FAIR Canada Canada's Investor Rights Advocate | Promoteur des droits des investisseurs

April 14, 2022

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Re: Proposed Amendments respecting Reporting, Internal Investigation and Client Complaint Requirements (Proposed Amendments)

FAIR Canada is pleased to provide comments on the above-referenced Proposed Amendments published by the Investment Industry Regulatory Organization of Canada (IIROC).

FAIR Canada is a national, independent charitable organization dedicated to being a catalyst for the advancement of the rights of investors and financial consumers in Canada. It advances its mission through outreach and education, public policy submissions to governments and regulators, and proactive identification of emerging issues. FAIR Canada has a reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of retail investors and financial consumers.[1]

1. General Comments

Access to a simple, fair, timely, and effective complaint-handling process is a cornerstone of any strong investor protection framework. If properly designed, it promotes a level-playing field, minimizes the risk of ongoing harm, fosters fair outcomes and treatment for those involved, and provides insights for remedying operational deficiencies and systemic issues.

FAIR Canada supports IIROC's efforts to improve complaint handling by Dealer Members pending the establishment of a new national self-regulatory organization. Fixing the process should be a priority and we fully support IIROC's decision to move forward with the Proposed Amendments.

[1] Visit www.faircanada.ca for more information.

In doing so, we recommend IIROC harmonize its rules with current best practices being adopted by other Canadian financial services regulatory authorities (regulators). This will help streamline and simplify the process for consumers and industry, regardless of the type of financial product involved, or where the consumer or Dealer Member is located.

The Proposed Amendments address several well-known shortcomings. These include:

- Introducing measures aimed at helping clients better understand the complaints process.

- Removing investor confusion and harm by prohibiting the use of the term "ombudsman" to describe a Dealer Member's internal dispute resolution service.

- Moving away from having different processes based solely on whether the complaint is communicated verbally or in writing.

- Prohibiting individuals who are the subject of a complaint from being involved in handling the complaint.

The Proposed Amendments, however, need to go further in several areas to meet current best practices. These include streamlining the Dealer Members' internal ombudsman processes, reducing the time for providing substantive responses to consumers, and promoting concrete action around systemic issues.

Details of our concerns and how the Proposed Amendments should be improved are provided below. We also include suggested improvements regarding the ComSet reporting and record retention requirements contemplated by the Proposed Amendments.

2. Complaint Handling

(i) Internal Ombudsman

Consumer advocates have repeatedly raised concerns about financial institutions that, in addition to providing complaint handling processes, promote internal ombudsmen services to their clients.[2]

The use of so-called internal ombudsman processes is potentially harmful and unfair for several reasons, including:

- The title "ombudsman" creates confusion and can mislead clients into believing the internal ombudsman process is arm's length and wholly independent of the Dealer Member.

- It obscures the fact that, 90 days after initiating their complaint, clients have the right

[2] To help distinguish between the complaint process and the internal ombudsman process, in these submissions we refer to the former as the "complaint-handling process," and the latter as either the "internal ombudsman", or the "internal dispute resolution service."

to bring their complaint to the Ombudsman for Banking Services and Investments (OBSI), irrespective of whether the firm has completed its process(es) or provided a final response.

- The additional time to complete the internal ombudsman process may lead to the client missing other timelines to their detriment. For example, a client must bring any complaint to OBSI within 180 days of receiving an unsatisfactory response from the Dealer Member.

- The internal ombudsman process risks dragging out a resolution longer than warranted or necessary. This, in turn, increases the likelihood a client may simply abandon their complaint, or worse, agree to settle for less to simply put the complaint process behind them.

