B.6
Request for Comments

B.6.1 CSA Notice and Request for Comment – Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service – Proposed Amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations and Proposed Changes to Companion Policy 31-103CP Registration Requirements, Exemptions and Ongoing Registrant Obligations

CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Request For Comment

Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service

Proposed Amendments to
National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*

Proposed Changes to
Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*

November 30, 2023

1. Introduction

The Canadian Securities Administrators (**CSA** or **we**) are publishing for a **90-day comment period expiring February 28, 2024,** proposed amendments to certain complaint handling provisions of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), as well as proposed changes to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**31-103CP**).

The proposed amendments to NI 31-103 are referred to as the **proposed rule amendments** and the proposed changes to 31-103CP are referred to as the **proposed CP changes**.

The proposed rule amendments and proposed CP changes would form part of a new regulatory framework (the **proposed framework**) under which an independent dispute resolution service (**IDRS**) that is a not-for-profit entity and which has been designated or recognized by CSA jurisdictions (the **identified ombudservice**) would have the authority to issue binding final decisions.

The British Columbia Securities Commission (**BCSC**) supports the outcomes intended by this project, but is not participating in the proposal for comment of the rule amendments or proposed CP changes. British Columbia is considering legislative changes that may achieve the same outcomes as those intended by the proposed framework. The BCSC is interested in feedback on the proposed framework and will take comments into consideration.

In Québec, the Autorité des marchés financiers (**AMF**) provides, as per its governing legislation, conciliation and mediation services to consumers of financial products and services, including retail investors. The AMF is participating in the CSA consultation by proposing to maintain the exemption applicable to firms registered in Québec regarding the dispute resolution services requirements under NI 31-103. In this Notice, all references to outcomes sought by the CSA are therefore made by CSA members excluding Québec.

To provide context for the proposed rule amendments and to ensure meaningful participation in this consultation and in the further development and refinement of the proposed framework, this Notice also describes potential key structural elements of a proposed framework, the CSA's rationale for proposing these elements, and questions and matters for consideration where we encourage specific feedback to inform our continued work. We also welcome general comments on all components of this publication.

Currently, NI 31-103 provides for the Ombudsman for Banking Services and Investments (**OBSI**) as an independent service that resolves disputes, but OBSI does not have authority to make binding decisions. If implemented, the proposed rule amendments

would modify the complaint handling process and require that firms (as defined below) comply with a final decision of the identified ombudservice.

The proposed framework is informed by the CSA's experience overseeing OBSI in its current form, as well as international best practices. If the proposed framework is implemented, we anticipate that OBSI would be the IDRS considered for designation or recognition by securities regulatory authorities.

Implementing a binding investment ombudservice regime in Canada would improve confidence in our markets and provide retail clients who are dissatisfied with their firm's response to a complaint and who take their dispute to OBSI for resolution (each, a **complainant**) with a fully effective system of redress that is final, fair and accessible. For example, internationally, a number of financial ombudservices that may be considered OBSI's peers have the authority to issue binding decisions.

In Canada, while most retail clients' complaints are resolved by firms, the CSA has observed historic refusals to pay complainants at all and patterns of settling disputes for less than OBSI recommends. This can have significant impacts on complainants and may discourage others from taking their case to OBSI. Making OBSI recommendations binding could improve investor protection and promote increased fairness for retail clients. In addition to impacting clients, these historically observed patterns and dynamics may also be inefficient for firms given that OBSI's services do not necessarily resolve a dispute, which potentially prolongs complaint resolution processes and consumes more resources to bring finality to them.

In developing the proposed framework, the CSA was also informed by the demonstrated fairness and efficiency of dispute resolution services currently available to parties through OBSI as an alternative to litigation, which can be complicated, expensive, and stressful for all parties. The CSA considered reports and consultations that considered the benefits of, and recommended that OBSI be granted binding authority, including those of the independent evaluators of OBSI and Ontario's Capital Markets Modernization Taskforce. The CSA also consulted OBSI and was informed by statements of regulatory priorities in CSA jurisdictions.

The CSA recognizes the importance of having an efficient system that resolves complaints fairly and effectively without creating undue burden for either party to a dispute. To promote a high degree of confidence for all parties using the dispute resolution services of an identified ombudservice, the proposed framework would incorporate OBSI's existing investigation and recommendation processes while adding a subsequent optional review stage, the outcome of which is a final decision that binds firms and, in particular circumstances, complainants.

Legislative amendments in CSA jurisdictions will be required to enable the proposed framework. Accordingly, some CSA jurisdictions have suggested amendments to local statutes for consideration by their government. Any amendments to local acts would be proposed by governments. Proposed legislative amendments would only become law in a CSA jurisdiction if they were proclaimed and in force in that jurisdiction. Nothing in this Notice or the decision to publish the Notice should be considered as an indication of whether such legislative amendments will be made in any jurisdiction.

CSA jurisdictions other than British Columbia are issuing this Notice to solicit comments on the proposed rule amendments and the proposed CP changes that are part of the proposed framework. Although the BCSC is not publishing the proposed rule amendments and the proposed CP changes for comment, the BCSC is interested in the views expressed.

The text of the proposed rule amendments and the proposed CP changes are reflected in Annex B and Annex C of this Notice and is also available on the websites of certain CSA jurisdictions, including:

lautorite.qc.ca
www.asc.ca
https://nssc.novascotia.ca
https://fcnb.ca
www.osc.ca
www.fcaa.gov.sk.ca
www.mbsecurities.ca

2. Substance and Purpose

Currently, Part 13, Division 5 of NI 31-103 sets out requirements that apply to a registered firm, except an investment fund manager acting in that capacity[1] (each, a **firm**), for handling and responding to complaints by retail clients, as well as requirements regarding making an independent dispute resolution or mediation service available to a retail client.[2]

If implemented, the proposed rule amendments would impose new requirements on firms in respect of a not-for-profit IDRS that has been designated or recognized by an order of the securities regulatory authority (each, a **harmonized order**). Harmonized

[1] See subsection 13.14 (1) of NI 31-103, "This Division does not apply to an investment fund manager in respect of its activities as an investment fund manager."

[2] Please note that, in Québec, pursuant to section 13.14 of NI 31-103, a registered firm is deemed to comply with Part 13, Division 5 of NI 31-103 if it complies with sections 168.1.1 to 168.1.4 of the Securities Act (RSQ, chapter V-1.1). The requirement to make available an independent dispute resolution or mediation service also does not apply in Québec.

orders would make the not-for-profit IDRS the identified ombudservice authorized to make binding final decisions, the services of which firms would be required to make available to their retail clients free of charge.

Recognizing the impact binding decisions would have on all parties, the proposed framework contemplates that an identified ombudservice would have an initial investigation and recommendation stage based on OBSI's current practice. Additionally, the proposed framework contemplates an internal review stage where firms and complainants may raise specific concerns regarding the identified ombudservice's recommendation. In order to ensure that efficiency and proportionality are preserved, the internal review stage would require that the identified ombudservice use only procedures proportionate to the dispute in reviewing a recommendation. Once the identified ombudservice issues its final decision following the internal review stage, the final decision would be binding on a firm in all circumstances and would be binding on a complainant if the complainant objected to the recommendation and thus triggered the review. Implementing the proposed framework would enhance the accessibility and efficiency of dispute resolution through the identified ombudservice, provide fairness for both firms and complainants, and enhance investor protection and confidence in the investment services sector.

The proposed rule amendments would be necessary to implement key potential structural elements of the proposed framework in the jurisdictions publishing them for comment. The new provisions would require firms to, among other things, comply with a final decision of the identified ombudservice.

To reduce the risk of confusing the dispute resolution services of the identified ombudservice with a firm's internal complaint handling processes, the proposed rule amendments would also prohibit firms from using certain terminology for internal or affiliated services that implies independence, such as the title "ombudsman" or "ombudservice". This proposed prohibition on certain terminology would not prevent firms from offering complaint handling services or processes; it is intended to underscore the policy rationale of improving investor redress through the identified ombudservice.

The proposed framework would more closely reflect international best practices for financial dispute resolution services, including a two-stage process and binding decisions.

3. Background

a. Binding authority and international financial ombudservices

Financial ombudservices that provide dispute resolution services operate in many jurisdictions globally. While some ombudservices make only non-binding recommendations, some financial ombudservices – including examples in the United Kingdom,[3] Australia,[4] and Ireland,[5] jurisdictions which have similar legal systems to Canada's – have the authority to issue binding final decisions. In respect of the current dispute resolution process available through OBSI, Canada has not kept pace with these jurisdictions in implementing a binding ombudservice regime. This gap received international comment in the most recent International Monetary Fund (**IMF**) Financial Sector Assessment Program (**FSAP**) review of Canada.[6]

In addition to the IMF's international critique, the lack of binding authority has been identified as a concern domestically.[7] Three independent evaluations of OBSI, required by the CSA as part of the current oversight regime, have identified the lack of binding authority as a significant design flaw in Canada's investment dispute resolution system.[8]

The financial ombudservices of the United Kingdom, Australia and Ireland operate within regulatory frameworks which emphasize fairness and flexibility, and which share many elements with the proposed framework, including:

- a single ombudservice either created by legislation or recognized by a regulator
- oversight by financial service regulatory authorities
- no obligation for a complainant to use the ombudservice and preserving the complainant's ability to pursue their case in court instead
- the ombudservice's standard of decision-making considers what is fair in all the circumstances between the complainant and financial services provider, having regard to relevant codes and good industry practices

3 Financial Ombudsman Service (UK), How we make decisions, "Final Binding Decisions", accessed at <https://www.financial-ombudsman.org.uk/who-we-are/make-decisions>.

4 Australian Financial Complaints Authority, What process we follow, "Determination (a binding decision)", accessed at < https://www.afca.org.au/what-to-expect/the-process-we-follow>.

5 Financial Services and Pensions Ombudsman, How we deal with your complaint, "Formal complaint resolution", accessed at < https://www.fspo.ie/our-services/>.

