

June 24, 2022

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

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Re: CSA Consultation on the Application for Recognition of New Self-Regulatory Organization

FAIR Canada is pleased to provide our comments and recommendations on Canadian Securities Administrators (CSA) Notice 25-304 Application for Recognition of New Self-Regulatory Organization (“New SRO”).

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. We advance our mission through outreach and education, public policy submissions to government and regulators, proactive identification of emerging issues and other initiatives. FAIR Canada has a

reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of ordinary investors and financial consumers.¹

1. Introduction

As stated in our submission to the CSA dated October 1, 2021², FAIR Canada supports the overall framework and approach adopted by the CSA. We believe the draft application for recognition (“Draft Application”), draft recognition order (“Draft Recognition Order”) and draft terms of reference for the New SRO’s Investor Advisory Panel (the “IAP”, and together with the Draft Application and Draft Recognition Order, the “Application materials”) are consistent with that framework and direction.

Furthermore, the Application materials are, to a great extent, responsive to public comments that the New SRO must put the public interest first and better reflect investor concerns and perspectives. We believe the proposed approach should improve outcomes for investors and increase public confidence. We thank the CSA for pursuing these objectives, and for working towards a timely launch of the New SRO.

Our comments focus on a few distinct, but important, details that impact investors’ interests and the New SRO’s ability to effectively meet its public interest mandate. As discussed below, the Application materials could be strengthened in these few areas.

2. The Complaints Process

FAIR Canada has consistently advocated for a much more accessible and effective complaints process for investors. We restated our position on this issue, including the shortcomings of the existing process in comments submitted to the Investment Industry Regulatory Organization of Canada (IIROC) in April 2022.³

We support IIROC’s efforts to improve complaint handling by dealer members today, as opposed to waiting for the New SRO to address these issues at a later time. Improving the complaints process should be a top priority and efforts to improve it should not be held up pending the launch of the New SRO.

In addition, any rule adopted by IIROC (or, ultimately, by the New SRO) should conform to current best practices in the field. At a minimum, the rule should be consistent with the best practices reflected in the new Bank Act requirements and those being proposed in Quebec by the Autorité des marchés financiers’ (AMF) new complaint processing and dispute settlement regulation.

¹ Visit www.faircanada.ca for more information.

² https://faircanada.ca/wp-content/uploads/2021/11/2021_10_01_SRO-Position-Paper_Ver.0.pdf

³ https://faircanada.ca/wp-content/uploads/2022/04/2022_04_14_IIROC_Complaint_Handling_Rules.pdf

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.

We recognize that the details of a strong complaints process will need to be addressed at the regulatory and operational level. However, given the importance of improving the complaints process, the Draft Recognition Order must go further than simply requiring a “robust complaint-handling and resolution process”.

We recommend, therefore, that the Draft Recognition Order set out the core principles for a robust complaint handling and resolution process. These include:

- Providing complainants with clear guidance and information about the process.
- Ensuring the process is easily accessible for complainants and that filing complaints is a reasonably simple process.
- Dealing with complaints fairly and objectively.
- Addressing complaints in a timely manner and providing investors with a clear explanation and information about any next steps.
- Requiring firms to take remedial action if a complaint reveals potential harm to other clients.

3. Compensating Investors for Losses

FAIR Canada has raised concerns over significant obstacles investors face when seeking compensation for losses caused by misconduct. We repeatedly advocated for both the CSA and SRO enforcement programs to prioritize finding ways to financially compensate investors harmed because of misconduct. Our concerns and positions on these issues are set out in past submissions, including our October 2020 submission to the CSA on the regulatory framework for SROs.⁴

The lack of an ability to order compensation by disgorgement or other means is currently a priority issue that IIROC has been grappling with. It is currently exploring ways to return disgorged funds collected from advisors and firms disciplined by IIROC to harmed investors. This includes researching regulatory frameworks that focus on investor compensation from disgorgement

We agree IIROC should have the ability “to remove any ill-gotten benefits, such as profits, commissions, fees, and compensation wrongfully obtained, or losses wrongfully avoided, by an

⁴ See pages 16-17. That submission included a list of suggestions for improving SRO enforcement programs, including on the issue of investor compensation, https://faircanada.ca/wp-content/uploads/2020/10/2020_10_23_submission_to_CSA_on_SROs_Ver.00.pdf

advisor or a firm through their misconduct and return these funds to harmed investors”.⁵ We encourage IIROC to continue this work pending the establishment of the New SRO.

We also believe flexibility should be provided in the Application materials to ensure the New SRO can establish rules to enable it to compensate harmed investors as part of its enforcement program, and that it commits to using them. Compensating victims of misconduct should be a central tenet of the New SRO’s enforcement and complaint-handling and resolution process.⁶ We are therefore supportive of including a provision in the Draft Recognition Order that permits the New SRO to use monetary sanctions “for such other purposes as may be subsequently approved by the Commission.”

We also recommend that the recognition orders state that investor compensation should be a core principle of the New SRO’s enforcement program in the future. It should also prioritize how it can better ensure firms and dealer representatives provide fair compensation for losses of aggrieved clients in cases decided by hearing panels and cases resolved by a settlement agreement. Furthermore, given the limitations of disgorgement orders, the New SRO should obtain the authority to order compensation for losses caused by misconduct where disgorgement alone is not relevant or is insufficient to compensate for the losses incurred.

4. Investor Advisory Panel

FAIR Canada has urged the SROs to introduce stronger mechanisms to ensure the concerns of investors are considered in their work, including increasing the level of engagement with investor advocates such as FAIR Canada. This issue is particularly relevant to policy development and rulemaking, which historically have tended to favour industry’s concerns and preferred responses. Consequently, we support that the New SRO be required to establish an Investor Advisory Panel (IAP) and Investor Office.