The Canadian Securities Administrators (CSA) described this inherent unfairness as follows:

> Ultimately, investors may not be fully aware of their options or may get worn down by this extended process and abandon their claims, or settle for less than they may have obtained had they gone directly to OBSI after receiving the firm's decision concerning their complaints. The prejudice to clients is compounded by the fact that the 180-day time limit to access OBSI's services after receiving a firm's decision continues to run during the internal ombudsman process…[3]

The prejudicial effect of the internal ombudsman process was also evident in the federal banking sector. Following an in-depth review of the internal complaints process at Canada's largest financial institutions, the Financial Consumer Agency of Canada (FCAC) observed:

> …significant levels of attrition when consumers try to escalate their complaints further in the banks' processes. Approximately two-thirds (65%) of consumers surveyed who were not satisfied with the resolution proposed at the second level chose not to escalate their complaint to the bank's designated [internal ombudsman]. More than two-thirds (68%) of consumers surveyed whose complaints were not resolved satisfactorily by [the internal ombudsman] dropped the complaint and said they did not contact [OBSI or the ADR Chambers Banking Ombuds Office].[4]

For these reasons, we welcome IIROC's efforts to try to address concerns around the use of an internal ombudsman process. In addition to prohibiting the use of misleading terms like "ombudsman" by Dealer Members, these efforts include:

- Requiring Dealer Members to tell clients that any "internal dispute resolution service" offered beyond their complaint-handling process is not independent.

[3] Joint CSA Staff Notice 31-351, IIROC Notice 17-0229, MFDA Bulletin #0736-M Complying with requirements regarding the Ombudsman for Banking Services and Investments (December 2017), page 4.
[4] Industry Review: Bank Complaint Handling Procedures. FCAC (2020), page 16.

- Requiring Dealer Members to inform their clients they have the right to go to OBSI if the Dealer Member has not provided its response within 90 days, or, if a response has been provided, the client remains unsatisfied.

- Requiring Dealer Members to advise clients that the use of the internal dispute resolution service is strictly voluntary.

- Requiring that any internal dispute resolution service process be completed within a new fixed 90-day timeframe.

While these are arguably improvements on the status quo, the new requirements still miss the mark. In our view, the entire process for resolving a complaint should be as streamlined as possible. We do not believe there is any need or rationale for creating two distinct processes—one for the firm's complaint handling process, and another for an internal dispute resolution service—with two separate 90-day timelines (or 180 days in total).

To effectively address the inherent unfairness of the internal ombudsman process, we strongly recommend that IIROC:

- Establish a single, fixed period for Dealer Members to deal with a complaint; and

- Set that fixed period at 60 days.

In addition to promoting fair outcomes, this approach would reflect best practices being adopted by the Federal Government under the Bank Act, and by the Autorité des marchés financiers (AMF) in draft regulations (herein referred to as the draft AMF regulation).[5]

As highlighted in the table below, these best practices include more responsive timelines. They also streamline the process by requiring the client be provided with a final response within those timelines, irrespective of how many internal complaint-handling layers or dispute resolution processes the banks or investment firms may want to create.

	Bank Act	**Draft AMF Regulation**
Timeline to deliver final/substantive response to complainant	56 days[6]	60 days
Separate timeline for internal ombudsman service?	No[7]	No

While some may argue that moving to a 60-day timeline is not possible, other jurisdictions have been able to implement them successfully. In the United Kingdom, for example,

[5] Draft Regulation respecting complaint processing and dispute resolution in the financial sector, published by the AMF on September 9, 2021.
[6] The 56-day limit for banks replaces the previous 90-day limit by virtue of s. 14 of the new Financial Consumer Protection Framework Regulations.
[7] The FCAC specifically notes that the requirement to provide a resolution within 90 days included completion of banks' internal ombudsman processes. See the FCAC review of bank internal complaints processes, pages 21 and 22.

financial institutions have 56 days to respond to complaints. In Australia, financial institutions have 30 days to respond.[8] Clearly, there is room to improve the timelines for complaint handling in Canada.

As a public interest regulator, we believe IIROC can and should strive for best-in-class solutions that promote better outcomes for investors. In our view, if a dealer or adviser registered in Quebec can resolve a complaint within 60 days or less, there is no reason why their counterparts across Canada cannot do the same.

