January 31, 2025

Submitted via Email

Attention:

General Counsel's Office
Canadian Investment Regulatory Organization
40 Temperance Street, Suite 2600
Toronto, Ontario M5H 0B4
E-mail: GCOcomments@ciro.ca

Dear CIRO:

Re: Proposal to Modernize the CIRO Arbitration Program

We write in response to CIRO's request for comments (the "**Request for Comments**") on its Proposal to Modernize the CIRO Arbitration Program (the "**Arbitration Program**").

SUMMARY OF POSITION

We generally agree with CIRO's conclusion – as supported by the IIROC Arbitration Program Working Group Recommendations[1] – that the Arbitration Program continues to have value as a mechanism for encouraging alternative dispute resolution. We agree that the Arbitration Program offers features that are beneficial to parties in investment-related disputes and, although the Arbitration Program is not free, the costs associated with arbitration are reflective of the unique benefits offered by the arbitration process, which include flexibility, expediency, and access to a private decision maker.

In recognition of the important role that the Arbitration Program plays in promoting access to justice in investment disputes, CIRO ought to ensure that investors have the freedom to choose between the Arbitration Program, civil litigation, and the OBSI rather than set claims criteria, which eliminate this choice. Moreover, as part of CIRO's efforts to reduce the costs associated with arbitration and to encourage investors to obtain legal representation in the arbitral process, CIRO should reconsider the Working Group Recommendations to provide investors with a fee waiver or subsidy for legal fees.

Notwithstanding our general support for the Arbitration Program, we have concerns with respect to CIRO's proposal to extend limitation periods for the Arbitration Program, to impose a 12-month limit for all arbitrations, to publish statistics and case studies, and to restrict investors to selecting arbitrators from the ADR Chambers list. These proposals will likely deter future participation in the Arbitration Program.

[1] IIROC Arbitration Program Working Group Recommendations (July 2022) [the "**Working Group Recommendations**"].

RESPONSES TO CONSULTATION QEUSTIONS

Consultation Question No. 1:

The Request for Comments poses the following question:

> 1. *Should the Program be extended to clients of mutual fund dealers?*

Yes. Investors with mutual fund dealers should not be excluded from this option.

Consultation Question No. 2:

The Request for Comments poses the following question:

> 2. *Should the Program remain available for: (a) claims that fall outside OBSI's mandate/eligibility criteria; and (b) claims where investors had attempted to resolve their dispute through OBSI and withdrew from or abandoned the process?*

We believe that claims that fall within the OBSI's mandate/eligibility criteria should remain eligible for CIRO's Arbitration Program. In review of the Request for Comments, it is unclear how the option to pursue a complaint by way of OBSI review or arbitration creates any material confusion for investors. In any event, potential confusion, if any, among investors on the mandates and key features of the Arbitration Program and the OBSI dispute resolution process can be avoided through improved information and outreach of the Arbitration Program, which was reflected in the Working Group Recommendations.[2]

It is important for investors to have a choice in how they resolve their disputes with dealers. As noted by the IIROC Working Group, the OBSI dispute resolution process and CIRO's Arbitration Program both have unique characteristics that may be attractive to aggrieved investors. CIRO should avoid eliminating investor choice in the interests of streamlining the Arbitration Program to accommodate the OBSI.

Notwithstanding the foregoing, we do not believe that allowing investors to abandon commenced OBSI proceedings in favour of the Arbitration Program (or *vice versa*) would promote the fair and efficient resolution of investor complaints. "Forum shopping" based on the perceived outcome of a commenced OBSI or Arbitration Program proceeding would only serve to create delay and undermine the credibility of those dispute resolution systems.

Consultation Question No. 3:

The Request for Comments poses the following question:

> 3. *Is the proposed range, between $350,000 (and potentially $500,000) to $1,000,000, appropriate for arbitration claims involving investor disputes in Canada?*

In response, we do not believe that it is necessary or desirable to set an upper and/or lower claim limit for claims eligibility under the Arbitration Program.

[2] Working Group Recommendations No. 1 and No. 2, which are not addressed in CIRO's Request for Comments.

The IIROC Working Group did not recommend setting a lower limit for claim eligibility under the Arbitration Program. We believe that setting a lower-limit to coincide with the OBSI's upper-limit would arbitrarily limit access to the Arbitration Program. The Arbitration Program should remain open to investors regardless of whether their complaints meet the OBSI claims criteria.

CIRO's proposal to extend the upper claims limit to $1 million (or higher with the parties' consent), is not unreasonable. However, we note that setting an upper limit does restrict access to the Arbitration Program. Ultimately, access to the Arbitration Program should be based on demand for the program as determined by the quality of the program's process and outcomes.

Consultation Question No. 4:

The Request for Comments poses the following question:

> *4. Should the limitation period be extended and what would be the appropriate limitation period for arbitration claims in the Program?*

The IIAC is opposed to CIRO's proposal to extend the limitation periods that apply to the Arbitration Program. We note that the IIROC Working Group did not opine on or recommend the extension of any limitation periods for the Arbitration Program.

