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

January 23, 2025

General Counsel's Office
Canadian Investment Regulatory Organization (CIRO)
40 Temperance Street, Suite 2600
Toronto, Ontario, M5H 0B4
GCOcomments@ciro.ca

Re: Proposal to Modernize the CIRO Arbitration Program

FAIR Canada is pleased to provide comments in response to the above-referenced Consultation.

FAIR Canada is a national, independent, non-profit organization known for balanced and thoughtful commentary on public policy matters. Our work includes advancing the rights of investors and financial consumers in Canada through:

- Informed policy submissions to governments and regulators
- Relevant research focused on retail investors
- Public outreach, collaboration, and education
- Proactive identification of emerging issues.[1]

A. General Comments

We appreciate the opportunity for further comment on CIRO's arbitration program (the Program). FAIR Canada supports the Program, which gives individual investors an important avenue for resolving investment disputes.

This letter supplements our March 2023 submission to CIRO[2] on its 2022 consultation on the Program.[3] The current Consultation builds on the 2022 consultation and poses specific questions. Below, we comment on certain aspects of the Consultation.

B. Extending the Program to Mutual Fund Dealer Clients

We support making the Program available to clients of all CIRO dealers (i.e., investment dealers, mutual fund dealers and dual-registered firms).

[1] Visit www.faircanada.ca for more information.
[2] FAIR Canada Comment Letter - Review of the New SRO Arbitration Program, March 6, 2023.
[3] CIRO, Review of the IIROC Arbitration Program, December 6, 2022.

Extending the Program would:

- Give clients of all types of CIRO dealers uniform access to dispute resolution mechanisms, which aligns with the principles of fairness and equal treatment,
- Give investors who cannot currently use the Program an additional complaint-handling avenue that is an alternative to litigation, enhancing access to justice,
- Help mutual fund dealers and dual-registered firms to more effectively resolve complaints by providing an alternative to litigation for investors dissatisfied with the firm's response, and
- Demonstrate CIRO's commitment to protecting investors regardless of which dealer member is involved, levelling the playing field and strengthening public confidence in the regulatory system.

C. Availability of Program

a. Lower Award Limit

FAIR Canada opposes restricting access to the Program only for claims above the OBSI compensation maximum ($350,000). We are unaware of any problem with the current choice-based approach and do not see any compelling reason to introduce this substantive change in the complaint-handling framework now.

We firmly believe in preserving investor choice: investors should be free to choose which dispute resolution venue to use and to access the Program, regardless of the amount involved. Our position is consistent with the North American Securities Administrators Association's long-held view that investors should be able to choose the forum for resolving their investment disputes.[4]

Currently, investors have several options for bringing their complaints, including the Ombudsman for Banking Services and Investments (OBSI), a lawsuit, or arbitration under the Program.[5] These options differ in many ways, such as the time and costs involved, procedural rules and tools, and the degree of formality and confidentiality. Investors should be free to select the option that best fits their needs, preferences and unique situation. Only the individual investor can make that determination, and the regulatory regime should not constrain their choices. Doing so could undermine investor confidence in the dispute resolution framework and have unintended and potentially harmful consequences for some investors.

Maintaining choice is critical because decisions under the Program are binding, whereas OBSI recommendations are not. If a firm ignores OBSI's decision, there is little the investor can do other than accept a low-ball offer to settle. An investor with a legitimate claim of $250,000, for example, may want a binding decision and decide arbitration is their preferred route. Based on historical data, we know this is a serious consideration because low-ball offers are more common with higher claim amounts: 57% of low-ball cases involve amounts over $50,000.[6] In some cases, the firm may outright refuse to pay. For example, in 2016, a firm simply walked away from the process after OBSI recommended compensating the client

[4] Written Statement of Stephen Brey, Examining the Use of Mandatory Arbitration Clauses by Registered Investment Advisers, December 10, 2024, p. 1.
[5] Investors may also use other alternative dispute resolution mechanisms outside of the Program. Investors based in Quebec may also have the option of bringing their complaint to the Autorité des marchés financiers (AMF).
[6] CSA Staff Notice 31-365 - OBSI Joint Regulators Committee Annual Report for 2023, July 11, 2024, p. 4.

almost $130,000, leaving the investor with nothing.[7] Given this evidence, we see no principled reason why CIRO should deny investors access to the Program and force them to use OBSI's non-binding process or pursue costly litigation.

