

13.1.4 IROC Response to Comments on Client Complaint Handling Rule and Guidance Note and Amendments to IROC Dealer Member Rules 19, 37 and 2500

January 28, 2009

Re: IROC response to comments on Client Complaint Handling Rule and Guidance Note and amendments to IROC Dealer Member Rules 19, 37 and 2500

We have provided an open letter in response to the comment letters received on proposed complaint handling requirements and the proposed amendments to IROC Dealer Member Rules 19, 37 and 2500 (previously IDA By-law Nos. 19 and 37 and Policy No. 2). The comments specific to the proposed rule and guidance note have been summarized to correspond with the various sections of the rule, followed by IROC staff response.

GENERAL

Definition of a complaint

We have received the following comments which relate to the definition of a complaint:

- Two comment letters suggest that the definition of a complaint is too broad and in one instance also vague.
- Two comment letters state that the rule should only pertain to complaints of a regulatory nature.
- Four comment letters remark that the words in the basket clause, “would include, but is not limited to...”, extends the scope of the complaint definition to potentially include alleged misconduct not relating to a client’s account or dealings with the Dealer Member as well as service complaints.
- One comment letter submits that the complaint definition would capture grievances which may be settled in the ordinary course of business.

IROC staff response

The complaint definition that appears in the proposed rule was developed to specifically target retail client complaints alleging misconduct in the handling of their account or accounts. As such, a complaint subject to this rule:

- must be submitted by a client or a person authorized to act on behalf of a client;
- may be either a recorded expression of dissatisfaction or a verbal expression of dissatisfaction; and
- must allege misconduct in the handling of their account or accounts.

The proposed complaint definition also indicates that alleged misconduct includes, but is not limited to, allegations of breach of confidentiality, theft, fraud, misappropriation or misuse of funds or securities, forgery, unsuitable investments, misrepresentation, unauthorized trading relating to the client’s account(s), other inappropriate financial dealings with clients and engaging in securities related activities outside of the Dealer Member. It is therefore our view that the complaint definition is not too broad in scope or vague.

It is also our view that all complaints alleging misconduct in the handling of the client’s account or accounts should be dealt with in the same timely manner irrespective of whether the alleged misconduct is regulatory or criminal in nature or both.

Finally, because the complaint definition specifically targets allegations of misconduct in the handling of the client’s account or accounts, complaints that relate to non client account matters and service issues would be outside of the scope of this rule. None of the specific alleged misconduct items listed in the proposed complaint definition would be considered service issues or issues to be settled in the ordinary course of business. There will however be a requirement to respond to all written complaints under Dealer Member Rule 2500, Section VIII.

Nature of complaint received

We have received the following comments which relate to a verbal expression of dissatisfaction being included in the definition of a complaint:

- Five comment letters assert that complaints should be submitted in writing for various reasons:
 - verbal comments are too subjective and may lead to confusion and miscommunication;
 - there is great potential for confusion and risk with verbal communication such that the substance, nature, and scope of the allegations are not going to be accurately interpreted in order to respond and address them;
 - it is not unduly onerous and is beneficial as it provides focus and clarity of the client's intention, substantive allegations, and scope of the subject of the complaint;
 - verbal expressions can be far too subjective and very difficult to summarize;
 - there will be disagreements about the timing, content, intent, and seriousness of the verbal complaint. Moreover, credibility issues may arise as there may be different recollections about the verbal statements;
 - it would not be unduly onerous on clients and would help to keep the focus of the complaints process on substantive allegations of misconduct; and
 - a written submission provides a bright line commencement point to the complaint handling process otherwise there is a potential inability of Dealer Members to determine when the ninety (90) days period to provide a substantive response begins.
- One comment letter claims that the concept of a verbal expression of dissatisfaction seems to encompass service related complaints.
- Three comment letters state that verbal complaints could be made to any employee, regardless of their seniority. Notes of conversations or voicemail messages would be required to determine if an investigation was warranted under the circumstances. Records would have to be retained for review.

