opportunity to provide the following general comments on the Consultation.

We are supportive of any measure that aims to redirect the flow of ill-gotten gains from wrongdoers back to harmed investors. We are also advocating for new regulatory processes to have a justifiable cost-benefit analysis tied to a demonstrable improvement in outcomes for harmed investors. Based on the materials provided in the Consultation and the foreseeable costs involved in administering a program of this nature, we question whether the proposed policy in current form will have a sufficient positive effect to justify its adoption.

**Cost-Benefit Analysis**

As noted in the Consultation, over the course of the last thirteen years, IIROC hearing panels have ordered \$7.9 million in disgorgement, of which IIROC has collected just over \$1 million. Given the relatively small amounts of prior disgorgement orders and the lack of success of past collection efforts, we question whether the benefits of this new policy will present an appreciable improvement for aggrieved investors over the status quo. We anticipate the processes in this proposal have the potential to be both costly and time-consuming. In the absence of evidence suggesting an increase in disgorgement orders or an improvement in related collection rates is forthcoming under the New SRO (which we would very much welcome if contemplated or available), it is unclear to us whether the costs of implementing this proposal will create any meaningful incremental benefits for aggrieved investors.

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<sup>1</sup> The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 21,000 Canadian CFA Charterholders. The council includes investment professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit [www.cfacanada.org](http://www.cfacanada.org) to access the advocacy work of the CAC.

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors' interests come first, markets function at their best, and economies grow. There are more than 190,000 CFA Charterholders worldwide in 160 markets. CFA Institute has nine offices worldwide and there are 160 local societies. For more information, visit [www.cfainstitute.org](http://www.cfainstitute.org) or follow us on LinkedIn and Twitter at @CFAInstitute.

To accurately assess the costs of this proposal, additional details are needed on a number of facets of the program. For example, with respect to the eligibility and provability of investor claims for disgorged funds, it is unclear what process will be implemented along with who will adjudicate the merit of potential claims as the program administrator. If the process requires investors to submit significant documentary evidence to substantiate their claims and their respective dollar amounts, the proposal will likely require considerable time and resources both for wronged investors (or their representatives), and for the program administrator in the adjudication of claims. It's also unclear whether applications and adjudication of investor claims prior to successful collection of the disgorged amount could only exacerbate cost-benefit concerns relating to the proposal if collection is then unsuccessful.

One conspicuous absence from the Consultation is an answer on who would administer the program. While the Consultation notes the process would be separate and apart from the enforcement process/personnel, it is noncommittal on which department of the New SRO will take the lead. If the program is to be administered by a new independent department of the New SRO, there are questions as to whether the number of investors who are likely to access the program (given historical disgorgement order/collection figures) justifies the creation of a new department. While the data on disgorgement amounts ordered and collected over the last decade was a helpful addition to the Consultation, we believe consideration of the associated restitution outcomes for the investors in these cases (if available) alongside disgorgement outcomes would be informational. Furthermore, additional information on the Office of the Investor's role as liaison between investors and the program administrator would also be helpful, particularly if the Office of the Investor will serve in an advocacy capacity for investors.

### **Implications for Existing Compensation Channels**

The proposal notes that New SRO member firms are required to handle complaints in a fair and timely manner, which may involve compensating investors. Where investors have been compensated in the past by member firms relating to complaints, these member firms may have new incentives to alter their complaint compensation behaviours, which must be considered as an aspect of complexity in the design and operation of this program, and the adjudication/timing of investor claims against collected disgorgement amounts. It is possible that new contingency terms or delays in investor compensation will be the net result of the proposal, if disgorgement orders trail the complaint compensation process and have the effect of limiting complaint compensation eligibility.

### **Priority of Claims**

We note that New SRO hearing panels have the power to issue orders for fines, costs, and specific disgorgement amounts. The Consultation is silent as to in what order the New SRO will pursue the collection of these amounts, and whether disgorgement orders will be given subordinate, *pari passu*, or first priority relative to the payment of ordered fines and costs by sanctioned member firms or individuals in related enforcement cases.

It is further unclear whether the New SRO will be obliged to or will as a matter of practice, seek to collect on all disgorgement orders regardless of their amount or perceived likelihood of collectability. In instances where the dollar amount of a disgorgement order falls below the probable costs of collection efforts, we query whether the New SRO is (and should be) committed to pursuing these amounts, notwithstanding the organization may make a net loss on those efforts, particularly after further additional costs of claims adjudication, and the division and distribution/payment of disgorgement funds to eligible harmed investors.