(ii) Systemic Issues Require Concrete Action

The Proposed Amendments also include several new requirements regarding the handling of potential "systemic issues" identified through complaints. We support the requirement that Dealer Members should turn their minds to potential issues that could have an impact on other clients or raise systemic issues.

We are concerned, however, that the new wording highlighted below in red does not go far enough:

> (ii) ascertain the scope and severity of client detriment that might have arisen,
> (iii) consider whether it is fair and reasonable for the Dealer Member to undertake proactively a redress or remediation exercise, and
> (iv) ensure recommendations to remedy the problem are submitted to the appropriate management level.

Our concern is that the drafting falls short of requiring concrete action from Dealer Members. As drafted, Dealer Members are simply required to "consider" and "recommend" taking steps to remediate clients. To effectively address and prevent further client harm, Dealer Members should have a positive obligation to remediate problems where client detriment is identified.

To address this shortcoming, we suggest the following edits:

> Dealer Members must:
>
> (ii) ascertain the scope and severity of client detriment that might have arisen, and
> (iii) ~~consider whether it is fair and reasonable for the Dealer Member to~~ undertake proactive~~ly~~ measures to remedy the problem, including a fair and reasonable redress or remediation exercise for all affected clients. ~~and~~
> (iv) ~~ensure recommendations to remedy the problem are submitted to the appropriate management level.~~

[8] As of October 2021, Australia moved from a 45-day final response timeframe to a 30-day requirement, per Regulatory Guide 271 – Internal Dispute Resolution (RG 271.56). In the UK, a 56-day rule applies per the FCA Handbook, DISP 1.62.

We would also refer IIROC to the following two examples of more definitive language on how firms should handle systemic issues. The first example is provided by the FCAC:

> Where a recurring or systemic issue has been identified, complaint-handling Policies and Procedures should ensure that the Bank provides redress and reimbursement to all affected Consumers.[9]

The second example comes from the draft AMF regulation:

> The complaint processing and dispute resolution policy must provide that the reasons supporting a complaint will be analyzed to determine whether they may have repercussions for other persons who are members of the financial intermediary's clientele and to take measures to remedy them, if necessary.[10]

We recommend that IIROC look to these examples, or our suggested revisions, to ensure the Rules clearly require Dealer Members to act on systemic issues. Such action must effectively remediate both the underlying causes of the issue and all clients impacted by it.

(iii) The "Serious Client-Related Misconduct" Threshold

Under the Proposed Amendments, Part E of Rule 3700 contemplates two basic situations. One involves what could be called "non-serious" matters. In this situation, a Dealer Member would only need to comply with the provisions in section 3750. These include documenting and responding to each complaint in a manner that a reasonable client would consider effective, fair, and expeditious.

For those complaints involving "serious client-related misconduct", Dealer Members would also be required to comply with sections 3751 to 3759.

What constitutes "serious client-related misconduct" is based on a definition of "serious misconduct." The definition of serious misconduct includes "[a]ny activity which creates a reasonable risk of material harm to a client or the capital markets, including but not limited to…" A long list of specific types of misconduct is then enumerated. Any conduct in that list is deemed to be serious.

In contrast, no distinction is drawn between "serious client-related misconduct" from other misconduct under the existing rules. Rather, a client today must simply allege misconduct to trigger the full scope of complaints requirements set out in Part E of the rule.

We understand that the change was introduced to reduce the burden on Dealer Members from being bound by all Part E requirements in cases involving more trivial or less significant complaints. While appreciative and supportive of this consideration, our concern is that the new approach creates a subjective threshold for determining which complaints get the full benefit of the enhanced complaint-handling requirements.

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[9] Section 24, FCAC Guideline on Complaint-Handling Procedures for Banks and Authorized Foreign Banks (January 2022).
[10] Section 10 of the draft AMF regulation.