6 *Canada: Financial System Stability Assessment IMF Country Report No. 19/177*, June 2019 by the International Monetary Fund, at p 30.

7 *See, for example*, Capital Markets Modernization Taskforce, *Modernizing Ontario's Capital Markets: Capital Markets Modernization Taskforce Final Report*, online: <Ontario.ca>, (January 2021) [https://www.ontario.ca/document/capital-markets-modernization-taskforce-final-report-january-2021].

8 *See, for example,* Poonam Puri and Dina Milivovejic, *Independent Evaluation of the Canadian Ombudsman for Banking Services and Investments' (OBSI) Investment Mandate* (2022) at p 9.

- the ombudservice has latitude in determining its decision-making procedures, with a focus on procedural fairness, proportionality and efficiency
- a "first stage" investigator recommending compensation where facilitated settlement between the parties cannot be reached, followed by a binding decision made by a separate, more senior internal decision-maker if either party rejects the case handler's recommendation and elects to pursue a "second stage" binding process
- the ability to award monetary and non-monetary remedies
- enforceability of the ombudservice's final decision

Regarding which parties are bound by a final decision, Ireland's framework takes a different approach from the frameworks in the United Kingdom and in Australia. In Ireland, both the firm and the complainant are bound, whereas in the United Kingdom and Australia, only the firm is bound. However, under Ireland's framework, an appeal of a decision to the High Court is permitted, whereas no appeal is permitted under the frameworks in either the United Kingdom or Australia.

Additional examples of financial ombudservices with binding decision-making authority include:

- Insurance and Financial Services Ombudsman Scheme (New Zealand)[9]
- Financial Ombudsman Institution (Taiwan)[10]
- Financial Industry Disputes Resolution Centre (FIDeC) (Singapore)[11]
- Dutch Institute for Financial Disputes (Kifid) (Netherlands)[12]
- Office of the Ombud for Financial Services Providers (South Africa)[13]
- The Office of the Czech Financial Arbitrator (Czech Republic)[14]

Recently, Spain announced that it will create an independent administrative authority with the ability to make binding decisions, with the goal of strengthening the system of out-of-court settlement of complaints between institutions and customers of banking, securities and insurance products.[15]

b. Current investor redress through OBSI

OBSI is a federally incorporated not-for-profit organization that provides an independent service for resolving investment disputes between participating firms and their clients, at no cost to those clients and without the need for legal representation. OBSI's services are available to complainants who want an independent and impartial third party to resolve a dispute about whether their firm has treated them fairly.[16] Currently, firms in Canada (except in Québec) must, under subsection 13.16(6) of NI 31-103, "take reasonable steps to ensure that OBSI will be the independent dispute resolution or mediation service that is made available to a client".

In assessing complaints, OBSI applies a fairness standard whereby OBSI considers what would be fair to the parties in all the circumstances of a complaint.[17] In applying the fairness standard, OBSI "[takes] into account general principles of good financial services and business practice, law, regulatory policies and guidance, professional body standards and any relevant code of practice or conduct".[18]

In applying the fairness standard, OBSI uses an inquisitorial process or method whereby an investigator, in an independent and impartial role, takes an active part in investigating the facts of the case before making a recommendation about the outcome of the dispute (**inquisitorial approach**). Under the inquisitorial approach, an OBSI investigator gathers evidence from the parties, identifies core issues, asks the parties follow-up questions, and makes a recommendation on the issues based on their findings. The inquisitorial approach is distinct from an adversarial process where each party presents their own facts and positions on issues. Overall, the adversarial process can be difficult for parties to navigate without a lawyer and specific industry expertise. In

9 *See* www.ifso.nz
10 *See* www.foi.org.tw
11 *See* www.fidrec.com.sg
12 *See* www.kifid.nl
13 *See* www.faisombud.co.za
14 *See* www.finarbitr.cz
15 Reuters, "Spain to launch financial consumers' protection authority", online: <reuters.com>, (April 5, 2022) [https://www.reuters.com/world/europe/spain-launch-financial-consumers-protection-authority-2022-04-05/].
16 Retail clients who are concerned that a firm has breached securities regulations or requirements may complain to the securities regulatory authority, or if the firm is a member, to CIRO.
17 *See* OBSI Terms of Reference at section 13.2, "OBSI will make a recommendation or reject a complaint with reference to what is, in OBSI's opinion, fair in all the circumstances to the Complainant and the Participating Firm".
18 *Ibid*, s. 8.1(a).

contrast, the inquisitorial approach allows parties to interact with OBSI without a lawyer and can provide a timely resolution for both firms and complainants.

The inquisitorial approach gives OBSI procedural flexibility to address the potential power imbalance between complainants and firms when determining the issues in dispute and gathering information. This approach also acknowledges that firms often have greater resources and specialized knowledge in relation to the substance of a complaint. OBSI's inquisitorial approach is crucial to making its services accessible to retail clients because it enables OBSI to apply only the processes that are necessary and proportionate to each complaint. OBSI's ability to control its own procedures enables OBSI to provide fair access to its services, maintain efficiency for all parties to a dispute, and minimize the chances that complainants will abandon the dispute resolution process due to complexity.

Currently, when OBSI investigates a complaint and determines that it would be fair for the firm to provide monetary compensation to a complainant, OBSI typically first attempts to facilitate a settlement between the complainant and the firm. If the parties do not arrive at a settlement, OBSI issues a non-binding recommendation for an amount up to the monetary compensation limit of $350,000. In cases where OBSI recommends compensation, OBSI has no formal power or process to require a firm to pay the complainant.

Since firms are currently not required to comply with an OBSI recommendation, to encourage compliance, OBSI employs a 'name and shame' system under which OBSI publishes the names of only those firms which refuse to follow its recommendations in their entirety. However, historically, publication has not included the names of firms that settle a complaint at an amount lower than what OBSI recommended. Consequently, if a firm disagrees with an OBSI recommendation and the complainant accepts a settlement offer lower than OBSI's recommendation, then the firm's name will not be made public. As OBSI recommendations are not binding on a firm, complainants may feel compelled to accept a lower settlement offer or risk receiving nothing. While commencing a civil proceeding to seek full compensation is another option for the complainant, such proceedings can be time-consuming, expensive, and stressful.

The concerns about the current "name and shame" system were highlighted in both the 2016[19] and 2021[20] independent evaluations of OBSI's investment operations and processes. The evaluations criticized the current system for creating a power imbalance in favour of registered firms, with the result that firms can negotiate down the compensation paid to complainants.[21] Likewise, each of the 2011, 2016 and 2021 independent evaluations recommended that OBSI be given binding authority.[22] These recommendations were accompanied by favourable findings regarding OBSI's accessible investigative processes and OBSI's rates of case retention (as described below).

c. Patterns Observed by the CSA

The CSA's development of the proposed framework has been informed by a variety of concerns and observed patterns. As the independent evaluators of OBSI's investment operations and processes observed in their 2016 and 2021 reviews, the CSA has also recognized that low settlements may erode investor confidence in the fairness and effectiveness of the dispute resolution process.[23] Historically, patterns of refusals may have had a similar impact.

The OBSI process for dispute resolution provides efficiency for firms and a helpful service for complainants, as shown by strong case retention rates.[24]

In developing the proposed framework, the CSA has sought to balance the need to address observed patterns, enhance fairness and improve efficiency for both firms and complainants that engage in the dispute resolution services of OBSI.

i. Low settlements

Since OBSI's recommendations are currently not binding, CSA staff have observed that some firms offer a settlement amount that is less than the amount of compensation recommended by OBSI. The complainant's main alternatives to OBSI are initiating a civil proceeding against the firm or abandoning the complaint. Given limited alternatives available to complainants, once OBSI makes a recommendation, complainants may feel they must accept a settlement offer that is below OBSI's recommended amount or risk receiving nothing. This dynamic may dissuade some complainants from using OBSI's non-binding process.

Low settlements and settlement refusals may erode retail client confidence in the fairness and effectiveness of OBSI's dispute resolution services, the CSA's approach to independent dispute resolution generally, and in addition may contribute to reluctance to engage with firms or to invest in financial markets using the services of firms if there is no assurance of an effective dispute

19 Deborah Battell and Nikki Pender, *Independent Evaluation of the Canadian Ombudsman for Banking Services and Investments' (OBSI) Investment Mandate* (2016) at p 1.
20 Puri and Milivojevic, *supra*, at p 9.
21 *Ibid*, for example at p 34.
22 Battell and Pender, *supra* at p 7; Puri and Milivojevic, *supra* at p 9; Navigator Company, *Ombudsman for Banking Services and Investments, 2011 Independent Review* (2011), at p 9.
23 CSA Staff Notice 31-362 *OBSI Joint Regulators Committee Annual Report for 2021* (November 3, 2022), at p 5.
24 See case retention rate discussion at page 9 of this Notice.

resolution service. Addressing the non-binding nature of OBSI recommendations is an opportunity to promote increased confidence in Canada's investment services sector and drive efficiencies for both parties to a financial services dispute.

Overall, since OBSI's fiscal year 2018, retail clients received approximately $1.6 million less than what OBSI recommended at the conclusion of OBSI's investigation.[25] The CSA has observed that the percentage of cases that settle below OBSI's recommended amount (**low settlement cases**) increases as the value of the recommended monetary compensation increases.

Table 1 below shows case data provided by OBSI, including the percentage of cases where retail clients settled below OBSI's recommended amount from 2018-2022.

Table 1 – 2018-2022 Investment Cases Settled Below OBSI's Recommended Amount

OBSI Recommended Amount	% of Cases settled below OBSI's recommended amount	# of Cases Closed with monetary compensation recommendations
$1 to $9,999	1%	384
$10,000 to $49,999	13%	113
$50,000 to $99,999	46%	26
$100,000 to $199,999	43%	14
$200,000 to $350,000	67%	9

While compliance with OBSI recommendations is generally strong where the recommended monetary compensation is below $50,000, the percentage of low settlements increases where the recommended compensation exceeds $50,000. In terms of the dollar amount, where OBSI made a recommendation for compensation of $50,000 or less, the complainant received an average of $8,373 less than what OBSI recommended.[26] Where OBSI made a recommendation for compensation above $50,000, the complainant received an average of $59,373 less than what OBSI recommended.[27] On average, low settlement cases settled for 60% of OBSI's recommended amount of compensation.[28] This observed pattern can be problematic, given that complainants who have received a greater monetary compensation recommendation are likely to be those who have suffered greater harm.

