

INVESTOR ADVISORY PANEL

October 14, 2021

Director General
Financial Services Division
Financial Sector Policy Branch
Department of Finance Canada
James Michael Flaherty Building
90 Elgin Street
Ottawa, ON K1A 0G5

Re: Strengthening Canada's External Complaint Handling System

I am writing on behalf of the Ontario Securities Commission's Investor Advisory Panel (IAP) to comment on the Department of Finance Canada consultation paper regarding consumer complaint handling and the framework for External Complaint Bodies (ECBs) in banking.

The IAP is an initiative by the OSC that aims to bring investor concerns and voices into its rule development and policymaking process. While we typically focus on investment products and services, we note there are many crossovers and commonalities in the handling of investment and banking disputes in Canada. The consultation paper touches on those common elements in its discussion of aspirational guiding principles, many of which align with reforms we have called for in the investment sector's external complaint handling system.

For example, we have urged securities regulators to make that system more accessible, more functional, more transparent and, ultimately, more conducive to optimizing outcomes. We believe accomplishing this requires the shortening of response times for resolving disputes, increasing investor understanding of how best to navigate the complaint resolution process, and granting OBSI binding authority and higher monetary jurisdiction.

Consequently, we encourage you to ensure that external complaint resolution in the banking sector will conform to the guiding principles outlined in your consultation paper, as follows:

- **Accessible** – the complaint resolution process should be easy to understand, available in French and English, and free to consumers.
- **Accountable** – ECBs should be subject to regulatory oversight and accountable to their stakeholders.

- **Impartial and Independent** – complaint resolution should be objective and free from undue influence and conflicts of interest.
- **Timely and Efficient** – the resolution of complaints should not face undue delays.
- **Impactful Decisions** – consumer complaints should be fully resolved, and banks should adhere to ECB decisions.

To this list, however, we would add two interrelated foundational principles – **Fairness** and **Integrity**.

Fairness is necessary as a guiding principle because of the extreme asymmetry involved in most banking complaints. Individual complainants typically are hindered by low levels of financial literacy or limited resources, or both. They are pitted against very large and adept financial institutions that derive further advantage if the dispute resolution process is complicated or protracted.

This asymmetry cannot be neutralized simply by making ECBs independent and impartial – that would be sufficient only if the parties were evenly matched. But where they are mismatched, a process that affords each of them the same means and opportunity to present their case actually favours the dominant party. Such a process is more apt to produce unfair outcomes.

Including fairness as a guiding principle would permit and encourage ECBs to provide complainants with information and support necessary to fully identify the issues raised by their concerns and elicit the true merit, if any, in their complaints. Thus, a focus on fairness would help ensure that the guiding principles optimize the outcome of dispute resolution, not merely its process, by empowering ECBs to investigate each complaint as appropriate.

Similarly, a focus on maintaining public confidence in the integrity of the banking system will optimize dispute outcomes. Consumer protection should include an expectation that erroneous or inappropriate conduct will be fully identified and scrutinized, and that full compensation will be provided where harm has occurred.

Turning now to the specific questions posed in your consultation paper, we offer the following observations:

1. Are the guiding principles appropriate to guide future policy directions on the structure and key elements of the ECB system in Canada?

With the addition of **Fairness** and **Integrity** as guiding principles, we think they are appropriate. Absent a focus on fairness and integrity, however, we would be concerned that the asymmetry inherent in the process and consequent sub-optimal outcomes will persist.

Also, we suggest clarifying the principle of **Accessibility** to the ECB process. True access depends on more than a process that's "easy to understand" – it requires a process straightforward in design. This is necessary because a complex, labyrinthine, or repetitive complaint process tends to exhaust complainants and discourage them from pursuing their complaints.

Some clarification of the **Timely and Efficient** principle is warranted, too, in recognition of the need to speed up resolution of complaints. This should be emphasized in addition to the goal of preventing undue delays.

2. What ECB system structure would best address the deficiencies identified in the FCAC report and most effectively uphold the guiding principles outlined in the previous section?

We support a single, not-for-profit ECB with binding authority. Based on our review of practices elsewhere, Canada's current utilization of multiple ECBs in banking is an outlier among countries with well-developed financial systems and markets.