IIROC staff response

The vast majority of client complaints received by Dealer Members are received in writing. In relative terms, there are not many verbal complaints received that allege misconduct. A verbal complaint, like any other expression of dissatisfaction, must be linked to alleged misconduct before it is subject to the proposed complaint handling framework. Consequently, verbal service complaints would not be included in the requirements relating to misconduct complaints. However, there will be a requirement to respond to all written complaints under Dealer Member Rule 2500, Section VIII.

We appreciate that the handling of verbal complaints can be problematic if the firm is not provided with enough information to properly investigate the alleged misconduct complaint or multiple conversations with the client result in complaint inconsistencies. To address these potential verbal complaint problems, the proposed Guidance Note leaves it to the professional judgment of the sales supervisor / compliance staff or equivalent to determine if the receipt of a verbal expression of dissatisfaction alone requires an investigation into the alleged misconduct. The proposed Guidance Note also permits the Dealer Member to request that a verbal complaint be put in recorded form prior to the issuance of a substantive response to the client. It should be noted however that the ninety (90) day timeline to issue a substantive response commences from the time a complaint is made, whether verbal or in writing.

Regarding the concern that verbal complaints could be made to any employee, it is expected, as with written complaints addressed to any employee, that Dealer Members already have in place policies and procedures to escalate complaints to the appropriate staff.

Person authorized to act on behalf of the client

We have received the following comments regarding the submission of a complaint by a person authorized to act on behalf of a client:

- Two comment letters express the view that only complaints submitted by a person legally authorized to act on behalf of a client should be accepted. It is further explained that legal authorization may be contractual in nature, such as where a legal advisor is retained by the client, through the granting of a power of attorney prepared in accordance with the applicable law, or granted to executors or beneficiaries of the estate of a deceased client.

IIROC staff response

It has been suggested that only a legally authorized agent of a client such as a legal advisor or executor of an estate should have the status to submit a complaint on behalf of a client. This is too restrictive as it impinges on the freedom of a client to appoint anyone to act on his or her behalf through a letter of authorization. There is no intention of IIROC to modify this long standing practice.

Individuals with special needs

We have received one comment recommending that the special needs of seniors, the handicapped, and immigrants be a consideration in the Rule.

IIROC staff response

The duty to assist clients was contemplated in the proposed Guidance Note. We have amended the section in the Guidance Note to further clarify that Dealer Members should be prepared to assist clients in submitting a complaint, in particular if the client is handicapped in any way, is a senior with special needs or a language or a literacy issue is involved.

DESIGNATED COMPLAINTS OFFICER (DCO)

We have received the following comments in connection with the newly created position of Designated Complaints Officer (DCO):

- Two comment letters recommend clarification whether Dealer Members should internally determine what would comprise the requisite knowledge, experience, and authority for a DCO or whether IIROC will be providing guidance on what the requisite knowledge, experience, and authority should be. One letter goes a step further in suggesting that Dealer Members should have the discretion to determine who qualifies as a DCO by establishing their own standards as such standards will vary from one Dealer Member to the next.
- Two comment letters are of the opinion that the reference to the ISO 10002-2004(E), *Guidelines for Complaints Handling in Organizations* should be replaced with specific responsibilities for the DCO position set out in the Rule. One of the two comment letters suggests that the reference to the ISO standards is an inappropriate delegation of rulemaking authority to an external body.
- Two comment letters urge specific training in dispute resolution should be mandatory. One comment letter would have the DCO be responsible for the entire dispute resolution system including information technology and privacy related issues.

IIROC staff response

The proposed Guidance Note provides assistance to Dealer Members in determining the choice of DCO such as the Ultimate Designated Person, the Chief Compliance Officer or an individual with supervisory responsibility over the complaints process. Dealer Members have been granted wide discretion in the choice of DCO as they are in the best position to designate an individual based on their skills, experience and a variety of criteria which may be unique to each firm. Specific training will not be mandatory, such as instruction in dispute resolution. Nor will sole responsibility rest with the DCO as it is a firm wide duty as much as a senior management role. We have removed the reference to the ISO standards.