Providing an identified ombudservice with binding authority would give complainants more certainty that they would receive fair redress that reflects the harm suffered, if the identified ombudservice determines that compensation is warranted. In turn, this may also improve investor confidence in OBSI, as the potential identified ombudservice, prompting more retail clients to take their disputes to OBSI.

ii. Case retention

Case retention at OBSI – that is, whether a complainant engages in OBSI's processes until OBSI concludes its investigation and determines whether to recommend compensation – provides some guidance as to how parties, particularly complainants given that they have the power to withdraw or abandon their complaint before OBSI, view the OBSI dispute resolution process.

Table 2 below set outs OBSI's case retention from its fiscal years 2018 – 2022.

Table 2 - 2018 to 2022 Case Data - Investments Only

OBSI Fiscal Year	# of Cases Closed by OBSI	# of Closed Cases Withdrawn or Abandoned	% of Closed Cases Withdrawn or Abandoned
2018	327	21	6%
2019	387	6	2%
2020	405	11	3%
2021	567	9	2%
2022	444	6	1%

25 CSA Staff Notice 31-364 *OBSI Joint Regulators Committee Annual Report for 2022* (October 2023), at p 4.
26 *Ibid.*
27 *Ibid.*
28 *Ibid*.

The data above shows that overall, OBSI has low case withdrawal rates, and suggests that the current process used by OBSI in considering a complaint is one that complainants may generally find to be helpful or accessible. It appears that complainants choose to remain engaged instead of pursuing other forms of dispute resolution or abandoning their case. A complainant's willingness to have their complaint assessed by OBSI is likewise positive for firms as they will not have to delegate additional resources to defending legal proceedings. Given the general indicia that complainants are content with having their complaints investigated and resolved by OBSI, and the positive impact this also has for firms, the CSA is of the view that the inquisitorial approach currently used by OBSI should be maintained in the proposed framework.

d. Design of Proposed Framework – Improving Investor Redress

The proposed framework being developed by the CSA would be a binding authority regime that is intended to be fair, efficient, accessible for all parties, and ultimately to improve access to redress for retail clients. To achieve this, dispute resolution under the proposed framework would include enhanced procedures for both firms and complainants.

Under the proposed framework, a not-for-profit IDRS would be designated or recognized by securities regulatory authorities, making it the identified ombudservice. The identified ombudservice would be subject to coordinated oversight by CSA jurisdictions, including through harmonized orders that would include terms and conditions on the identified ombudservice. Harmonized orders governing the identified ombudservice, an enhanced CSA oversight program, and prior CSA approval of certain identified ombudservice procedures and documents, including changes to them, would apply. As discussed below, we anticipate that OBSI would be the identified ombudservice.

The CSA pursued its work informed by international comparators and multi-year patterns of firms' engagement with OBSI that raised concerns about investor protection and fairness for complainants. Our work to date in developing the proposed framework has also been informed by the demonstrated efficiency of the dispute resolution mechanism currently available to parties through OBSI.

To address observed patterns and key concerns, the proposed framework would include binding authority for the identified ombudservice, while preserving OBSI's existing investigative processes. The proposed framework would achieve this by adding an optional review stage with a flexible and proportionate process applied by the identified ombudservice in reaching a binding final decision that provides certainty and finality to the parties. The two stages used by the identified ombudservice – investigation and review – would enhance fairness and confidence for both parties to a complaint. In addition, the proportionate processes applied by the identified ombudservice under the proposed framework may help to preserve the firm's relationship with the complainant following resolution of the dispute, a prospect which may be less likely following recourse through litigation which is adversarial in nature.

4. Key Elements of the proposed framework

This part of the Notice describes key elements of the proposed framework, including dispute resolution through the services of the identified ombudservice, the regulatory regime required to implement the proposed framework, and CSA oversight.

a. Overview of Regulatory Regime

To create a regulatory regime that would implement the proposed framework, the proposed rule amendments would require the adoption of legislation in local jurisdictions. Below, we provide an overview of key elements of the overarching regulatory regime that would implement the proposed framework.

i. Legislation

Existing or new legislation in local jurisdictions that would be required to implement the proposed framework could include the following:

- Authorizing the securities regulatory authority to recognize or designate an IDRS (i.e., the identified ombudservice);
- Authorizing the securities regulatory authority to make decisions with respect to the manner in which an IDRS carries on business or any by-law, rule, regulation, policy, procedure, interpretation or practice of an IDRS;
- Authorizing the securities regulatory authority to make rules regarding a recognized or designated IDRS, including with respect to oversight and governance;
- Authorizing the securities regulatory authority to require firms to be a member of the identified ombudservice and to comply with binding final decisions of the identified ombudservice (discussed below);
- Authorizing the identified ombudservice to issue binding final decisions that include financial compensation;

- Establishing that either the identified ombudservice or a complainant may file a final decision of the identified ombudservice with the court, making the decision enforceable as if it were an order of the court;

- Setting out that the identified ombudservice must apply the fairness standard and proportionate processes (discussed below)

In addition, to support the identified ombudservice and its unique role as an efficient and fair dispute resolution service provider, it is contemplated that the identified ombudservice would be excluded from arbitration acts and if necessary, other legislation that sets out procedural requirements for tribunals. This would facilitate procedural and adjudicative flexibility for the identified ombudservice under CSA oversight, furthering its ability to act as an alternative to litigation as a dispute resolution service.

Nothing in this Notice or the decision to publish the Notice should be considered as an indication of whether such legislative amendments will be made in any jurisdiction.

ii. NI 31-103

The proposed rule amendments would include certain requirements, including that firms be members or maintain membership in the identified ombudservice, cooperate with the identified ombudservice in respect of its investigation and review of complaints by not withholding, destroying or concealing any information or documents, and comply with final decisions of the identified ombudservice.

In addition, to address the potential for retail investor confusion, the proposed rule amendments would prohibit the firm's use of certain terms when referring to their internal complaint handling procedures or to their internal complaint handling department or service (such as "ombudsman", "internal ombudservice" or a term that is substantially similar).

iii. 31-103CP

The proposed CP changes set out the CSA's interpretation of the requirements within the proposed rule amendments and provides guidance for complying with these requirements. This includes additional discussion of complaint handling with respect to complaints lodged with a firm verbally, as well as when OBSI may be notified about a complaint.

b. OBSI as the Potential Identified Ombudservice

Under the proposed framework, it is anticipated that OBSI would be considered for designation or recognition by CSA jurisdictions as the identified ombudservice under NI 31-103. The identified ombudservice would be subject to coordinated oversight by CSA jurisdictions, which the CSA continues to develop, and which is expected to reflect certain existing oversight regimes such as those in place for self-regulatory organizations (**SROs**), clearing agencies and exchanges. Oversight is anticipated to include purview over governance and organizational aspects of the identified ombudservice.

The identified ombudservice would continue to function as an alternative dispute resolution service, with its processes and binding decision power designed to address the potential power imbalances referenced above. Use of the identified ombudservice's dispute resolution services would remain optional for complainants.

The proposed rule amendments would require firms to be members of the identified ombudservice, cooperate with the identified ombudservice in the dispute resolution process, and to comply with the final decision of the identified ombudservice, or the recommendation once it has been deemed a final decision, which may require payment of monetary compensation or potentially the performance of certain specified corrective actions.

Consultation Question

1. The CSA contemplates that under the proposed framework, an IDRS would be authorized to issue binding decisions in circumstances where it is designated or recognized in a jurisdiction as the identified ombudservice. It is possible that some CSA jurisdictions may not designate or recognize OBSI as the identified ombudservice at the same time, resulting in the status quo (e.g., OBSI making non-binding recommendations only) applying in those jurisdictions until OBSI were designated or recognized as the identified ombudservice. If jurisdictions designate or recognize OBSI as the identified ombudservice at different times, what operational impacts, if any, would you anticipate from an IDRS being designated or recognized in some but not all jurisdictions? How can these impacts best be managed?

c. Investigation and Review of a Complaint Before the Identified Ombudservice

A flowchart of the dispute resolution process through the identified ombudservice under the proposed framework is included at Annex D.

The proposed framework contemplates that the identified ombudservice would preserve as much of the investigative processes currently used by OBSI as possible, the integrity and fairness of which has been reviewed and endorsed through multiple independent reviews, while adding a new binding decision stage.

The proposed framework contemplates that, within harmonized orders, the identified ombudservice would have two stages as part of its dispute resolution process:

- *Investigation and settlement or recommendation* (**investigation and recommendation stage**)
- *Review and decision* (**review and decision stage**)

The investigation and recommendation stage of an identified ombudservice would carry forward OBSI's current investigative processes, while the review and decision stage would be the new stage under which an identified ombudservice would issue binding final decisions. Adding the review and decision stage would preserve as much of OBSI's current inquisitorial approach as possible while equipping the identified ombudservice with appropriate expanded procedural tools in order to issue a binding final decision without adding undue burden to the parties.

i. The Investigation and Recommendation Stage

Under the proposed framework, the investigation and recommendation stage would commence when a retail client notifies the identified ombudservice of a complaint that was not resolved through the firm's internal complaint handling processes, and which the complainant wishes the identified ombudservice to consider.

During this stage, the identified ombudservice would use the same inquisitorial approach currently used by OBSI to obtain relevant information to either facilitate a settlement between the parties in the course of preparing a recommendation or to make a recommendation to resolve the dispute. As is currently the case under OBSI's processes, the investigation and recommendation stage would be concerned with resolving a dispute fairly and addressing power imbalances which may exist between the parties because of potentially limited resources or lack of sophistication on the part of the complainant, as compared to the firm. In doing so, the identified ombudservice would act independently and impartially to gather and consider relevant information while applying the fairness standard.

