Advocis
The Financial Advisors Association of Canada

May 1, 2023

General Counsel's Office
New Self-Regulatory Organization of Canada
121 King Street West, Suite 2000
Toronto, ON M5H 3T9

Sent via email: GCOcomments@iiroc.ca

Dear Sirs/Mesdames,

Re: Proposal on Distributing Funds Disgorged and Collected through New SRO Disciplinary Proceedings to Harmed Investors

On behalf of Advocis, The Financial Advisors Association of Canada, we are pleased to provide our comments in regard to the proposal put forth by the New Self-Regulatory Organization of Canada – the Canadian Investment Regulatory Organization (CIRO) – on distributing funds disgorged and collected through CIRO's disciplinary proceedings to harmed investors ("Proposal").

1. ABOUT ADVOCIS

Advocis is the association of choice for financial advisors and planners. With over 17,000 member-clients across the country, we are the definitive voice of the profession. Advocis champions professionalism, consumer protection, and the value of financial advice. We advocate for an environment where all Canadians have access to the professional advice they need.

Advocis members advise consumers on wealth management; risk management; estate, retirement and tax planning; employee benefits; and life, accident and sickness, critical illness and disability insurance. In doing so, Advocis members help consumers make sound financial decisions, ultimately leading to greater financial stability and independence. In all that they do, our members are driven by Advocis' motto: *non solis nobis* – not for ourselves alone.

2. OUR COMMENTS

Advocis supports ensuring consumer trust in the financial market. We believe that a mechanism for distributing disgorged funds as an equitable remedy can enhance investors' sense of trust in regulators and the industry. We also recognize that the Proposal would be aligned with the recommendation of the Ontario Capital Markets Modernization Taskforce's final report that

would allow regulators to distribute disgorged funds to harmed investors.[1] While we generally support the Proposal, we believe that there are certain areas that need to be clarified and further improved on. In this submission we provide our comments with respect to those areas.

Separation of Enforcement Process from Distribution of Funds

We appreciate that the Proposal underscores the importance of maintaining separation between enforcement process and assessment of claims and distribution of disgorged funds to harmed investors. We emphasize the necessity of this separation to ensure the integrity of CIRO's enforcement proceedings.

Disgorgement orders aim to prevent perpetrators from benefiting from their illegal actions by forfeiting the profits gained through their misconduct. By doing so, disgorgement orders reduce the occurrence of similar illegal actions in the future. It is important that CIRO's enforcement process focuses on prevention and deterrence of misconduct, rather than investor compensation.

Calculation and Allocation of Funds

The Proposal provides that disgorged funds would be categorized as a stand-alone category of funds, referred to as "disgorged payable", that would be accounted for separately in the Restricted Fund. As discussed below, we ask CIRO to provide further guidance on calculating disgorgement amounts and fairly allocating them to qualified investors.

Currently, disgorged amounts are included in the Restricted Fund along with money collected from fines and settlements. Monies in the Restricted Fund are used for specific purposes as permitted under section 16 of CIRO's Recognition Order. Under the Proposal, funds categorized as "disgorged payable" in the Restricted Fund will be allocated to harmed investors after deduction of costs. We would appreciate if CIRO can clarify as to how the Proposal may impact the distribution of funds towards other purposes. For example, would fewer funds from the Restricted Fund remain for distribution towards other purposes including but not limited to investor protection clinics and whistleblower programs?

Further, it is important that the Mutual Fund Dealer Rules ("MFD Rules") and Investment Dealer and Partially Consolidated Rules ("Investment Dealer Rules") undertake a similar approach when calculating the disgorged amount. Section 7.4.1.2 of the MFD Rules enables the hearing panel to impose fines not exceeding the greater of $5,000,000.00 per offence and the amount equal to three times the profit obtained, or loss avoided by the member as a result of committing violations. On the other hand, section 8210(1) of the Investment Dealer Rules provides that the hearing panel may impose a disgorgement order of any amount obtained,

[1] Recommendation No. 55 of the Ontario Capital Markets Modernization Taskforce, "Final Report" (January 2021). At: https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf.

including any loss avoided, directly or indirectly as a result of the contravention. While the Investment Dealer Rules separately list disgorgement, the MFD Rules account for disgorgement into the overall sanction amount. It is important that both rules are harmonized and that the MFD Rules explicitly enumerate disgorgement as an identifiable sanction.