We would also appreciate further clarity on the approach the New SRO proposes to take for distributing funds between claimants on a *pro rata* basis. We are unsure whether claims, for example, will be paid *pro rata* based to some degree on the total number of eligible claimants or as a relative percentage of each eligible claimant's losses, relative to the recognized total losses and the associated disgorgement amount. De minimis thresholds for claim recognition and payment should also be enumerated in this context for clarity.

### Investor Confusion Implications

As the Consultation itself notes, the addition of yet another program requiring the participation of wronged investors may contribute to further confusion in the investor compensation landscape. An investor seeking recourse will already have to navigate potentially several of the following options:

- 1) the member firm's complaint handling process/internal ombudsman, if applicable;
- 2) the New SRO's complaints process;
- 3) any arbitration programs offered;
- 4) the Ombudsman for Banking Services and Investments ("OBSI");
- 5) pro-bono representation services like the Osgoode Investor Protection Clinic; and
- 6) pursuit of claims in civil court, and related representation.

We share concerns that the addition of yet another regulatory process may further obfuscate an already well-saturated selection of redress options for investors. This is particularly true given that in the majority of cases the proposed disgorgement approach will offer only fractional compensation to wronged investors, meaning investors must pursue other options concurrently to receive restitution.

This spate of options also has the potential to create confusion as multiple processes work towards compensating for the same underlying misconduct. The Consultation appears to put the onus on investors to monitor the progress of their claims with different bodies, agree to limitations on total claims, and to keep each claims adjudication avenue apprised of compensation amounts received from the others. Particularly if OBSI receives the ability to issue binding decisions, it is difficult to see what value the proposal would add, especially given the proposed prohibition on double recovery and the requirement to disclose and accept associated limitations of claims for amounts obtained elsewhere, as discussed below.

Finally, the proposed severance of the disgorgement process from the enforcement process also creates a duplicative burden for investors and adds an additional strain by bifurcating the investor's interactions with the New SRO. Investors will no doubt be

asked to provide documentation and other evidence to investigators and enforcement counsel as part of the enforcement process while also being required to liaise with the program administrator and submit separate documentation to substantiate their loss claims. This again demands further clarity on the role of the Office of the Investor.

### **Difference between Disgorgement and Restitution**

As discussed in the Consultation, there is a material difference in the purposes behind disgorgement and restitution. Disgorgement is wrongdoer-focused and assessed without any direct regard to the actual investor losses incurred because of the misconduct, instead being focused on ill-gotten gains by the individual or member firm, which may be entirely disconnected in relative amounts and causation. Disgorgement is therefore ambivalent with respect to consideration and resolution of investor claims and compensation. Restitution is however squarely aimed at assessing and compensating aggrieved investors for their losses. **As the Consultation acknowledges, these are distinct concepts which serve separate purposes.**

Given this distinction, it is unclear to us why amounts obtained by investors from disgorgement must be disclosed in parallel proceedings for purposes of claims limitation (and vice versa) if those proceedings are not also disgorgement focused. If disgorged amounts serve distinct purposes and are not meant to serve as restitution (as has been made plain in the Consultation and in our discussion above), it is unclear to us why an investor's civil claim/complaint compensation demands would need to be limited by any amount received through disgorgement. It is equally unclear why disgorgement payment eligibility, a wrongdoer-focused remedy, should be curtailed by amounts received as restitution, an investor claims/compensation-focused remedy. We believe that concerns of double-payment to wronged investors are overwrought given the data available, and that both processes should remain distinct and free from the claims limitations proposed.

### **Concluding Remarks**

While the notion of directing funds earmarked as disgorgement to harmed investors has obvious appeal, we have some reservations about the need for and efficacy of such a program as proposed. Particularly in light of historical disgorgement orders and collection efforts, the cost of creating and administering this new regulatory process may be incommensurate with the value it adds. This point will be even more compelling if OBSI obtains binding authority, particularly given OBSI's more holistic approach to the calculation of losses inclusive of opportunity costs.

As discussed, we also have strong reservations about the commingling and limitation of claims between the proposed disgorgement program and other mechanisms for wronged investors pursuing their claims. We believe there is both significant legal complexity in such an approach, and that disgorgement and restitution of investor claims serve distinct purposes and should be treated entirely as such.

We thank you for the opportunity to provide these comments and would be happy to address any questions you may have. Please feel free to contact us at [cac@cfacanada.org](mailto:cac@cfacanada.org) on this or any other issue in the future.



**CFA Societies  
Canada**

## **Canadian Advocacy Council**

120 Adelaide Street West, Suite 2205  
Toronto, ON M5H 1T1

+1 (416) 366 3658 tel  
[www.cfacanada.org](http://www.cfacanada.org)

(Signed) *The Canadian Advocacy Council of  
CFA Societies Canada*

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