In addition, we generally support the IAP’s proposed terms of reference. We would, however, recommend a few enhancements.

We recommend that the IAP’s terms of reference be revised as follows:

- i. In addition to advising staff of the New SRO, the IAP should be able to advise the New SRO’s Board. While most of the IAP’s interactions will be at the staff and executive management level, some issues may arise that would be better addressed at the Board level. In such cases, the IAP should have the ability to do so.
- ii. The terms of reference state the IAP chair must meet at least annually with the New SRO Board and the IAP must give an annual report to the Board. We recommend that the IAP’s

⁵ IIROC Priorities for 2023, <https://www.iroc.ca/news-and-publications/notices-and-guidance/iroc-priorities-2023>

⁶ We refer to the public interest guiding principles in schedule 1, section 1. (1) (l) of the draft OSC recognition order.

chair meet with the Board at least twice a year. One of those meetings should be to present and discuss the IAP's annual report to the Board. The other meeting should be to discuss the New SRO's priorities and investor concerns.

- iii. The terms of reference should explicitly state the IAP chair should be able to meet with the CEO and executive management team as needed.
- iv. The purpose of the IAP's ongoing dialogue with the New SRO's operational and regulatory staff is to better inform the IAP and enhance its ability to provide advice. We recommend this purpose be expanded to include advising operational and regulatory staff on issues involving investor protection and access to advice. This could help enhance staffs' awareness of investors' specific issues and concerns, and lead to potential improvements in regulatory policies and processes.
- v. The FAQs on the IAP states: "The IAP will have an annual budget that provides funding to effectively carry out its mandate and to conduct research activities. The funding provided will be similar to amounts provided to other consumer panels in the securities industry." The terms of reference simply states the IAP may engage in independent research projects, but does not say how projects will be funded or how the IAP's budget will be set. We recommend that, to be effective, this commitment to providing a sufficient budget be reflected in the terms of reference or elsewhere in the Application materials.

5. CSA Oversight of New SRO

FAIR Canada welcomes the CSA's intention to carry out enhanced oversight of the New SRO, as reflected in the draft Recognition Order. In our view, one of the shortcomings of prior oversight reviews is that they largely focused on specific SRO programs, and less on whether the SROs are meeting their public interest mandate.

The draft MoU among the regulators on oversight of the New SRO states: "The purpose of the Oversight Program is to ensure that [New SRO] is acting in accordance with its public interest mandate and complying with the terms and conditions of the [New SRO] Recognition Order."

However, Appendix B of the MoU, which describes the approach to oversight reviews, does not specifically mention assessing the New SRO's overall effectiveness in meeting its public interest mandate. Instead, it captures the public interest mandate and regulatory responsibilities indirectly by referencing the terms and conditions of the draft Recognition Order.

Given the stronger emphasis on the New SRO serving the public interest, these types of assessments will become even more important. As such, we recommend they be expressly stated as objectives of oversight reviews in Appendix B. We also recommend it be made clear that such assessments should also be carried out annually.

In terms of how to carry out such assessments, one critical component would be whether the New SRO is successful in delivering strong levels of investor protection and fair outcomes for investors. Investors include both clients of member firms and persons who use the services provided by regulated marketplaces that are supervised by the New SRO.

In addition to the reporting requirements listed in Schedule 2, section 5(1) of the Draft Recognition Order, we support requiring the New SRO to carry out a self-assessment on its public interest mandate and SRO functions annually.

It will be equally important to know how the regulators will assess the results of those self-assessments, or other indications of the SRO's overall effectiveness. The Application materials do not directly address this issue. In this regard, we reiterate the suggestions we made for improving oversight of SROs in our October 2020 submission to the CSA:⁷

Suggestions for Improving Oversight of New SRO

1. Create an oversight module for assessing the overall performance of SRO, based on its mandate and responsibilities. It should include onsite and offsite review processes.
2. Ensure the module includes assessing performance of SROs' public interest mandate.
3. Ensure that the regulators' assessment of the SROs' overall effectiveness in meeting its public interest mandate, and performing its regulatory responsibilities is reviewed and signed off by the CEO or head of each participating regulator. **[new]**
4. Revise the governance module to assess the board of directors' effectiveness in ensuring the public interest mandate is met and public accountability is achieved.
5. Revise the governance module to include specific assessment of independent directors' role and contributions, particularly on providing an independent voice from industry directors and on assessing performance of the organization's public interest mandate.
6. Annual meeting of CSA executives and the chair of the SRO Board and select independent directors.

Finally, we ask the CSA to consider the utility and effectiveness of a risk-based approach to oversight for the New SRO. With only one SRO, this approach will lead to assessing the relative

⁷ Point No. 3 is new; some points are edited for clarity, https://faircanada.ca/wp-content/uploads/2020/10/2020_10_23_submission_to_CSA_on_SROs_Ver.00.pdf

risk of different regulatory programs and processes for which the New SRO has responsibility. For example, delivering quality market regulation, strong business conduct compliance, and sound financial and operational compliance programs. Such a risk-ranking approach would be inherently difficult to apply because these programs vary widely in nature and purpose, yet are all vital to sound investor protection and the public interest.

We thank the CSA for the opportunity to provide our comments in this submission. We would be pleased to discuss our submission with the CSA, if you have questions or would like us to explain our views on these issues. Please contact me [REDACTED]

Sincerely,

[REDACTED]

Jean-Paul Bureaud,
President, CEO and Executive Director