Transparency in Administration Costs

We appreciate that the Proposal allows for the costs of administering the proposed program to be deducted from the Restricted Fund. Should the administration costs be extracted from CIRO's operating budget, this would disproportionately impact member fees and significantly increase the regulatory burden on all member-participants.

It is important that CIRO maintains transparency with respect to implementation of the Proposal and commit to the public disclosure of the accounting behind the disgorgement exercise. It is our concern that the implementation of this Proposal could become significantly costly. For instance, implementing the Proposal would require bringing on and training staff and the Administrator, identifying and notifying eligible investors, reviewing applications, assessing claims and distributing disgorged funds. We ask that CIRO provide clarification with respect to the kinds and amounts of operating costs, either in an absolute number or a percentage of the Restricted Fund or "disgorged payable", that industry participants should expect to see.

Lastly, we recognize that in rare cases, CIRO will not be pursuing the distribution of disgorged funds if the costs of doing so significantly exhaust the available funds for distribution. To improve transparency, we ask that CIRO provide clear guidance on the circumstances that lead to such costs being deemed prohibitively significant. For example, how are factors such as the size of the eligible class, their geographic dispersion or other factors taken into account?

Timeline

We ask that the Proposal clarify the timeframe for enforcement proceedings, sanctions hearings as well as for assessing and distributing disgorged funds to qualified investors. It is our understanding that any allocation of disgorged funds would occur after the completion of enforcement proceedings and sanctions hearings.

Prior to the merger, IIROC enforcement proceedings could have taken up to two years or more to be completed from the date the investigation against a respondent firm or individual commenced.[2] The consolidation of CIRO's rule books and the integration of enforcement processes used by IIROC and MFDA is a significant opportunity for CIRO to provide clarity and improve transparency with respect to expected timelines.

[2] As described in IIROC, "Enforcement Report 2021-2022" (July 7, 2022). At: www.iiroc.ca/media/19371/download?inline.

Parallel Recovery

We appreciate that investors are not prevented from seeking complete compensation through other avenues (to the extent that the disgorged funds do not make investors whole). On this note, we ask that CIRO clarify whether investors can bring simultaneous claims in multiple fora: for instance, pursuing a legal action or filing a claim with the Ombudsman for Banking Services and Investments ("OBSI"), while contemporaneously submitting an application for disgorgement. This is important for consumers to better understand available redress processes. For example, OBSI requires investors to put a pause on any legal proceedings and only resume or initiate a legal action once OBSI has made a final decision.[3]

Further, it is important that investors are not compensated twice for losses arising from the same contravention. Investors who receive disgorgement funds must be required to deduct the amounts from any future compensation they receive as a result of the same misconduct. Considering the possibly-shorter timeline associated with processing OBSI claims, it is reasonable that an OBSI compensation recommendation could be made before CIRO's enforcement proceeding is completed.[4] Therefore, it is important that CIRO ensures that mechanisms are in place to prevent double recovery.

We appreciate that the Proposal requires investors to declare any recovery that they have received through other avenues when seeking a payment from the disgorged funds. Similarly, mechanisms must be in place to require investors to disclose to all relevant parties any compensation they obtain through disgorged funds. Lastly, we ask that the Proposal clarify the oversight process on double recovery and provide guidance on how these declarations are enforced.

3. CONCLUSION

We recognize the role that disgorgement can play towards making harmed investors whole and we welcome the work CIRO has undertaken on this matter. While the Proposal addresses some of the existing challenges in the Canadian investor compensation regime, we believe it can be strengthened by addressing the issues we have highlighted in this submission.

We look forward to continuing working with the. Should you have any questions, please do not hesitate to contact the undersigned, or James Ryu, Vice-President, Advocacy and General Counsel at jryu@advocis.ca.

[3] Please see: www.obsi.ca/en/how-we-work/considering-legal-action.aspx.
[4] On average, OBSI process takes between 60 to 90 days to complete banking and financial institutions investigations. For investment firm investigations, in most cases it takes about 90 days, and all cases are completed within 120 days.

Sincerely,

"original signed by"

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