The investigation and recommendation stage would result in a recommendation by the identified ombudservice. Following a recommendation, the firm and the complainant would both have the opportunity to object to the identified ombudservice's recommendation, in whole or in part, in which case the review and decision stage described below would begin.

A recommendation by the identified ombudservice would become binding on firms and deemed to be a final decision if neither the firm nor the complainant object to the recommendation within the time period specified by the identified ombudservice in its rules and the complainant has not withdrawn from the dispute resolution process either through commencing a separate legal proceeding or otherwise.[29]

ii. The Review and Decision Stage

Either the complainant or the firm could trigger the review and decision stage by submitting a written objection to the identified ombudservice regarding its recommendation.

During the review and decision stage, a senior decision-maker of the identified ombudservice who was not involved in the investigation and recommendation stage would consider the party's formal objection to the recommendation. The scope of the decision-maker's review would be limited to the specific objections raised by the parties and the decision-maker would apply the fairness standard. The decision-maker would not engage in facilitated settlement.

In conducting its review, the identified ombudservice would adopt a process that is proportionate to the complaint. The identified ombudservice would achieve a proportionate process by following a procedural threshold test under which the identified ombudservice would engage only in processes essential to achieving as efficient, quick, and understandable a process as possible in resolving disputes in a fair manner (the **essential process test**). We contemplate that the essential process test would be set out in legislative amendments in local jurisdictions. During the review and decision stage, the essential process test would enable the identified ombudservice to use processes that range from inquisitorial to adversarial, if they are essential to achieving a proportionate process for both parties to resolve a dispute fairly. The identified ombudservice would decide which procedural tools to apply in each review. In all scenarios, the identified ombudservice would apply processes that achieve procedural fairness for

[29] The firm would not be required to comply with a recommendation while the recommendation is subject to a review.

both the firm and the complainant and that do not create disproportionate burden on the parties. The use of procedural tools that are more commonly found within the adversarial system during the review and decision stage is anticipated to be infrequent and would be limited to circumstances that meet the essential process test.

Once the identified ombudservice has completed its review, it would issue a decision. If only the firm had objected to the outcome from the investigation and recommendation stage, the complainant would have an opportunity to reject the decision within a specified period. If the complainant does not reject the decision and has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice, the decision would become final and binding on the parties. Parties may also be able to apply for judicial review of the decision, where available.

We anticipate that additional details regarding the processes of the identified ombudservice would be set out in either the identified ombudservice's governance documents or within harmonized orders – including in respect of when a recommendation is deemed to be a final decision as well as the circumstances in which a complainant would not be permitted to either abandon the dispute resolution process or commence litigation following the issuance of a final decision. We also anticipate that CSA member approval of those processes, and any changes to those processes as proposed by the identified ombudservice, would be required under the proposed legislative framework and harmonized orders.

We contemplate that the identified ombudservice would publish materials and communications to reflect its processes under the proposed framework, and to develop appropriate forms and notices to ensure that all participants in the dispute resolution process through the identified ombudservice understand the process and their rights and responsibilities.

iii. Final decisions of the identified ombudservice

A final decision of the identified ombudservice may require the firm to provide monetary compensation to a complainant or to take a specific type of corrective action, as appropriate in the circumstances. A complainant would be bound by the outcome of the review and decision stage, if they object to the identified ombudservice's recommendation. If only the firm objects to the recommendation and seeks a review, then the complainant could reject the dispute resolution process, including after they receive the decision, and instead pursue a civil proceeding against the firm regarding their complaint.

A characteristic in the proposed framework that distinguishes it from international financial ombudservices is that the complainant would always be bound by a final decision made by the identified ombudservice, where the complainant triggered the review and decision stage. In contrast, in both the United Kingdom and Australia the complainant is bound by a final decision of the ombudservice only where the complainant formally accepts it. In these jurisdictions, if the complainant does not accept the ombudservice's final decision, the complainant may still seek resolution in another forum (such as a court). The CSA is of the view that, to promote finality, efficiency and fairness to both parties, binding complainants where the complainant sought a final decision of the identified ombudservice is an appropriate and balanced outcome and provides both parties to the dispute with a fair and final resolution of the matter.

The proposed framework contemplates that the maximum monetary compensation that could be awarded by the identified ombudservice would be $350,000, which is the current maximum monetary compensation that can be awarded by OBSI. Our view is that the maximum monetary compensation could be subject to review and increased in the future. The proposed framework also contemplates that the identified ombudservice may direct the firm to take specified corrective action, such as requiring a firm to return documents or to correct erroneous information where the firm's error was harmful to the complainant.

Additionally, once a final decision is rendered by the identified ombudservice at the conclusion of the review and decision stage, the complainant or the identified ombudservice would be able to file the identified ombudservice's decision with a superior court as an order of the court, making it enforceable.

Consultation Questions

2. The proposed rule amendments include a new provision requiring compliance with a final decision of the identified ombudservice. Under the proposed framework, we contemplate that both a recommendation or decision of the identified ombudservice could become a final decision that will be binding on the firm under certain circumstances. Specifically:

    a. With respect to a recommendation made by the identified ombudservice following the investigation and the recommendation stage, we contemplate the recommendation becoming a final decision where (i) a specified period of time has passed since the date of the recommendation, (ii) neither the firm nor the complainant has objected to the recommendation, and (iii) the complainant has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice (the **deeming provision**). What are your general thoughts about the deeming provisions and the circumstances that trigger it? Please also comment on whether 30, 60, 90 days would be an appropriate length of time to be specified for a recommendation to be deemed a final decision under the deeming provision.

b. With respect to the decision made by the identified ombudservice following the review and decision stage, we contemplate the decision becoming final where (i) a specified period of time has passed since the date of the decision (the **post-decision period**), and if the complainant did not trigger the review and decision stage, (ii) the complainant has not rejected the decision and has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice. Please comment on the provision of this post-decision period and whether 30, 60 or 90 days would be the appropriate length for the post-decision period.

3. The proposed framework contemplates that complainants could not reject a decision of the identified ombudservice if they initiated the second-stage review of the recommendation by objecting to it. What are your views on this approach?

4. Please provide any comments on maintaining the compensation limit amount of $350,000.

iv. No statutory right of appeal

The proposed framework does not contemplate a statutory right of appeal to an external body, such as a securities tribunal or to a court. However, it does contemplate the availability of judicial review in appropriate circumstances.

In proposing no statutory appeal right, we carefully considered historic commentary on this point, including comments received from stakeholders which raised questions about how to ensure accountability in a scenario where OBSI is granted binding authority, suggesting that an appeal right may be helpful in this regard.

We consider that the availability of an appeal right to either a court or to a CSA member tribunal may undermine a principal policy goal of this project. Namely, a right of appeal may re-introduce a power imbalance as between a complainant and a firm, with firms likely being in a better-resourced position to pursue appeals from a final decision of the identified ombudservice. While appeals to an external body could provide an additional opportunity to be heard or to consider the procedures and concepts applied by an identified ombudservice, appeals have costs. Appeals would increase expense, delay and complexity for the parties. Since securities tribunals and courts use adversarial processes, appeals to them could, over time, move the identified ombudservice towards an adversarial process, negating the benefits of the inquisitorial approach highlighted above. While appeal through a CSA member tribunal is potentially less costly to appellants, complainants may be at a disadvantage to firms in determining on what grounds they are permitted to make an appeal and to navigating the overall system without the assistance of legal counsel.

It is our view that the introduction of the essential process test, along with robust CSA oversight of the identified ombudservice, would sufficiently address concerns relating to procedural fairness. Parties may, where available, pursue the option of judicial review.

The proposed framework also does not include any statutory privative clause to restrict or limit rights to judicial review. We consider that judicial review, where available,[30] together with the enhanced regulatory oversight regime the CSA is developing that would be applicable to the identified ombudservice, will ensure strong and efficient accountability over a decision-maker authorized to deliver binding decisions.

A judicial review takes another look at a decision or order made by an administrative body to ensure the decision or order is fair, reasonable, and lawful. The availability of judicial review is anticipated to provide parties to a complaint with a venue in which to raise concerns about procedural fairness in respect of the identified ombudservice's decision-making processes. Judicial review would also permit parties to raise concerns with a superior court regarding the substance of a final decision issued by the identified ombudservice.

Because judicial review would not generally consider the case afresh but instead focus on procedural and substantive aspects at issue, we anticipate that judicial review will be an effective means for parties to raise concerns with the identified ombudservice's final decisions.

Ultimately, we anticipate that judicial review will be an additional means of ensuring fairness in the decision-making process.

Availability of judicial review will be determined by the superior court that receives an application for review.

Consultation Questions

5. The proposed framework does not contemplate an appeal of a final decision to either a securities tribunal, or a statutory right of appeal to the courts (although parties could still seek judicial review of a final decision). What impact, if any, do you think the absence of an appeal mechanism will have on the fairness and effectiveness of the framework for parties to a dispute?

[30] Common law rights and legislative provisions providing for judicial review by the superior courts may vary among Canadian jurisdictions.

6. Should the proposed framework include a statutory right of appeal to the courts or another alternative independent third-party procedure for disputes involving amounts above a certain monetary threshold (for example, above $100,000)? If so, please explain why.

d. CSA Oversight

The CSA considers appropriate and effective oversight of an IDRS that offers binding dispute resolution services to retail clients to be of paramount importance.

At this time, the CSA continues to develop an oversight regime for the identified ombudservice that would complement the proposed framework by balancing independence of the IDRS with a need for robust monitoring and response by securities regulatory authorities. We welcome comments in respect of an appropriate oversight regime for the identified ombudservice.

The CSA and OBSI entered into a Memorandum of Understanding (**MOU**) which provides a framework for oversight of and engagement with OBSI. Currently, the MOU sets out certain standards for OBSI, including those regarding governance, independence and standard of fairness, processes to perform functions on a timely and fair basis, fees and costs, resources, accessibility, systems and controls, core methodologies, information sharing, and transparency. The MOU also provides a framework for cooperation and communication between OBSI and the CSA and requires that OBSI undergo an independent evaluation at least once every five years.

