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ARTICLE

IIROC Releases Bulletin on Limitation of Liability & Exclusionary Clauses

On October 10, 2019, the Investment Industry Regulatory Organization of Canada (IIROC) released Notice 19-0177 which outlined that certain limitation of liability and exclusionary clauses found in retail account agreements are inconsistent with the Dealer Members' regulatory obligations. Specifically, it found that some clauses are contrary to s 1402(1) of IIROC's Consolidated Rules and certain clauses are also contrary to the duty to deal fairly, honestly, and in good faith, as required by Ontario Securities Commission Rule 31-505 (see: [OSC Staff Notice 33-740](#); [OSC Staff Notice 33-747](#); and [Kingsmont Investment Management Inc.](#))

The Notice is intended to be a self-assessment tool that Dealer Members can use to review their client account agreements and ensure compliance with IIROC Requirements.

IIROC outlined the following as problematic clauses that they have identified in retail account agreements:

1. Clauses that seek to relieve dealers from their regulatory obligations (such as suitability):

Example: "Customer agrees not to hold Dealer responsible for losses incurred through following Dealer's trading recommendations or suggestions or those of its employees, agents or representatives."

2. Clauses which completely waive the dealer's liability:

Example: "We shall not be liable to you or any third party for loss of revenue or profits, failure to realize expected profits or savings, missed investment opportunities or other items of economic loss, of any nature whatsoever, or any special, indirect, consequential, exemplary, or incidental damages arising out of the services, however caused, and whether arising under contract, tort (including negligence) or any other theories of liability, even if we have been advised of the possibility of such damages."

3. Clauses which arbitrarily limit damages (such as limiting them to fees paid by the client):

Example: "Broker's total liability under the terms of this agreement will not exceed an amount equal to the fees paid by the customer to the broker for the one calendar month in which such damages first occurred."

The Notice also states that clauses limiting liability for software malfunctions may also be inappropriate as dealers are responsible for the functionality of online platforms and for monitoring tasks that are automated or outsourced (see: IIROC Notice 14-0012).

IIROC suggests that dealers conduct self-assessments of their client agreements to identify inappropriate clauses and rectify non-compliance. However, we would caution dealers against making unilateral changes without consulting legal counsel as the issues identified in the Notice may not be applicable to the firm or its business model (i.e., an order-execution only firm will want to specify to clients in the trading agreements and disclosures that they are not providing any advice or conducting trade by trade suitability). If, and when, Business Conduct Compliance Staff encounter clauses they deem to raise regulatory concerns, they will bring them to the attention of the respective dealer. The Notice indicated that Staff may recommend that the Dealer Member correct the clauses and advise the client of such changes, decide to include such clauses as a finding under IIROC's Consolidated Rules or, (in egregious cases), refer the matter to enforcement staff.

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By: James D.G. Douglas, [David Di Paolo](#), [Caitlin Sainsbury](#), [Maureen Doherty](#)


Services: [Securities Disputes](#), [Investment Management](#), [Financial Services](#), [Banking](#)

Related Contacts


David Di Paolo
National Group Head, Disputes Commercial & Construction


 Toronto


 DDiPaolo@biq.com

 [416.367.6108](tel:416.367.6108)

Caitlin Sainsbury
Partner


 Toronto


 CSainsbury@blg.com

 [416.367.6438](tel:416.367.6438)

Maureen Doherty
Partner

 Toronto

 MDoherty@blg.com

 [416.367.6183](tel:416.367.6183)