3. To what extent does the profit structure of an ECB have a real or perceived impact on the impartiality and independence of an ECB?

A for-profit ECB predictably will seek to maximize profits, and it will do so in two ways: (a) by driving down its expenses as much as possible; and (b) by doing whatever it can to attract and retain as many customers (i.e., banks) as possible. Expense reduction, at some point, brings into question whether the for-profit ECB is allocating sufficient resources to investigate cases much beyond a superficial overview of the complaint and the information provided primarily by the financial institution. Meanwhile, the for-profit ECB's imperative to keep the bank as a customer inevitably creates a perception – and potentially a reality – that the ECB will favour the bank. In short, by their very nature, for-profit ECBs suffer from a real or perceived lack of independence and impartiality.

4. To what extent could an ECB's fee assessment formula impact the real or perceived impartiality and independence of an ECB?

The fee assessment formulas currently employed by ADRBO and OBSI are both flawed. ADRBO's formula (charges member banks by the average number of complaints plus an hourly rate) lacks any semblance of independence and promotes the perception that ADRBO actively tries to curry favour with banks by discouraging or rejecting complaints and by doing cursory work on those complaints that it does investigate. OBSI's formula (charges based on the size of the institution and historical volume of complaints) is perceived as being driven, at least in part, by a need to compete with ADRBO's fee structure. But this fee competition raises questions about whether OBSI has been left with inadequate financial resources to pursue its public interest mandate fully.

5. What are the benefits to consumers from a banking ECB that provides non-bank dispute resolution services? Are there drawbacks?

Given the specialized and technical nature of most disputes involving financial products or services, we do not see a significant benefit to consumers from the fact that ADRBO is a branch of a firm that provides dispute resolution in a variety of other, dissimilar contexts.

In contrast, we believe OBSI's mandate as the single ECB for all registered investment dealers does present a significant benefit for financial consumers, given the very significant overlap in financial institutions providing both banking and investing services and the virtual homogeneity of many banking and investment products. OBSI's subject-matter expertise promotes consumer confidence in a single ECB system for investments, and likely would do the same for banking, as well. OBSI also reduces consumer confusion by offering a single intake source for both banking and investment disputes. It therefore is uniquely positioned to provide benefits from scale economies and staffing efficiencies if it is made the single ECB for banking in addition to investments.

6. Should an ECB be required to provide complainant assistance to customers, and what type of complainant assistance should be provided?

Absolutely! – see our discussion above about fairness. The ECB should promote its services extensively, educate consumers about their rights and responsibilities with respect to financial transactions, and assist complainants in articulating and organizing their complaints so that each will be fully investigated and expeditiously brought to a fair resolution.

7. Do you have views on whether the decisions of an ECB should be binding or non-binding on banks? Please refer to the guiding principles to support your position.

An ECB's effectiveness (including its ability to render impactful decisions) depends on its credibility and respect among complainants and financial institutions. However, it is extremely difficult for an ECB to establish credibility or engender respect without the ability to impose binding decisions – particularly in claims for larger amounts, where the financial institution will tend to be more reluctant to agree they should pay or pay fully. Since the ultimate objective of this consultation is to establish an effective ECB for Canada's banking system, we believe it is necessary and appropriate for the ECB to have binding authority in order to fulfil the guiding principle of impactful decision-making.

If fairness and integrity are added as guiding principles, as we have suggested, then binding authority is even more necessary since nothing is more unfair – and more apt to undermine public confidence in the banking system's integrity – than a disregarded finding that compensation is warranted.

8. Should the government establish requirements for representation on the board of directors of an ECB? To what extent should an ECB be required to make public its governance process?

ECBs have public interest mandates either explicitly or implicitly. Accordingly, we believe government *must* establish requirements for the composition of ECB's boards of directors that promote balanced stakeholder representation and broad diversity. In the same vein, we strongly support the adoption of extensive transparency and public accountability in ECB governance.

We thank you for this opportunity to comment on the issues and questions posed by your consultation paper. Please let us know if you require further input or elaboration on any of the matters we have outlined.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil Gross".

Neil Gross
Chair, Investor Advisory Panel