We are of the view that a more comprehensive oversight regime should be developed for the identified ombudservice under the proposed framework, since it would be authorized to issue binding final decisions. This enhanced oversight regime would apply to OBSI if it were designated or recognized as the identified ombudservice. Upon implementation of the proposed framework, the CSA anticipates that oversight of the identified ombudservice would be enhanced and broadly follow the approach for oversight of SROs, clearing agencies, and exchanges. For example, similar to SROs, statutory authority in some jurisdictions could authorize the securities regulatory authority to make decisions with respect to the manner in which an identified ombudservice carries on business or any by-law, rule, regulation, policy, procedure, interpretation or practice of an identified ombudservice.

As the CSA has done for SROs, CSA oversight of the identified ombudservice would include oversight through harmonized orders setting out the terms and conditions on the identified ombudservice's recognition or designation. At the highest level, recognition or designation as the identified ombudservice would include a public interest requirement. Additionally, the harmonized orders would likely include obligations and requirements pertaining to risk identification, organizational structure and governance, including appropriate expertise and representation, fees, capacity building, reporting, and public transparency through publication of anonymized reasons. CSA jurisdictions would have approval powers over the identified ombudservice's key materials, which may include the Terms of Reference, procedural rules and written guidance.

Operationally, CSA oversight of the identified ombudservice is anticipated to include co-ordinated compliance examinations and monitoring of the identified ombudservice's reporting under a new MOU among the CSA jurisdictions. In advance of implementation of the proposed framework, we will develop oversight practices tailored to the identified ombudservice.

Consultation Questions

7. Are there elements of oversight, whether mentioned in this Notice or not, that you consider to be of particular importance in ensuring the objectives of the proposed framework are met? If so, please explain your rationale.

8. Do you consider oversight, together with the other aspects of the proposed framework discussed in this Notice, to be sufficient to ensure that the identified ombudservice remains accountable?

5. Summary of the proposed rule amendments and the proposed CP changes

The proposed rule amendments and the proposed CP changes are important components of the proposed framework and as such, are necessary to implement the proposed framework.

We welcome comments on all aspects of the proposed rule amendments and the proposed CP changes, as well as the proposed framework.

a. Proposed Rule Amendments

The proposed rule amendments would amend the definition of "complaint" for the purposes of sections 13.16 and 13.16.1 of NI 31-103 in order to clarify that a complaint concerns an "expression of dissatisfaction" that relates to a trading or advising activity of a firm or a representative of a firm.

The proposed rule amendments would require firms to make available the identified ombudservice for purposes of the requirement under subsection 13.16(4) of NI 31-103, be members of an identified ombudservice, cooperate with the identified ombudservice in respect of its investigation and review of complaints, and comply with final decisions of the identified ombudservice. We expect

that under the proposed framework the identified ombudservice would have the authority to decide to make a financial award or direct the firm to take a specified corrective action, such as correcting erroneous information a firm provided to a credit bureau or the Canada Revenue Agency regarding a complainant.

The proposed framework would require a firm to comply with the identified ombudservice's recommendation if neither party objects to the recommendation within a specified period. In these circumstances, a non-binding recommendation would be deemed to be a binding final decision of the identified ombudservice.

A party objecting to the recommendation would trigger a review of that recommendation and that review could result in the issuance of a binding final decision by the identified ombudservice. The proposed rule amendments would require a firm to comply with the identified ombudservice's decision, unless the complainant has rejected the decision or withdrawn from the dispute resolution process in a manner authorized by the rules of the identified ombudservice.

Section 13.16.1 would apply to a firm if a not-for-profit IDRS has been designated or recognized, making it the identified ombudservice in the jurisdiction. Section 13.16.1 would impose requirements on a firm regarding membership, cooperation, and compliance with a final decision as noted above.

If a CSA jurisdiction has not designated or recognized an identified ombudservice, the status quo is expected to apply in that jurisdiction, such that section 13.16 would continue to apply, and OBSI would continue to be authorized to issue non-binding recommendations.

Finally, the proposed rule amendments include a prohibition on firms using certain terminology that could be misleading or confusing to a retail investor (such as "ombudsman", "internal ombudservice" or a term that is substantially similar) when referring to a firm's complaint handling procedures or to an internal department or service that engages in complaint handling. The proposed prohibition on firms using certain terminology is consistent with Joint CSA Staff Notice 31-351 *Complying with requirements regarding OBSI* which indicates the general view that if an "internal ombudsman" is included in a registered firm's complaint-handing system, there is a potential for clients to confuse or conflate the firm's internal service with OBSI.[31] A similar prohibition can also be found at subsection 627.43(2) of the *Bank Act*,[32] which is applicable to the banking sector.

Consultation Question

9. Please provide your views on the anticipated effectiveness of prohibiting the use of certain terminology for internal or affiliated complaint-handling services that implies independence, such as "ombudsman" or "ombudservice", to mitigate investor confusion.

b. Proposed Changes to 31-103 CP

The proposed CP changes align complaint handling guidance with the requirements in NI 31-103. This includes additional discussion of complaint handling with respect to complaints lodged with a firm verbally, as well as when OBSI may be notified about a complaint. Additionally, it clarifies the CSA's expectation that for purposes of a firm's complaint handling obligations under NI 31-103, a complaint regarding trading or advising activity can include a complaint about client information, trading authority or suitability, and that consequently, CSA expects a firm to respond substantively and in writing.

The proposed CP changes also provide guidance regarding the proposed rule amendments, particularly the requirements they impose on firms. This includes discussion of when a firm is subject to the requirements of an identified ombudservice, when existing requirements would continue to apply, as well as membership and cooperation requirements with respect to an identified ombudservice.

6. Other matters

a. Alternatives considered to the proposed rule amendments and the proposed framework

The CSA has considered maintaining the status quo, under which OBSI would continue to make non-binding recommendations after its review of a complaint. The CSA is of the view that not proceeding with binding authority for a designated or recognized IDRS would prevent potential improvements to investor protection and potential enhancements to fairness, efficiency, and confidence in the investment services sector. As discussed above, the CSA has also considered adjustments to various elements of the proposed framework. While the proposed framework represents the CSA's view at this time, we welcome further comments on these elements. Please see section 7 below.

[31] Joint CSA Staff Notice 31-351, IIROC Notice 17-0229, MFDA Bulletin #0736-M – *Complying with requirements regarding the Ombudsman for Banking Services and Investments*, (December 2017) 30 OSCB 9651 at pp 4-5.

[32] SC 1991, c 46.

b. Local Matters

Where applicable, Annex E provides additional information required by the local securities legislation.

7. Request for Comments

a. Consolidated Questions

We welcome your comments on all aspects of the proposed rule amendments, the proposed CP changes, and the proposed framework. In addition to considering local regulators' statements of regulatory priorities and the reports of OBSI's independent evaluators, the CSA has consulted with OBSI regarding its processes and practices. The CSA also noted consultations by Ontario's Capital Markets Modernization Taskforce as well as by others, where relevant.

In addition to any general comments you may have, we also invite comments on the specific questions included throughout this Notice, which are reproduced in the following consolidated list for ease of review:

1. The CSA contemplates that under the proposed framework, an IDRS would be authorized to issue binding decisions in circumstances where it is designated or recognized in a jurisdiction as the identified ombudservice. It is possible that some CSA jurisdictions may not designate or recognize OBSI as the identified ombudservice at the same time, resulting in the status quo (e.g., OBSI making non-binding recommendations only) applying in those jurisdictions until OBSI were designated or recognized as the identified ombudservice. If jurisdictions designate or recognize OBSI as the identified ombudservice at different times, what operational impacts, if any, would you anticipate from an IDRS being designated or recognized in some but not all jurisdictions? How can these impacts best be managed?

2. The proposed rule amendments include a new provision requiring compliance with a final decision of the identified ombudservice. Under the proposed framework, we contemplate that both a recommendation or decision of the identified ombudservice could become a final decision that will be binding on the firm under certain circumstances. Specifically:

    a. With respect to a recommendation made by the identified ombudservice following the investigation and the recommendation stage, we contemplate the recommendation becoming a final decision where (i) a specified period of time has passed since the date of the recommendation, (ii) neither the firm nor the complainant has objected to the recommendation, and (iii) the complainant has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice (the **deeming provision**). What are your general thoughts about the deeming provisions and the circumstances that trigger it? Please also comment on whether 30, 60, 90 days would be an appropriate length of time to be specified for a recommendation to be deemed a final decision under the deeming provision.

    b. With respect to the decision made by the identified ombudservice following the review and decision stage, we contemplate the decision becoming final where (i) a specified period of time has passed since the date of the decision (the **post-decision period**), and if the complainant did not trigger the review and decision stage, (ii) the complainant has not rejected the decision and has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice. Please comment on the provision of this post-decision period and whether 30, 60 or 90 days would be the appropriate length for the post-decision period.

3. The proposed framework contemplates that complainants could not reject a decision of the identified ombudservice if they initiated the second-stage review of the recommendation by objecting to it. What are your views on this approach?

4. Please provide any comments on maintaining the compensation limit amount of $350,000.

5. The proposed framework does not contemplate an appeal of a final decision to either a securities tribunal, or a statutory right of appeal to the courts (although parties could still seek judicial review of a final decision). What impact, if any, do you think the absence of an appeal mechanism will have on the fairness and effectiveness of the framework for parties to a dispute?

6. Should the proposed framework include a statutory right of appeal to the courts or another alternative independent third-party procedure for disputes involving amounts above a certain monetary threshold (for example, above $100,000)? If so, please explain why.

7. Are there elements of oversight, whether mentioned in this Notice or not, that you consider to be of particular importance in ensuring the objectives of the proposed framework are met? If so, please explain your rationale.

8. Do you consider oversight, together with the other aspects of the proposed framework discussed in this Notice, to be sufficient to ensure that the identified ombudservice remains accountable?