We would, of course, be open to CIRO revisiting this issue once OBSI's recommendations become binding. Until then, there should be no monetary restrictions on using the Program.

b. Upper Award Limit

The Consultation seeks comment on raising the award limit to $1,000,000 and allowing the parties to use the Program on consent for claims above this amount. FAIR Canada agrees that the limit should be raised.

One reason for establishing the Program was to provide a cheaper and faster alternative to court. To encourage more investors to use it, the Program needs to be a better option than civil litigation. Because litigation can be very expensive, claims above the current $500,000 limit may not be worth pursuing in court. To make the Program a viable option for these claims, CIRO needs to raise the award limit.

We would support a higher limit beyond $1 million. As our previous comment letter to CIRO stated, we believe a limit of $5 million would be more appropriate. A higher limit would promote greater alignment with a similar arbitration program used by CIRO's U.S. counterpart, the Financial Industry Regulatory Authority (FINRA). Under FINRA's binding arbitration program (which does not include an appeal process except in very narrow circumstances),[8] there is no award limit. In fact, FINRA has been known to make multi-million dollar awards. For example, in a 2022 case, the award exceeded $18 million.[9] In a more recent case, FINRA awarded the claimants over $14 million.[10] As a result, we understand that it has become the *de facto* preferred way for U.S. dealers to resolve client complaints.

D. Claims Outside OBSI's Mandate and Withdrawn Claims

The Consultation asks whether the Program should remain available 1) for claims that fall outside OBSI's mandate/eligibility criteria and 2) where investors tried to resolve their dispute through OBSI but withdrew from or abandoned the OBSI process. We support making the Program available to investors in both these instances.

Consistent with our comments above, the Program should be available for complaints against a CIRO member regardless of whether it falls within OBSI's mandate or eligibility criteria. Without access to the Program, investors in these circumstances would likely be forced to resort to costly, time-consuming litigation or abandon their claims.

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[7] OBSI Firm Refusals, Sentinel Financial Management Refuses to Compensate Investor, August 9, 2016.
[8] FINRA does not have an appeals process, but there are limited grounds on which a court may hear an appeal, such as evident corruption in the arbitrators or if the arbitrators disregarded a clearly defined law. See FINRA Decision & Award.
[9] FINRA, In the Matter of the Arbitration Between Stephens Inc. vs. Benjamin F. Edwards & Company, Inc., Benjamin F. Edwards, IV, Brian Todd Erwin, Timothy Garry Fitzgerald, Jeffrey Lynn Green and Malcolm Andy Peeler, Case Number: 17-02378, January 21, 2022.
[10] FINRA, In the Matter of the Arbitration Between Louis R. Deluca, Elizabeth Deluca and UBS, Inc. vs. Stifel, Nicolaus & Co., Inc., Case Number: 23-01288, October 3, 2024.

The Consultation expresses concern that allowing investors who abandon or withdraw claims from OBSI to use the Program could enable them to bypass OBSI by starting and then purposely abandoning a claim. We question the notion that they are "bypassing" OBSI. Investors have a choice regarding where they bring their complaints. This includes the option of withdrawing from or abandoning the OBSI process. They are not required to use OBSI, and it should be up to the individual investor to decide which forum to use. This is particularly true because OBSI's recommendations are not yet binding.

Furthermore, it is unclear how investors would be "undermining OBSI's intended role as the primary dispute resolution mechanism" for claims under $350,000. The complaint handling system has always been based on choice. Just because OBSI is the *de facto* preferred way to resolve complaints—since it is free, informal, efficient, and impartial—does not mean it was intended to be the only option for claims below $350,000. While it may be within CIRO's prerogative to limit access to its Program, the reason provided is based on a flawed premise.

Furthermore, OBSI and the Program have co-existed for decades, and there is no evidence the Program will dislodge OBSI from its place within the dispute resolution framework. Years of data show that fewer than a handful of arbitration cases are opened annually.[11] In contrast, OBSI opens hundreds of investment cases a year.[12] As such, we are not concerned that allowing access to the Program for claims outside OBSI's mandate and withdrawn claims will supplant OBSI's important role in the complaint-handling landscape. It has not done so to date, and we've seen no evidence to suggest it will do so in the future.

At best, we suspect only a small subset of cases—those with specific complexities or dissatisfaction with OBSI—would go from OBSI to arbitration. Allowing the Program to be used in these scenarios complements, rather than undermines, OBSI's role by providing a necessary alternative for disputes that OBSI is not best suited to resolve.