Given that determining what is material is in the eye of the beholder, there is a risk of different outcomes depending on which Dealer Member is making that determination—what might be viewed as material by one may be viewed as immaterial by another. This determination of what is material may also conflict with the client's own view and personal situation.

To promote consistency in outcomes and avoid valid complaints from falling through the cracks, we would recommend a different approach to filter out less serious complaints.

In our view, rather than introducing a subjective materiality threshold, we recommend adopting the approach proposed by the AMF. Under the draft AMF regulation, the distinction is based on whether a complaint can be handled quickly versus complaints that require more time to address.

Broadly speaking, the draft AMF regulation contemplates three scenarios, each with escalating complaint-handling requirements.

Under the first scenario, any complaint that can be resolved at the time they are expressed by the client is specifically excluded from the process.[11] Under the second scenario, any complaint that can be resolved within 10 days is subject to a simplified and less onerous set of requirements. In these situations, the Dealer Member will only need to send the client a notice confirming receipt of the complaint and that it was resolved.

For complaints involving situations that cannot be resolved within 10 days, the Dealer Member would be required to follow the more detailed and comprehensive complaint handling requirements.

The advantage of the AMF approach is that it removes reliance on each Dealer Member's subjective determination of what is material misconduct. An additional benefit is that it creates an incentive for Dealer Members to resolve matters in a timely manner to benefit from the simplified process. We believe this creates a better dynamic and removes concerns with inconsistency in how the rules are applied.

(iv) Improving Accessibility

The Proposed Amendments require acknowledgement and substantive response letters to complainants to be drafted in plain language and "in a format readily accessible and understandable by that complainant."

The Consultation Notice implies that this might require communicating with a complainant in a language other than English or French, if a Dealer Member has been servicing that client in that other language. We would encourage IIROC to reflect this expectation in its planned updated guidance that will accompany the finalized Rules.

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[11] As per the Notice that accompanies the draft AMF regulation:

> [The definition of "complaint"] excludes dissatisfactions or reproaches that can be resolved at the time they are expressed by the consumer (e.g., when a consumer calls the financial institution's… client service department with a reproach and the reproach is addressed to the consumer's satisfaction during the call).

In addition, we recommend that Dealer Members be required to offer assistance to complainants in raising their complaint.

Requiring assistance to be provided is a key step forward in promoting effective complaint handling. This is because most consumers have little experience interacting with the system. This contrasts with Dealer Members, which build up institutional knowledge and expertise over time, and have far greater resources at their disposal. We consider this assistance a critical tool in leveling the playing field between the firm and the client.

Adding an assistance requirement would also align the Proposed Amendments with the draft AMF regulation, which will require firms to provide a complaint-drafting assistance service to any person expressing a need for it. We encourage IIROC to include a similar provision. In our view, the assistance should be offered up front to any clients, as opposed to just those who might request assistance.

(v) Providing Information to OBSI

Currently, we understand that OBSI experiences some delays in getting all the information it needs to be able to begin its investigation. This then leads to further and undesirable delays in resolving complaints between the Dealer Member and their clients.[12]

This issue was highlighted by the FCAC in its 2020 review of Canada's External Complaints Bodies (ECBs) with respect to banking complaints:

> The lengthy delays before beginning investigations appear to be caused mainly by inefficient transfers of information from banks to the ECBs. FCAC found that it takes OBSI approximately 25 days and ADRBO 27 days to assemble the required information. Banks do not appear to send comprehensive information about complaints in response to initial requests from the ECBs. FCAC observed ECBs making a number of follow-up requests in an effort to acquire all of the relevant information.[13]

While the Proposed Amendments contemplate changes to Rule 9504 regarding the information Dealer Members must provide to OBSI, it does not impose any timeframe.

To ensure there are no concerns with the transfer of relevant information between Dealer Members and OBSI, we recommend that Rule 9504 be further revised to require that any request for information or records be delivered to OBSI on a timely basis or without undue delay.