9. Please provide your views on the anticipated effectiveness of prohibiting the use of certain terminology for internal or affiliated complaint-handling services that implies independence, such as “ombudsman” or “ombudservice”, to mitigate investor confusion.

b. Comment Process

Please submit your comments in writing by February 28, 2024.

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. In addition, all comments received will be posted on the websites of each of the Alberta Securities Commission at www.asc.ca, the Autorité des marchés financiers at lautorite.qc.ca and the Ontario Securities Commission at www.osc.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Thank you in advance for your comments.

Please address your comments to all of the CSA as follows:

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

Please deliver your comments only to the addresses that follow. Your comments will be forwarded to the remaining jurisdictions:

Meg Tassie
Senior Advisor, Legal Services,
Capital Markets Regulation
British Columbia Securities Commission
1200 - 701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, British Columbia V7Y 1L2
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mtassie@bcsc.bc.ca

The Secretary
Ontario Securities Commission
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Me Philippe Lebel
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Contents of Annexes

This Notice contains the following annexes:

- Annex A – Proposed Rule Amendments to National Instrument 31-103
- Annex B – Blackline showing Proposed Amendments to National Instrument 31-103
- Annex C – Blackline Showing Proposed Changes to Companion Policy 31-103CP

- Annex D – Overview and Flowchart of Identified Ombudservice Processes under Proposed Framework
- Annex E – Local Matters

Questions

Please refer your questions to any of:

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Financial and Consumer Affairs Authority of Saskatchewan
Mobolanle Depo-Fajumo
Legal Counsel
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Ontario Securities Commission
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Doug Harris
General Counsel, Director of Market Regulation and Policy and Secretary
Doug.Harris@novascotia.ca

ANNEX A

PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 31-103 *REGISTRATION REQUIREMENTS, EXEMPTIONS AND ONGOING REGISTRANT OBLIGATIONS*

1. National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations is amended by this Instrument.

2. Subsection 13.14(2) is amended by replacing "168.1.3***" with "***168.1.4***".***

3. The Instrument is amended by adding the following sections:

13.15.1 Prohibited terminology

(1) A registered firm must not describe the complaint handling procedures, officers or employees of the registered firm or an affiliate of the registered firm, in a manner that could lead a reasonable client to conclude that the procedures, officers or employees are independent of the registered firm.

(2) For greater certainty, and without limiting subsection (1), a registered firm must not refer to a department or service of the registered firm or an affiliate that engages in complaint handling with respect to complaints of the registered firm as independent, or as an ombudsman, internal ombudservice, or a term that is substantially similar.

13.16.01 Definitions – complaint handling

In sections 13.16 and 13.16.1,

"complaint" means an expression of dissatisfaction by a client that

(a) relates to a trading or advising activity of a registered firm or a representative of the firm, and

(b) is received by the firm within 6 years of the day when the client first knew or reasonably ought to have known of an act or omission that is a cause of or contributed to the client's expression of dissatisfaction;

"identified ombudservice" means an independent dispute resolution service that is incorporated as a not-for-profit entity and is designated or recognized by the securities regulatory authority.

"OBSI" means the Ombudsman for Banking Services and Investments or any successor entity that resolves disputes involving registrants and their clients.

4. The heading of section 13.16 is amended by adding "*offered to clients****" after "****service****".***

5. Section 13.16 is amended:

(a) by repealing subsection (1),

(b) in paragraph (2)(a) by deleting "this***" and adding "***13.16 and if applicable, subsections 13.16.1(1) and (2)***" after "***section***",***

(c) in paragraphs (2)(b) and (c) by replacing "under***" with "***pursuant to***",***

(d) by adding the following subsection:

(6.1) Despite subsection (6), if there is an identified ombudservice, the registered firm must make the identified ombudservice available to the client for the purposes of the requirement to make available an independent dispute resolution or mediation service under subsection (4).**, *and***

(e) in subsection (7) by replacing "Subsection (6) does**" with "***Subsections (6) and (6.1) do***".***

6. The Instrument is amended by adding the following section:

13.16.1 Firm obligations relating to an identified ombudservice

(1) If there is an identified ombudservice, a registered firm must

(a) be a member of the identified ombudservice;

(b) not withhold, destroy or conceal any information or documents or otherwise fail to cooperate with a reasonable request made by the identified ombudservice in respect of its investigation and review of a complaint;

(c) promptly comply with a final decision of the identified ombudservice.

(2) Paragraphs (1)(b) and (1)(c) do not apply unless the client agrees that any amount the client will claim for the purpose of the identified ombudservice's consideration of the complaint will be no greater than $350,000.

(3) This section does not apply in respect of a complaint made by a permitted client that is not an individual.

7. The provisions of Division 5 of Part 13 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, as amended by this Instrument, do not apply to a complaint received by the firm prior to the effective date of this Instrument.

8. A firm must comply with Division 5 of Part 13 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* as it read on [•] with respect to complaints received by the firm prior to the effective date of this Instrument.

9. (1) This Instrument comes into force on **[•]**.

(2) In Saskatchewan, despite subsection 1), if this Instrument is filed with the Registrar of Regulations after **[•]**, this Instrument comes into force on the day on which it is filed with the Registrar of Regulations.

ANNEX B

BLACKLINE SHOWING
PROPOSED AMENDMENTS TO
NATIONAL INSTRUMENT 31-103 *REGISTRATION REQUIREMENTS, EXEMPTIONS AND ONGOING REGISTRANT OBLIGATIONS*

Division 5 Complaints

13.14 Application of this Division

(1) This Division does not apply to an investment fund manager in respect of its activities as an investment fund manager.

(2) In Québec, a registered firm is deemed to comply with this Division if it complies with sections 168.1.1 to ~~168.1.3~~168.1.4 of the *Securities Act* (Québec).

13.15 Handling complaints

A registered firm must document and, in a manner that a reasonable investor would consider fair and effective, respond to each complaint made to the registered firm about any product or service offered by the firm or a representative of the firm.

~~**13.16 Dispute resolution service**~~

13.15.1 Prohibited terminology

(1) A registered firm must not describe the complaint handling procedures, officers or employees of the registered firm or an affiliate of the registered firm, in a manner that could lead a reasonable client to conclude that the procedures, officers or employees are independent of the registered firm.

(2) For greater certainty, and without limiting subsection (1), a registered firm must not refer to a department or service of the registered firm or an affiliate that engages in complaint handling with respect to complaints of the registered firm as independent, or as an ombudsman, internal ombudservice, or a term that is substantially similar.

13.16.01 Definitions – complaint handling

~~**(1)**~~ In ~~this section,~~sections 13.16 and 13.16.1,

"complaint" means ~~a complaint~~an expression of dissatisfaction by a client that

(a) relates to a trading or advising activity of a registered firm or a representative of the firm, and

(b) is received by the firm within 6 years of the day when the client first knew or reasonably ought to have known of an act or omission that is a cause of or contributed to the ~~complaint~~client's expression of dissatisfaction;

~~"~~

"identified ombudservice" means an independent dispute resolution service that is incorporated as a not-for-profit entity and is designated or recognized by the securities regulatory authority.

"OBSI~~"~~" means the Ombudsman for Banking Services and Investments or any successor entity that resolves disputes involving registrants and their clients.

13.16 Dispute resolution service offered to clients

(1) [Repealed]

(2) If a registered firm receives a complaint from a client, the firm must, as soon as possible, provide the client with a written acknowledgement of the complaint that includes the following:

(a) a description of the firm~~'~~'s obligations under ~~this~~ section 13.16 and if applicable, subsections 13.16.1(1) and (2);

(b) the steps that the client must take in order for an independent dispute resolution or mediation service to be made available to the client ~~under~~pursuant to subsection (4);

(c) the name of the independent dispute resolution or mediation service that will be made available to the client ~~under~~pursuant to subsection (4) and contact information for the service.

(3) If a registered firm decides to reject a complaint or to make an offer to resolve a complaint, the firm must, as soon as possible, provide the client with written notice of the decision and include the information referred to in subsection (2).

(4) A registered firm must as soon as possible ensure that an independent dispute resolution or mediation service is made available to a client at the firm's expense with respect to a complaint if either of the following apply:

(a) after 90 days of the firm's receipt of the complaint, the firm has not given the client written notice of a decision under subsection (3), and the client has notified the independent dispute resolution or mediation service specified under paragraph (2)(c) that the client wishes to have the complaint considered by the service;

(b) within 180 days of the client's receipt of written notice of the firm's decision under subsection (3), the client has notified the independent dispute resolution or mediation service specified under paragraph (2)(c) that the client wishes to have the complaint considered by the service.

(5) Subsection (4) does not apply unless the client agrees that any amount the client will claim for the purpose of the independent dispute resolution or mediation service's consideration of the complaint will be no greater than $350,000.

(6) For the purposes of the requirement to make available an independent dispute resolution or mediation service under subsection (4), a registered firm must take reasonable steps to ensure that OBSI will be the service that is made available to the client.

(6.1) Despite subsection (6), if there is an identified ombudservice, the registered firm must make the identified ombudservice available to the client for the purposes of the requirement to make available an independent dispute resolution or mediation service under subsection (4);

(7) ~~Subsection~~Subsections (6) ~~does~~and (6.1) do not apply in Québec.

(8) This section does not apply in respect of a complaint made by a permitted client that is not an individual.

13.16.1 Firm obligations relating to an identified ombudservice

(1) If there is an identified ombudservice, a registered firm must

(a) be a member of the identified ombudservice;

(b) not withhold, destroy or conceal any information or documents or otherwise fail to cooperate with a reasonable request made by the identified ombudservice in respect of its investigation and review of a complaint;

(c) promptly comply with a final decision of the identified ombudservice.

(2) Paragraphs (1)(b) and (1)(c) do not apply unless the client agrees that any amount the client will claim for the purpose of the identified ombudservice's consideration of the complaint will be no greater than $350,000.

(3) This section does not apply in respect of a complaint made by a permitted client that is not an individual.

