FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

October 8, 2010

Rosemary Chan
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121 King Street West, Suite 1600
Toronto, ON M5H 3T9

Re: Summary of Public Comments relating to IIROC Arbitration Program Review and Requests for Comments re: Award Limit of $500,000 and Costs Awards

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FAIR Canada is pleased to offer comments on the proposed amendments to the Investment Industry Regulatory Organization of Canada ("IIROC") Arbitration Program ("Program"). Thank you for the opportunity to provide these comments.

FAIR Canada is an independent, non-profit organization dedicated to representing the interests of Canadian investors and shareholders in securities regulation. The mission of FAIR Canada is to be a national voice for investors and shareholders on securities regulation and a catalyst for enhancing the rights of Canadian shareholders and individual investors.

FAIR Canada endorses IIROC's proposals to increase the award limit and change the rules regarding cost awards. These changes are welcome improvements to the Program.

Summary of FAIR Canada's recommendations:

1. While we support the award limit increase to $500,000, we would prefer a larger increase to a minimum of $1 million. We recommend that IIROC review the new limit in 2 years.
2. FAIR Canada agrees that the costs rule should be amended to allow the claimant to make an election as to costs. However, we suggest that a claimant be provided with the option of electing to provide the arbitrator with the discretion to award costs. In the absence of such an election, the default should be that the arbitrator has no discretion to award costs in the absence of unfair or improper behaviour.
3. We recommend that the election as to costs be disclosed to the arbitrator at the outset of the proceeding.
4. FAIR Canada recommends that IIROC fund a no- or low-cost service to assist individual investors in understanding their claim, deciding which cost election to make, calculating their damages, and completing the requisite paperwork. Investor rights groups across Canada should be given the opportunity to provide such a service.
5. We recommend that IIROC publish detailed aggregate statistical information about cases that have gone through the Program, and consider publishing full decisions in the future.

1. Increase in award limit.

1.1. FAIR Canada supports IIROC's proposal to increase the award limit. FAIR Canada agrees that, in order for the Program to become more viable, it must become a more attractive alternative for investors to civil litigation, particularly for larger claims. In our view, $500,000 is the minimum increase required to make arbitration a viable alternative. We encourage IIROC to review the limit in 2 years. As noted in our earlier submission, we support an increase in the limit to a minimum of $1 million or even no limit.

1.2. With the high cost of civil litigation, the Program tends to appeal mainly to claims above $350,000 (i.e. the OBSI limit). Limiting the Program's award jurisdiction to $500,000 would only make arbitration the most attractive alternative for claims between $350,000 and $500,000, which is a limited $150,000 range. Given the complexity and cost of court proceedings, a greater increase in the limit, such as to $1 million, would make the Program much more viable. While we recognize there are significant differences between FINRA's arbitration program and IIROC's Program, FAIR Canada would like draw attention to the fact that there is no award limit applicable to FINRA's arbitration program.

1.3. In its request for comments, IIROC states that limiting the monetary jurisdiction of the Program to $500,000 reflects a balance between providing greater access to recourse that is expeditious and cost-effective, and ensuring adherence to principles of natural justice and legal process. Under the Program, parties are encouraged to agree on the choice of arbitrator, and as a result are able to select one with the requisite experience. While arbitration does not offer a right of appeal, the decision-maker is an experienced lawyer or retired judge, chosen by the parties, and is obligated to make an unbiased decision based on all the relevant information. That decision is still subject to judicial review, but is otherwise final and binding. The benefit of a fair, more expedient and less costly means of dispute resolution should not be precluded by an arbitrary monetary amount. If the Program's jurisdiction must be capped, the cap should be higher than $500,000.

Recommendation #1
While we support the award limit increase to $500,000, we would prefer a larger increase to a minimum of $1 million. We recommend that IIROC review the new limit in 2 years.

2. Costs award rule amendment.

2.1. FAIR Canada agrees that amending the rules of procedure to allow the claimant to make an election as to costs would eliminate the deterrent effect of the risk of an adverse cost award.

2.2. We suggest that, in order to protect investors, the default should be that arbitrators have no discretion to award costs unless they find that the party has acted in a manner that may be characterized as unfair, vexatious, improper, in bad faith or has unnecessarily and unreasonably prolonged proceedings. If an investor wishes to provide the arbitrator with the

discretion to award costs, the investor should be entitled make that election at the time of filing. Designing the Program to default to arbitrator discretion could improperly suggest to uninformed investors that that is the most appropriate and common cost choice for Program proceedings. FAIR Canada believes that requiring a positive, active election for costs would encourage investors to seriously consider the implications of cost awards before electing to accept the risk and provide the arbitrator with that discretion.

Recommendation #2
FAIR Canada recommends that the rules of procedure be amended to allow the claimant to make an election as to costs. IIROC should design the rule so that a claimant is provided with the option to elect to provide the arbitrator with discretion to award costs. In the absence of such an election, the default should be that the arbitrator has no discretion to award costs in the absence of unfair or improper behaviour.

3. Timing of disclosure of complainant's costs award election.

3.1. FAIR Canada believes that disclosing the claimant's election as to costs at the outset of the proceeding would be appropriate. We see no reason to withhold this information from the arbitrator until a decision on the merits has been reached.

Recommendation #3
We recommend that the election as to costs be disclosed to the arbitrator at the outset of the proceeding.

4. Investor assistance and education.

4.1. FAIR Canada acknowledges that the information and education initiatives listed by IIROC in its notice are positive contributions to improved investor protection. However, we agree with the Small Investor Protection Association's (SIPA) submission that more needs to be done to ensure that individual investors have sufficient information and resources available to them to ensure that valid claims are brought forward for resolution. As we stated in our comments on the Review of IIROC Arbitration Program dated March 16, 2010, investors need further assistance to enable them to pursue their claim to a satisfactory resolution. Individual investors face many challenges in understanding the nature of their claim, the extent of damages suffered, the implications of potential costs awards, and the paperwork that must be completed. We would like to stress again that the "suitability" concept can be particularly problematic for individual investors.

Recommendation #4
FAIR Canada recommends that IIROC fund a no- or low-cost service to assist individual investors in understanding their claim, deciding which cost election to make, calculating their damages, and completing the requisite paperwork. Investor rights groups across Canada should be given the opportunity to provide the service.

5. Publication of IIROC Arbitration Program statistics.

5.1. FAIR Canada continues to be concerned about the limited transparency for investors built into the Program. However, we also recognize that the limited volume of decisions currently resulting from the Program would not provide a sufficiently large body of jurisprudence upon which to base other claims and decisions.

5.2. FAIR Canada agrees with SIPA's submission that IIROC should publish key statistics periodically. We support IIROC's insistence on more robust and standardized tracking and reporting of statistical information by the arbitration firms going forward. FAIR Canada would like to see reporting of detailed aggregate statistical information, including information regarding the nature of the complaints, holdings (in whose favour claims were decided), whether the parties were represented, monetary awards (if any), elections as to costs, and costs awarded (if any).

5.3. IIROC should undertake to evaluate the Program after 2 years of operating under the new award limit and consider publishing edited arbitral decisions if a sufficient number of claims have been resolved.

Recommendation #5
FAIR Canada recommends that IIROC publish detailed aggregate statistical information about cases entered into the Program, and consider publishing full decisions in the future.

We thank you for the opportunity to provide our comments and views on the comments summary and proposed amendments. We welcome the public posting of this submission and would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 416-572-2282/ermanno.pascutto@faircanada.ca or Ilana Singer at 416-572-2215/ilana.singer@faircanada.ca.

Sincerely,

Canadian Foundation for Advancement of Investor Rights