In any event, CIRO does not have the authority to extend the limitation periods that apply to the Arbitration Program. It bears emphasizing that CIRO's Arbitration Program is designed to facilitate the resolution of private investment disputes and the initiation of the program by investors is subject to provincial limitation statutes. For example, for investors in Ontario, the appliable limitation period for commencing a proceeding through the Arbitration Program is two years as set out in s. 4 of the Ontario *Limitations Act*, 2002, C.O. 2002, c. 24. Sched. B and s. 52(1) of the *Arbitration Act,* 1991, S.O. 1991, c. 17.

CIRO's proposal to extend the limitation periods that apply to claims made through the Arbitration Program is problematic and amounts to the circumvention of provincial legislation and the imposition of a new limitation period on investors and securities dealers across Canada. The Arbitration Program is and must remain subject to provincial limitations legislation.

Consultation Question No. 5:

The Request for Comments poses the following question:

> *5. Would the proposed changes, in particular: (a) funding reasonable case management and mediation costs, (b) setting reasonable arbitrators' rates and offering fixed fee arbitration, and (c) referring self-represented litigants to pro bono legal assistance, effectively address the issue of costs in the Program and promote greater access to justice for parties in investment-related disputes?*

As noted above, arbitration can be a flexible and efficient alternative to civil litigation. However, the benefits of arbitration come with the costs of retaining a private arbitrator, which are substantially higher than the administrative fees that parties incur in civil litigation. Moreover, as with civil litigation, it is

prudent for investors to retain legal counsel in arbitration, which requires investors to incur legal fees. As stated in the Request for Comments, "[g]iven the adversarial nature and complexities of the arbitration process, the Program is more suitable for claimants who have legal representation."

We support CIRO's proposal to fund case management and mediation costs, set reasonable arbitration rates, and refer unrepresented investors to *pro bono* legal services. However, in order to meaningfully promote access and address the issue of costs in the Arbitration Program, CIRO ought to reconsider the Working Group's Recommendations to provide a form of fee waivers and/or subsidy to investors for legal fees and other arbitration costs especially in cases involving investor impecuniosity arising from registrant misconduct.[3] The need for investors to obtain legal counsel should be viewed as part of the process of improving access to justice for parties in investor-related disputes.

We understand that CIRO's Restricted Fund is governed by s. 16 of the Recognition Orders, which provide that CIRO may only use such funds "directly, or indirectly, in the public interest" and on one of the enumerated grounds. Funding the reasonable legal and arbitration costs of aggrieved investors is certainty in the direct and/or indirect public interest and, although it is not captured by the enumerated grounds in the Recognition Orders, CIRO could obtain approval to distribute funds for this use under s. 16(1)(a)(V) of the Recognition Orders.

We disagree with CIRO's conclusion that the Restricted Fund is limited to matters of the "greater public interest" and that it is "not appropriate to extend the Restricted Funds to funding individual cases". We note that CIRO recently published a separate Request for Comments on a proposal to extend the approved uses of the Restricted Fund under s. 16(1)(a)(V) to include the distribution of collected funds to harmed investors. CIRO should take a consistent approach to its use of the Restricted Fund, which supports the needs of investors and the role of the Arbitration Program in the investor protection 'landscape'.

ADDITIONAL COMMENTS

In addition to the above consultation questions, the Request for Comments includes additional proposals related to the Working Group Recommendations. We provide the following comments in response.

Selecting Arbitrators

We note that the Request for Comment does not address the Working Group's recommendation to allow parties to the Arbitration Process to select an arbitrator that is not included on the ADR Chambers list of arbitrators.[4] The ability to select the decision-maker is a key feature of any arbitration and restricting parties to the ADR Chambers list may discourage participation in the Arbitration Program.

Arbitration Timelines

We disagree with CIRO's proposal to set a claims resolution limit of 12 months for all claims commenced through the Arbitration Process. While this limit may be reasonable in some cases, it may be entirely unreasonable in others. The length of a proceeding will necessarily depend on, among other things, the complexity of the dispute, the volume of documents exchanged, and the parties' interlocutor motions. The question of whether there has been an unreasonable delay in a case should be left to the arbitrator.

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[3] Working Group Recommendations No. 14.
[4] Working Group Recommendations No. 4(1).

Publication of Arbitration Decisions

According to the Request for Comments, CIRO proposes to publish:

1. "Enhanced statistics about the Program's usage (i.e. case volumes per region, type of dealer involved, time of resolution) and detailed key issues to enhance transparency"; and
2. "Select anonymized case studies representative of key issues to inform the public and potential users about typical claims in the Program".

The publication of enhanced statistics and/or case studies will not benefit the public or the Arbitration Program. This proposal will not provide the public with a meaningful or reliable source of information, nor will it have any precedential or interpretive value for parties to the Arbitration Program. Contrary to the Working Group's observation, the publication of case studies/statistics will not provide a source of information or guidance on "suitability" determinations or loss calculations.[5] We caution that arbitration decisions are highly fact-specific and are not binding in subsequent arbitration proceeding.

In addition, it must be emphasized that confidentiality is one of the central benefits of private arbitration. CIRO should not overlook the fact that investors may be encouraged to participate in the Arbitration Program because it is strictly confidential. The publication of case summaries risks undermining that benefit and thereby discouraging participation in the Arbitration Program.

Respectfully submitted,

Investment Industry Association of Canada

[5] Working Group Recommendations at p. 34.