E. Limitation Period

FAIR Canada supports increasing the limitation period from two to six years. The two-year limitation period is at the lower end of the spectrum. Several other complaint-handling bodies have longer limitation periods. For example, OBSI and FINRA have a six-year limitation period. The Australian Financial Complaints Authority, the United Kingdom Financial Ombudsman Service, and the Irish Financial Services and Pension Ombudsman also have a six-year limitation period, subject to certain narrow exceptions. Harmonization would help create a more uniform, predictable dispute-resolution landscape for investors and firms.

Aligning the Program's limitation period would also provide numerous other benefits. First, it would provide crucial protection for vulnerable investors, including clients who have reduced mental abilities, people with limited language skills, and individuals with low financial literacy. These groups may take longer to recognize financial issues or feel confident enough to complain.

Second, financial issues can be complex and take time to manifest or for investors to fully discover. The limitation period would allow for the gradual realization of unsuitable investments and the discovery of

[11] CIRO Arbitration Statistics.
[12] OBSI opened 662 investment cases in 2023 and 465 cases in 2022. See OBSI 2023 Annual Report, p. 40.

long-term patterns of misconduct. This is, in part, why some provincial securities laws provide for a six-year limitation period for enforcement proceedings.[13]

Third, while longer than some legal limitation periods, it balances giving investors adequate time to bring complaints and providing reasonable finality to dealer members. This balance helps maintain the integrity and effectiveness of the dispute resolution process while still protecting consumer rights. A shorter limitation period could prevent legitimate complaints from being heard, effectively denying consumers access to this important dispute resolution mechanism.

Lastly, given the general obligation for dealer members to retain records for at least seven years,[14] and the specific requirement to keep copies of client complaint files for seven years,[15] we see no reason to maintain the more restrictive two-year limitation period.

F. Program Costs

The Consultation asks whether (1) funding reasonable case management and mediation costs from CIRO's operating fund, (2) setting reasonable arbitrators' rates and offering fixed fee arbitration, and (3) referring self-represented litigants to pro bono legal assistance would address the issue of Program costs and promote greater access to justice. FAIR Canada agrees with these proposals and believes they would help address Program costs and improve access to justice.

We support using CIRO's operating fund for reasonable case management and mediation costs and conducting a pilot to assess the effectiveness of and amount of funding for these processes. Using the operating fund for these purposes would show that resolving investor disputes is one of CIRO's core operational features, consistent with its mandate to protect investors.

G. The 90-day Requirement

We understand that CIRO intends to review the 90-day timeline before investors can use the Program as part of a separate policy project. We strongly support reducing the 90-day timeline to reflect developments in Canada and align with international best practices.

Banks in Canada now have 56 days to try to resolve client complaints. Beginning July 1, 2025, firms operating in Quebec will have 60 days to resolve complaints before the client can escalate it to OBSI, the Autorité des marchés financiers, the Program or a court of law.

Several of Canada's international peers impose shorter timeframes than 90 days. For example, in the United Kingdom, firms regulated by the Financial Conduct Authority generally have 56 days to resolve complaints.[16] In Australia, the timeframe is even shorter: financial firms regulated by the Australian Securities & Investments Commission generally have 30 days.[17]

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[13] See, for example, section 129.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5.
[14] Investment Dealer and Partially Consolidated Rules s. 3803(1), December 31, 2024.
[15] Ibid., s. 3786(2).
[16] Financial Conduct Authority Handbook, s. DISP 1.6.2.
[17] Australian Securities & Investments Commission, Regulatory Guide 271 - Internal Complaint Resolution, Section RG 271.56,

We look forward to providing feedback on CIRO's consultation on the appropriate timeline before investors can use the Program.

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Thank you for considering our comments on this important issue. We welcome further opportunities to advance efforts that improve investor outcomes. We intend to post our submission on the FAIR Canada website and have no concerns with CIRO publishing it on its website. We would be pleased to discuss our submission with you. Please contact Jean-Paul Bureaud, Executive Director, at jp.bureaud@faircanada.ca or Tasmin Waley, Policy Counsel, at tasmin.waley@faircanada.ca.

Sincerely,

Jean-Paul Bureaud
President, CEO and Executive Director
FAIR Canada | Canadian Foundation for Advancement of Investor Rights

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