ANNEX C

BLACKLINE SHOWING
PROPOSED CHANGES TO
COMPANION POLICY 31-103CP *REGISTRATION REQUIREMENTS, EXEMPTIONS AND ONGOING REGISTRANT OBLIGATIONS*

Division 5 Complaints

13.14 Application of this Division

Division 5 applies to registered firms that are registered dealers and registered advisers. Investment fund managers are only subject to Division 5 if they also operate under a dealer or adviser registration, in which case the requirements in this Division apply in respect of the activities conducted under their dealer or adviser registration. Furthermore, since sections 13.16(8) and 13.16.1(4) exclude from sections 13.16 and 13.16.1 a complaint made by a permitted client that is not an individual, we would not expect a registered firm that only has such clients to maintain membership in OBSI or an identified ombudservice.

In Québec, a registered firm is deemed to comply with this Division if it complies with sections 168.1.1 to ~~168.1.3~~168.1.4 of the Québec Securities Act~~, which provides a substantially similar regime for complaint handling~~.

The guidance in Division 5 of this Companion Policy applies to registered firms registered in any jurisdiction ~~including Québec~~.

However, ~~section 168.1.3 of~~ the Québec Securities Act~~,~~ includes requirements with respect to dispute resolution ~~or mediation~~ services that are different than those set out in section 13.16 of NI 31-103. In Québec, registrants must, in accordance with the Québec Securities Act, inform each complainant~~, in writing and without delay, that if the complainant is dissatisfied with how the complaint is handled or with the outcome, they may~~ of their right to request the ~~registrant to forward a copy~~examination of ~~the~~their complaint ~~file to~~record by the Autorité des marchés financiers if they are dissatisfied with the registered firms' processing of their complaint or the outcome. The registrant must forward a copy of the complaint file to the Autorité des marchés financiers~~, which will examine the complaint~~ for examination. The Autorité des marchés financiers may, with the parties' consent, act as ~~a~~conciliator or mediator ~~if it considers it appropriate to do so and the parties agree~~or designate a person to act as such.

13.15 Handling complaints

General duty to document and respond to complaints

Under Section 13.15 ~~requires~~, registered firms ~~to~~must document ~~complaints,~~ and ~~to effectively~~, in a manner that a reasonable investor would consider fair and ~~fairly~~effective, respond to ~~them~~each complaint made to the registered firm about any product or service offered by the registered firm or a representative of the firm. We are of the view that ~~registered firms should document and respond to all~~this includes complaints received from a client, a former client or a prospective client who has dealt with the registered firm (complainant), regardless of whether the method used to initiate the complaint was verbal or written.

~~Firms~~Registered firms are reminded that under paragraph 11.5(2)(m) they are required to maintain records which demonstrate compliance with complaint handling requirements ~~under paragraph 11.5(2)(m)~~.

Complaint handling policies

An effective complaint ~~system~~handling policy should deal with all formal and informal complaints or disputes in a timely and fair manner. To achieve ~~the objective of handling complaints fairly~~these objectives, the firm's complaint ~~system~~handling policy should include standards ~~allowing~~ for objective factual investigation and analysis of the matters specific to the complaint.

We take the view that registered firms should take ~~a~~an objective and balanced approach to the gathering of facts ~~that objectively considers~~, including concerning the ~~interests~~actions of

- ~~-~~ the complainant
- ~~-~~ the registered representative, and
- ~~-~~ the firm

Registered firms should not limit their consideration and handling of complaints to those relating to possible violations of securities legislation.

Complaint monitoring

The registered firm's complaint handling policy should provide for specific procedures for reporting ~~the~~ complaints to superiors~~,~~ in order to allow the detection of frequent and repetitive complaints made with respect to the same matter which may, on a cumulative

basis, indicate a serious problem. ~~Firms~~Registered firms should take appropriate measures to deal with such problems as they arise.

Responding to complaints

Types of complaints

All complaints relating to one of the following matters should be responded to by the firm by providing an initial and substantive response, both in writing and within a reasonable time:

- ~~-~~a trading or advising activity, including regarding client information, trading authority, and suitability
- ~~-~~a breach of client confidentiality
- ~~-~~theft, fraud, misappropriation, or forgery
- ~~-~~misrepresentation
- ~~-~~an undisclosed or prohibited conflict of interest, or
- ~~-~~personal financial dealings with a client

Firms may determine that a complaint relating to matters other than the matters listed above is nevertheless of a sufficiently serious nature to be responded to in the manner described below. This determination should be made, in all cases, by considering if an investor, acting reasonably, would expect a written response to their complaint.

When complaints are not made in writing

We would not expect that complaints relating to matters other than those listed above, when made verbally and when not otherwise considered serious based on an investor's reasonable expectations, would need to be responded to in writing. However, we do expect that verbal complaints be given as much attention as written complaints. If a complaint is made verbally and is not clearly expressed, the firm may request the complainant to put the complaint in writing and we expect firms to offer reasonable assistance to do so.

Firms are entitled to expect the complainant to put unclear verbal issues into written format in order to try to resolve confusion about the nature of the issue. If the verbal complaint is clearly frivolous, we do not expect firms to offer assistance to put the complaint in writing. The firm may nonetheless ask the complainant to put the complaint in writing on his or her own.

Timeline for responding to complaints

Firms should

- promptly send an initial written response to a complainant: we consider that an initial response should be provided to the complainant within five business days of receipt of the complaint
- provide a substantive response to all complaints relating to the matters listed under "Types of complaints" above, indicating the firm's decision on the complaint

A firm may also wish to use its initial response to seek clarification or additional information from the client. Requirements for providing information about the availability of dispute resolution or mediation services paid for by the firm are discussed below.

We encourage firms to resolve complaints relating to the matters listed above within 90 days.

13.15.1 Prohibited terminology

Section 13.15.1 is intended to reduce the risk of investors confusing an independent not-for-profit ombudservice such as OBSI with a department or affiliate of a registered firm.

13.16 Dispute resolution service ~~Section~~ offered to clients

~~13.15 requires a registered firm to document and respond to each complaint made to it about any product or service that is offered by the firm or one of its representatives. Section 13.16 provides for recourse to an independent dispute resolution or mediation service at a registered firm's expense for specified complaints where the firm's internal complaint handling process has not produced a timely decision that is satisfactory to the client.~~

~~Registered~~

Under section 13.16, registered firms ~~may be~~are required to make an independent dispute resolution or mediation service ~~paid for by the firm~~ available to a client in respect of a complaint ~~that~~where the firm's internal complaint handling process has not produced a timely decision that is satisfactory to the client.

- ~~relates to a trading or advising activity of the firm or its representatives, and~~
- ~~is raised within six years of the date when the client knew or reasonably ought to have known of the act or omission that is a cause of or contributed to the complaint~~

Where there is an identified ombudservice in the jurisdiction, the requirements in subsection 13.16(6.1) apply instead of the requirements in subsection 13.16(6). In these circumstances, a registered firm must make the identified ombudservice available to a client.

As soon as possible after a client makes a complaint (for example, when sending its acknowledgment or initial response to the complaint), and again when the firm informs the client of its decision in respect of the complaint, a registered firm must provide a client with information about

- ~~•~~ a description of the firm's obligations under section 13.16, and if applicable, subsections 13.16.1(1) and (2),
- ~~•~~ the steps the client must take for an independent dispute resolution or mediation service to be made available to the client at the firm's expense, and
- ~~•~~ the name of the independent dispute resolution or mediation service, that will be made available to the client ~~(outside of Québec, this will normally be the Ombudsman for Banking Services and Investments (OBSI), as discussed below) and how to contact it~~ and contact information for the independent dispute resolution or mediation service.

~~Registrants who do business in other sectors~~

Some registrants are also registered or licensed to do business in other sectors, such as insurance. If there is a complaint about a registrant, then a registrant should inform their client that the services of the independent dispute resolution service or identified ombudservice are limited to complaints concerning registerable activities.

Taking a complaint to the independent dispute resolution or mediation service

A client may ~~escalate an eligible~~take a complaint to the independent dispute resolution or mediation service made available by the registered firm in either of two circumstances:

- ~~•~~ If the firm fails to give the client notice of its decision within 90 days of receiving the complaint ~~(telling, then~~ the client ~~that the firm plans to take more than 90 days to make its decision does not 'stop the clock'). The client~~ is ~~then~~ entitled to ~~escalate~~take the complaint to the ~~independent~~ service immediately ~~or at any later date until the firm has notified the client of its decision~~.
- ~~•~~ If the firm has given the client notice of its decision about the complaint ~~(whether it does so within 90 days or after a longer period)~~ and the client is not satisfied with the decision, the ~~client~~complainant then has 180 days ~~in which~~ to ~~escalate~~take the complaint to the ~~independent~~ service for consideration.

~~In either instance, the client may escalate the complaint by directly contacting the independent service.~~

~~We think that it may sometimes be appropriate for the independent service, the firm and the client involved in a complaint to agree to longer notice periods than the prescribed 90 and 180 day periods as a matter of fairness. We recognize that where a client does not cooperate with reasonable requests for information relating to a complaint, a firm may have difficulty making a timely decision in respect of the complaint. We expect that this would be relevant to any subsequent determination or recommendation made by an independent service about that complaint.~~

If a registered firm's complaint handling process takes longer than 90 days, a firm communicating to the complainant that the firm plans to take more than 90 days to make its decision does not 'stop the clock'. In addition, we note that the prescribed 90- and 180-day periods for a complainant to take a dispute to the independent dispute resolution or mediation service, as set out in section 13.16(4), apply respectively to when a registered firm first receives a complaint from a client and to the period after the client receives written notice of the firm's decision. The 90-day period applies to all internal complaint handling processes that may be pursued by the registered firm prior to providing the client written notice of a decision. If a client receives a written notice of the registered firm's decision, then the client has 180 days to notify the independent dispute resolution or mediation service that the client wishes to have their complaint considered. If a registered firm's complaint handling policy includes a secondary complaint handling department that can be engaged following the firm's initial handling of the complaint, then a complainant may take a dispute to the independent dispute resolution or mediation service before the secondary complaint handling department is engaged, as long as the conditions in section 13.16(4) are met.