COMPLAINT PROCEDURES / STANDARDS

Establish written procedures for dealing with complaints

We have received one comment that IIROC should clarify what is meant by "serious alleged misconduct" that would require escalation of a complaint to senior management.

IIROC staff response

This is a restatement of IIROC Dealer Member Rule 2500 (previously IDA Policy No. 2) in which senior management must be made aware of complaints of serious misconduct. Those who handle complaints must exercise professional judgment in their decision to inform senior management of serious alleged misconduct. Alleged misconduct is delineated in the proposed rule.

Client access to the complaint handling process

We have received the following comments in relation to the complaint handling information to be provided (including the method of delivery and frequency):

- One comment letter would like clarification of the difference between a Dealer Member's complaint handling procedures material and the IIROC approved complaint handling process brochure. It is suggested that Dealer Members only supply one complaint handling document to clients to avoid confusion from voluminous disclosure.
- Two comment letters suggest flexibility in the delivery of information such as electronic delivery or in a welcome package for new clients.
- Four comment letters warn that notification of options in both the IIROC approved brochure and the substantive response is unnecessarily duplicative and may result in client confusion.
- Three comment letters advise that a reference to litigation / civil action may be problematic if a Dealer Member wishes to raise a limitation period defense on a statute barred claim.

IIROC staff response

The complaint handling information included in the IIROC approved complaint handling process brochure is general in nature while the other is specific to the Dealer Member. A client will be able to distinguish the difference between the two documents.

As not all clients will have access to the internet, the only minimum requirement alternative is that a written document must be provided to the client. However, where a client has internet access, there is nothing in the proposed rule that prohibits the Dealer Member from delivering the written document electronically. Also, delivery of the required information in a welcome package is not precluded if it is done at the time of account opening.

An important part of the proposed complaint handling rule is ensuring that the client is fully aware of their complaint handling options. We therefore see no disadvantage to informing the client on more than one occasion (i.e., at time of account opening, complaint acknowledgement and complaint substantive response) and by more than one means (substantive response and standard brochure) of their complaint handling options. We do not believe that client confusion will result if the information the Dealer Member includes in the substantive response letter is consistent with the information included in the IIROC approved brochure.

Finally, we note that the reference to litigation / civil action is consistent with the current IIROC approved complaint handling brochure which refers to statutes of limitations and advises clients that they may wish to consult a lawyer to decide how to proceed.

Complaint acknowledgement letter

We have received four comments that five (5) business days is insufficient to send an acknowledgement letter to a client and the time frame should be extended to at least ten (10) business days or, in the alternative, a caveat for an increased period of time owing to extenuating circumstances.

IIROC staff response

We have considered this suggestion but continue to believe that five (5) business days is a reasonable time period within which to send the client an acknowledgement letter. We also note that this is a target which we expect Dealer Members to meet but understand that special circumstances may occasionally result in an extension of time to acknowledge a complaint.

Complaint substantive response letter

Various issues were raised with respect to the substantive response letter¹:

1. Timeline is either 90 business or calendar days

Two comment letters request clarification as to whether the reference to ninety (90) days is to either business or calendar days.

¹ One comment letter is represented unless otherwise noted for the issues listed below.

IIROC staff response

The ninety (90) days timeline is ninety (90) calendar days since “days” and “calendar days” have the same meaning throughout the IIROC Rule Book. Nevertheless, we have amended the proposed rule and guidance note to clarify that the timeline is ninety (90) calendar days.

2. *Matters in litigation*

Three comment letters are of the opinion that a misunderstanding has arisen that complaints subject to litigation will require a substantive response letter.

IIROC staff response

To clarify, a matter that is in litigation is not a complaint as such and therefore does not fall within the purview of the proposed rule.

3. *Substantive response undefined and indeterminate*

The substantive response is both undefined and indeterminate.

IIROC staff response

The proposed rule clearly describes what must be included in the substantive response to the client. Reference should be made to the provisions in section 4 of the proposed rule under the sub-heading entitled “Complaint substantive response letter”.