(vi) Deletion of the "Balanced Approach" Complaint-Handling Standard

The Proposed Amendments will remove the requirement for Dealers to handle complaints in a balanced manner. This change is explained as follows in the Consultation Notice:

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[12] See OBSI's 2021 Annual Report, page 39.

[13] Industry Review: Bank Complaint Handling Procedures. FCAC (2020), page 11.

We determined this was inconsistent with the Dealer's and Approved Person's obligation to put the client's interests first when managing conflicts of interest, as this provision does not require Dealers to put the client's interests ahead of their interests or their Approved Persons' and employees' interests.

However, we note the Canadian Securities Administrators (CSA) makes it clear that the complaint system should allow for objective factual investigations and analysis, and that registered firms "should take a balanced approach to the gathering of facts that objectively considers the interests of, the complainant, the registered representative, and the firm."[14]

Accordingly, we are unclear on the need to remove the reference from IIROC's rules.[15] In our view, we do not see a conflict between regulatory expectations for complaint handling and those for resolving conflicts of interest – they involve distinct and different contexts.

(vii) The Designated Complaints Officer

We recommend adding clearer requirements to promote the independence and objectivity of the Designated Complaints Officer (DCO). This could be achieved by requiring Dealer Members to include provisions in their complaint-handling policies that enable the DCO to act independently and to avoid situations in which they would be in a conflict of interest.[16]

This change would help ensure that responsible staff address complaints based on their merits, as opposed to staff's or the Dealer Member's self-interest. Stated differently, the Dealer Member's policies should empower responsible staff to "do the right thing" when dealing with complaints, even if it might not be welcomed by some.

In addition, it could help insulate staff from internal recrimination, or from feeling they might be disadvantaged from a career perspective.

3. The Updated Guidance

We note that IIROC plans to issue updated guidance together with the final version of the Proposed Amendments. We anticipate that this update will include many key substantive changes to the existing IIROC guidance, which has not been updated since 2009.[17] Given its significance and the fact that updates may be extensive, proposed draft guidance should be subject to stakeholder review and commentary prior to completion.

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[14] See section 13.15 of Companion Policy 31-103 CP Registration Requirements, Exemptions and Ongoing Registrant Obligations, page 66.
[15] Currently, subparagraph (2)(vi) of section 3723 states: "a balanced approach to dealing with complaints that objectively considers the interests of the complainant, the Dealer Member, including the employees, Approved Persons or other relevant parties." The Proposed Amendments will remove this subparagraph from the renumbered section 3753.
[16] The requirement could be included in the proposed new section 3752 (currently section 3722).
[17] Client Complaint Handling Rule and Guidance Note (December 21, 2009).

4. ComSet Reporting Requirements

The Proposed Amendments include a new definition of "serious misconduct." In addition to its use for determining applicable complaint-handling requirements, it also has a bearing on what must be investigated by Dealer Members and reported to IIROC.

The definition includes an expanded list of examples of misconduct that require investigating and reporting. This aspect of the definition is an improvement over the status quo.

However, for activities not specifically listed as examples, the definition introduces a threshold of "material" harm to trigger the investigation and reporting requirements. We would recommend removing the word "material" from the definition of serious misconduct, given the subjective nature of "materiality" and the need to focus on addressing and preventing harm.

The Proposed Amendments also remove the requirement to automatically report certain Dealer Member-initiated internal disciplinary actions to IIROC, if they result in monetary penalties over specified amounts. We agree with this approach. Simply crossing an arbitrary monetary penalty threshold should not, on its own, determine whether misconduct warrants reporting. The context in which the penalty was issued needs to be part of the analysis.

To promote compliance and consistency in reporting requirements, we recommend that IIROC clarify its expectations in this regard, as part of its planned publication of updated guidance.

5. Conclusion

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting. Please note that we intend to make our submission public by posting it to the FAIR Canada website. Should you have questions or require further explanation of our views on these matters, please contact me at jp.bureaud@faircanada.ca.

Sincerely,

Jean-Paul Bureaud,
Executive Director, FAIR Canada