4. *Means of notifying IIROC if time limit not met*

Three comment letters believe that guidance must be forthcoming to delineate the means of notifying IIROC if the ninety (90) days time limit will not be met by a Dealer Member.

IIROC staff response

Where the Dealer Member is unable to meet the ninety (90) days time limit for a particular complaint, they will notify IIROC through a filing on the ComSet system. To accommodate this filing, modifications will be made to the ComSet system to: (1) delineate complaints subject to the ninety (90) days time limit and (2) allow for the filing of a delayed complaint notification.

5. *Reasons for delay beyond ninety (90) days time limit*

It has been noted that a file may not be concluded for reasons beyond the control of the Dealer Member.

IIROC staff response

If there are reasons beyond the control of the Dealer Member in providing a substantive response, these reasons should be provided to IIROC as part of the delayed complaint notification filed through ComSet. IIROC will decide on a case by case basis if the explanation offered for the delay is reasonable. IIROC will consider issuing guidance in the future based on compliance experience with the rule.

6. *Ninety (90) days time limit too stringent*

The ninety (90) days time limit is shorter than IIROC's original proposal of six (6) months and is inconsistent with the MFDA's amended Policy 3. A six (6) months time frame would have established a more practical standard for the completion of complex investigations. A gradual transition would have given firms additional time to assess their resources and systems in adjusting to a tighter time frame.

IIROC staff response

The ninety (90) days timeline is a reasonable complaint handling standard that Dealer Members should try to meet. By way of comparison, the timelines in other jurisdictions are as follows: eight (8) weeks in the United Kingdom; forty-five (45) days in Australia; and twenty-five (25) days in Ireland. Furthermore, for the period commencing January 2004 and ending December 2007, IIROC statistics show that Dealer Members already send a substantive response to clients within one-hundred-and-eighty (180) days 83.6% of the time, and within ninety (90) days 62.2% of the time. Given these existing completion rates, compliance with the ninety (90) days timeline would seem to be a reasonably achievable undertaking. If a specific complaint is particularly

complex and cannot be responded to within the time frame allowed, this will be considered provided the explanation given in the notification filed with IIROC is reasonable.

A previous IIROC proposal to establish a six (6) months time limit would have included the time taken by the internal ombudsman (where an internal ombudsman process is in place) in the time limit. In response to concerns expressed that Dealer Members had no control over the time taken by an internal ombudsman to review a complaint, IIROC decided to exclude the internal ombudsman process from the time limit and to shorten the time limit to ninety (90) days.

There will be either a requirement for immediate implementation or a short implementation period once the rule is effective. Dealer Members should consider using this time prior to approval of the rule to prepare for the ninety (90) days timeline.

7. *Inconsistency between Rule and Guidance Note*

Two comment letters state that the Rule does not include the internal ombudsman process in the ninety (90) days time frame for providing a substantive response. However, the Guidance Note appears to take the opposite position.

IIROC staff response

We thank the commenters for pointing out this inconsistency and we have amended the Guidance Note to eliminate the inconsistency. The following sentence has been deleted: "As a result, should a Dealer Member offer its own internal ombudsman process, this would be subject to the ninety (90) days timeline."

8. *View that internal ombudsman process will be circumvented*

There are two comments relating to the consideration by the Ombudsman for Banking Services and Investments (OBSI) of a client complaint at the earlier of: (i) the date the complaint substantive response is provided to the client; or (ii) ninety (90) days after the receipt of the complaint. One correspondent is of the opinion that the approach is inconsistent with the OBSI Terms of Reference and current practice. A second letter notes an alteration in process owing to concurrent changes at OBSI which would require Dealer Members to inform clients that OBSI will consider a client complaint after a substantive response is given to the client or no later than ninety (90) days after receipt of the complaint. In effect, the internal ombudsman process will be circumvented.

IIROC staff response

OBSI is proposing changes to their Terms of Reference which are co-incident with the development of IIROC's complaint handling standards. IIROC is not seeking to circumvent or eliminate the internal ombudsman process as we do not have jurisdiction over such a function of the banks. For those financial institutions that offer an internal ombudsman process, the client will continue to have the option of pursuing that recourse or escalating directly to OBSI. In order for the client to make a fully informed choice, the Dealer Member must disclose in the substantive response to the client that the use of the internal ombudsman process is at the option of the client, and the estimated length of time the internal ombudsman process is expected to take.

9. *Disclosure of expected time period for review by the internal ombudsman process*

As a Dealer Member has little control over the length of time that the independent Ombudsman may take, it is therefore inappropriate to consult the Ombudsman prior to every substantive response which will only serve to delay the process.

IIROC staff response

The disclosure of the estimated time for the internal ombudsman process would not require a consultation with the ombudsman for each specific complaint, but rather will be based on historical data. We have amended the rule to make this clear.

10. *Conflict of interest*

A conflict of interest exists between Dealer Members and their clients: there is a reticence in firms to offer full disclosure owing to potential litigation and clients need full disclosure to make a properly informed decision.

IIROC staff response

Submission of a complaint by a client usually results in the creation of opposing interests. The proposed complaint handling rule will not eliminate this situation, but it is intended to set clear requirements for the Dealer Member to adhere to in resolving the complaint on a timely basis. An example of how the proposed rule seeks to provide additional disclosures to the client is that the

contents of the substantive response letter are prescribed and include a stipulation that the Dealer Member's final decision must include an explanation.

Duty to assist in client complaint resolution

We have received the following comments in relation to privacy issues:

- Three comment letters are concerned that the disclosure and sharing of personal client information may lead to a myriad of legal issues such as breach of confidentiality, client privacy, employment law or other potential liabilities.
- One comment letter contends that a Dealer Member may refuse to co-operate which may leave the other Dealer Member in a position of uncertainty as to how to proceed with handling the client's complaint.
- One comment letter advises that IIROC should co-ordinate information sharing between Dealer Members.

IIROC staff response

The proposed rule requires that there should be co-operation between firms in recognition that Approved Persons do not remain with one Dealer Member throughout their career and consequently, events leading up to a client complaint may take place at more than one firm.

Should other relevant Dealer Members not co-operate in a particular Dealer Member's complaint investigation this should be noted in any ComSet filing if such refusal has thwarted a full and fair response to the client.

We believe that the suggestion that IIROC co-ordinate the sharing of complaint investigation information between firms is impractical.

Settlement agreements

We have received the following comments in relation to the use of confidentiality restrictions:

- Two comment letters maintain that confidentiality clauses should be permitted in the settlement agreement.
- One comment letter is of the opinion that the term, "other enforcement authorities", is too broad and vague; consequently, the term should be removed or defined.
- One comment letter does not take issue with the limits on confidentiality provisions in the proposed rule, however, it is suggested that a positive statement with respect to general confidentiality should be included.
- One comment letter expresses skepticism of confidentiality agreements in general because other investors are exposed to wrongdoing. There is a follow-up recommendation for IIROC to confirm the turning over of appropriate complaint cases to law enforcement and providing a statistical summary in its Annual Report.

IIROC staff response

There is nothing in this rule that changes current practice. The proposed rule does not restrict the use of confidentiality terms in settlement agreements. It is a restatement of generally accepted industry practices as set out in the May 22, 2001 IDA Member Regulation Notice, *Releases Entered Into Between Member Firms and Clients and Confidentiality Restrictions* (MR-0076, Amended). It would be inappropriate to use positive language with respect to confidentiality as this would connote encouragement as opposed to neutrality.

The term "other enforcement authorities" is sufficiently precise and was included in the IDA Member Regulation Notice referred to above. We have taken under consideration the recommendation for IIROC to confirm, track, and report on referrals to law enforcement.

Complaint record retention

We have received the following comments with respect to the retrieval, retention, and centralization of records:

- Four comment letters advocate the principles based approach of a “reasonable period of time” to retrieve records. One comment letter claims that the specific time frame set out in the Guidance Note does not accommodate the business structure of many registrants, particularly large registrants with significant data storage.
- Three comment letters question the benefit of centralization of files.

IIROC staff response

The proposed rule stipulates that information must be obtained within a reasonable period of time. Feedback from Dealer Members suggested that establishing time frames would be helpful. However, flexibility will be provided in the administration and enforcement of the rule in this regard.

Complaint files should be in a centrally located place to facilitate Dealer Member responses to general queries by IIROC and reviews conducted by the Business Conduct Compliance Department. Dispersion of files would cause unnecessary delays which can be avoided through centralization.

OTHER MATTERS²

1. Harmonization

We have received the following comments in relation to co-ordination between organizations and a consistent approach to rulemaking:

- Four comment letters express concern that the various formulations of complaint handling by the MFDA, AMF, OBSI, CSA, and IIROC will be conflicting and as a result will confuse investors and industry members. It is suggested that harmonization will ensure uniformity and a level playing field for self-regulatory organization (SRO) and non-SRO registrants.
- One comment letter would like to see Dealer Members granted an exemption to proposed NI 31-103.

IIROC Staff Response

We consulted extensively with the Mutual Fund Dealers Association (MFDA), the Ombudsman for Banking Services and Investments (OBSI) and the Canadian Securities Administrators (CSA) during the development process. Furthermore, on May 28, 2008, the CSA constituted a working group which developed a framework for harmonizing the complaint handling rules in each of the IIROC and MFDA proposals, and proposed National Instrument 31-103 – *Registration Requirements*. IIROC staff participated in the working group and the current proposed amendments reflect the revisions that IIROC staff has made to the previous IIROC proposal in light of the framework. As a result, there are few remaining differences between the IIROC draft Rule and Guidance Note and the MFDA draft Policy.

While exemptions to national instruments are given at the discretion of the CSA, there is no inconsistency between the CSA's proposed standards in NI 31-103 and IIROC's proposed rule, although the latter provides a more comprehensive regime.

2. Rule to stand alone

We have received the following comments that the rule should be complete and not require a Guidance Note for implementation nor should third party standards be incorporated by reference:

- Three comment letters state that the Rule should stand alone and, one of the three comment letters is of the view that the Guidance Note should only be issued after matters requiring clarification are identified.
- Three comment letters state that it is not appropriate to incorporate by reference the ISO standards in IIROC rules. ISO standards worthy of inclusion should be set out in the Rule. Or, as suggested in one of the comment letters, the ISO standards are not of assistance as Dealer Members had no input or specific knowledge of such complaint handling guidelines.

² One comment letter is represented unless otherwise noted for the issues listed below.

IIROC staff response

The Guidance Note was developed to assist Dealer Members in complying with the Rule. The Guidance Note is not intended to prescribe requirements that are not set out in the proposed Rule. We have removed the reference to the ISO standards.

3. *Approval of complaint handling procedures*

IIROC should review and approve the complaint handling procedures and standards of its Dealer Members.

IIROC staff response

Following the implementation of the Rule a review to determine the level of compliance with the Rule will be undertaken by the Business Conduct Compliance Department, and a report will be issued.

4. *Consultation with investors*

Consideration of the proposed amendments should include consultation with SIPA and the OSC's Investor Advisory Committee.

IIROC Staff Response

All comments received in response to the publication of these proposals for public comment are being taken into account by IIROC staff. We note that we received a submission from SIPA; however, the OSC's Investor Advisory Committee was no longer in existence.

5. *Housekeeping*

Under the heading "Complaint Acknowledgement Letter", the word "resolve" should be changed to "investigate". Not every complaint will be resolved, however, the Dealer Member must at least investigate and respond to the complaint.

IIROC Staff Response

We have revised the language as suggested.

6. *Comments provided on other IIROC proposals and initiatives*

A number of letters included comments in their response letters that related to another IIROC rule amendment proposal; specifically, the proposals to implement the core principles of the Client Relationship Model (CRM).

IIROC Staff Response

These comments will be addressed as part of the IIROC consolidated response to public comments for that proposal.