The client must agree that the amount of any recommendation or decision by the independent dispute resolution or mediation service for monetary compensation will not exceed the compensation limit, that is $350,000. This limit applies only to the amount that ~~can~~may be ~~recommended. Until it is escalated to~~recommend or awarded, so outside the processes of the independent dispute resolution or mediation service, a complaint ~~made to~~regarding a registered firm may include a claim for a larger amount.

~~Except in Québec~~

We would regard it as a serious compliance issue if a registered firm misrepresented the services of the independent dispute resolution or mediation service, or exerted pressure on a client to not engage in that service.

Nothing in section 13.16 affects a client's right to choose to seek other recourse, including through the courts. If a client does not make use of the service, or if a client abandons a complaint that is under consideration by the service, the registered firm is not obligated to provide another service at the firm's expense.

Membership

Where there is an identified ombudservice in the jurisdiction, registered firms must be members of the identified ombudservice.

In jurisdictions without an identified ombudservice, a registered firm must take reasonable steps to ensure that the dispute resolution and mediation service that is made available to its clients ~~for these purposes~~under subsection 13.16(4) will be OBSI (except in Québec). The reasonable steps we expect a firm to take include maintaining ongoing membership in OBSI as a "Participating Firm" and, with respect to each complaint, participating in the dispute resolution process in a manner consistent with the firm's obligation to deal fairly, honestly and in good faith with its client. This would include entering into consent agreements with clients contemplated under OBSI's procedures.

~~Since section 13.16 does not apply in respect of a complaint made by a permitted client that is not an individual, we would not expect a firm that only has clients of that kind to maintain membership in OBSI.~~

~~A~~

Alternative service offerings

Except in Québec, a registered firm should not make an alternative independent dispute resolution or mediation service available to a client for the purposes of the requirement in subsection 13.16(6) at the same time as it makes OBSI available. Such a parallel offering would not be consistent with the requirement to take reasonable steps to ensure that OBSI will be the independent service that is made available to the client. ~~Except in Québec, we expect that alternative service providers will only be used for purposes of section 13.16 in exceptional circumstances.~~

~~We would regard it as a serious compliance issue if a firm misrepresented OBSI's services or exerted pressure on a client to refuse OBSI's services.~~

~~If a client declines to make use of OBSI in respect of a complaint, or if a client abandons a complaint that is under consideration by OBSI, the registered firm is not obligated to provide another service at the firm's expense. A firm is only required to make one dispute resolution or mediation service available at its expense for each complaint.~~

~~Nothing in section 13.16 affects a client's right to choose to seek other recourse, including through the courts.~~

~~Registrants that are members of an SRO, including those that are registered in Québec, must also comply with their SRO's requirements with respect to the provision of independent dispute resolution or mediation services.~~

~~**Registrants who do business in other sectors**~~

~~Some registrants are also registered or licensed to do business in other sectors, such as insurance. These registrants should inform their clients of the complaint mechanisms for each sector in which they do business and how to use them.~~

Similarly, a parallel offering would not be consistent with the requirement to make the identified ombudservice available under subsection 13.16(6.1).

13.16.1 Registered firm obligations relating to an identified ombudservice

In a jurisdiction where there is an identified ombudservice, section 13.16.1 sets out the obligations of a registered firm regarding a complaint being investigated or reviewed by an identified ombudservice.

Use of the identified ombudservice is optional for complainants, but participation in the identified ombudservices process by a registered firm is mandatory where a complainant has taken a complaint to the identified ombudservice.

Background regarding the identified ombudservice's process

The following guidance outlines the processes which may be followed by the identified ombudservice and clarifies the nature of a final decision of the identified ombudservice for the purposes of section 13.16.1. The identified ombudservice may issue either a recommendation or a decision in resolving a complaint. Both a recommendation and a decision may become a final decision that will be binding on a registered firm. A complainant may reject a final decision, whether it is a deemed final decision after the recommendation stage or a decision from the review stage, as long as only the firm and not the complainant objects to the recommendation of the identified ombudservice (see below). However, if the complainant also makes a written objection to the recommendation, then the complainant will also be bound by the final decision. A final decision of the identified ombudservice may require the firm to provide monetary compensation to a complainant or to take a specific type of corrective action, as appropriate in the circumstances.

Once a complaint is brought to the identified ombudservice and is determined to be within the identified ombudservice's mandate, the identified ombudservice will commence its investigation of the complaint. During its investigation, the identified ombudservice may request documents and information that are relevant to its assessment of the complaint. We will consider it a failure to cooperate with an investigation of an identified ombudservice if a firm takes any action which may frustrate the identified ombudservice's investigation. This may include, for example, being unresponsive to the identified ombudservice's requests for documentation or information.

Once the investigation stage has been concluded, the identified ombudservice will issue a recommendation. This recommendation will be deemed a final decision once a specified period of time has elapsed where: (i) neither the registered firm nor the complainant has submitted a written objection to the identified ombudservice regarding the recommendation; and (ii) the complainant has not rejected the recommendation or otherwise withdrawn from the dispute resolution process in a manner authorized by the identified ombudservice by the time that the identified ombudservice concludes its investigation and provides the parties with its written recommendation.

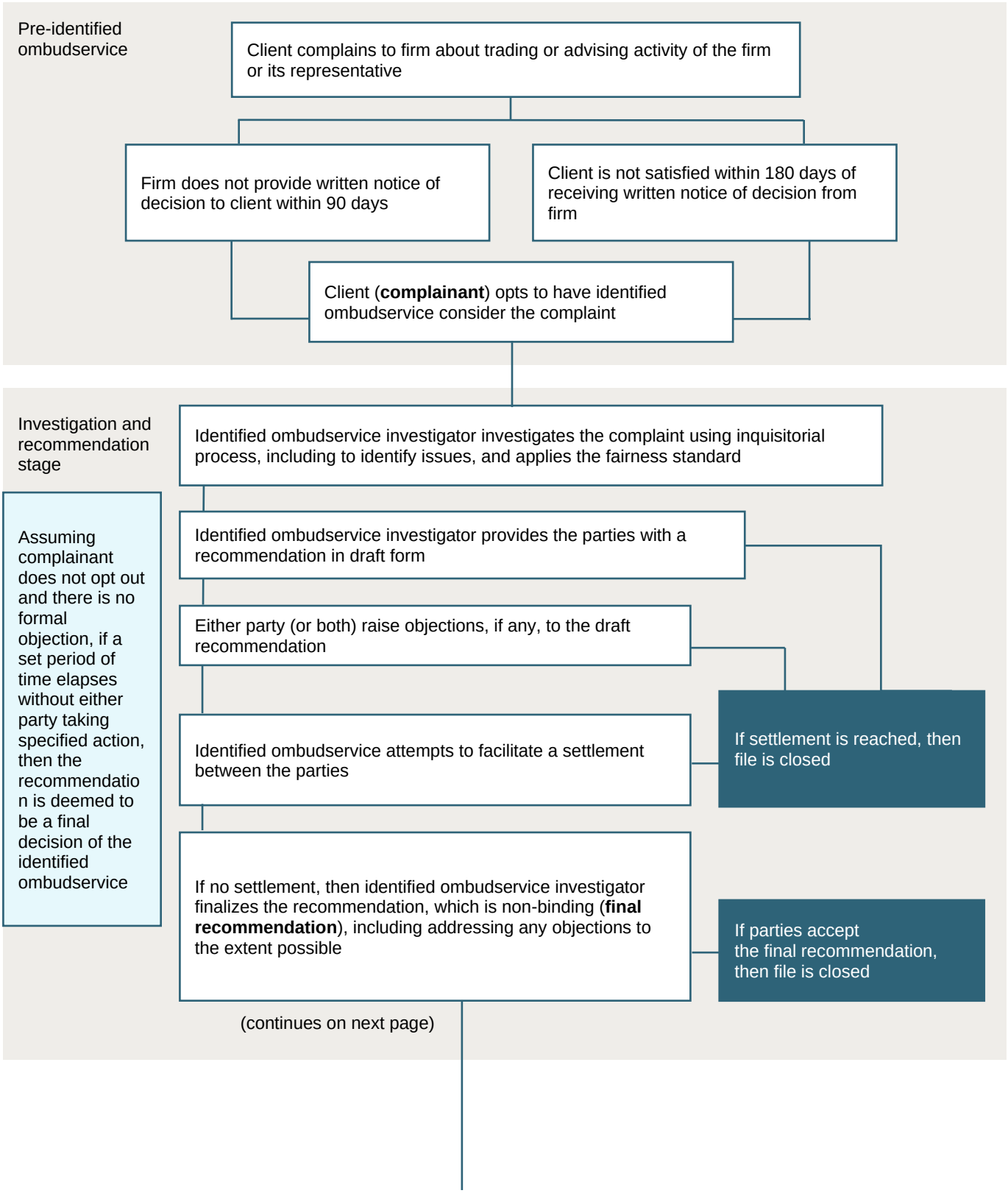
If either the registered firm or the complainant makes a written objection to the recommendation, then the identified ombudservice will conduct an independent review of the complaint and issue a decision at the conclusion of its review. If only the registered firm requested the review, the decision will become final once: (i) a specified period of time has passed since the date of the decision; and (ii) the complainant has not rejected the decision or otherwise withdrawn from the dispute resolution process in a manner authorized by the identified ombudservice. If the complainant has requested the review of the recommendation, they will not be able to reject a decision (once issued) or otherwise withdraw from the dispute resolution process.

NI 31-103 rule does not provide for partial compliance with a final decision of the identified ombudservice. However, firms may also seek to negotiate a settlement with a complainant at any time.

ANNEX D

OVERVIEW AND FLOWCHART OF IDENTIFIED OMBUDSERVICE PROCESSES UNDER PROPOSED FRAMEWORK

How a complaint will flow through the identified ombudservice's process



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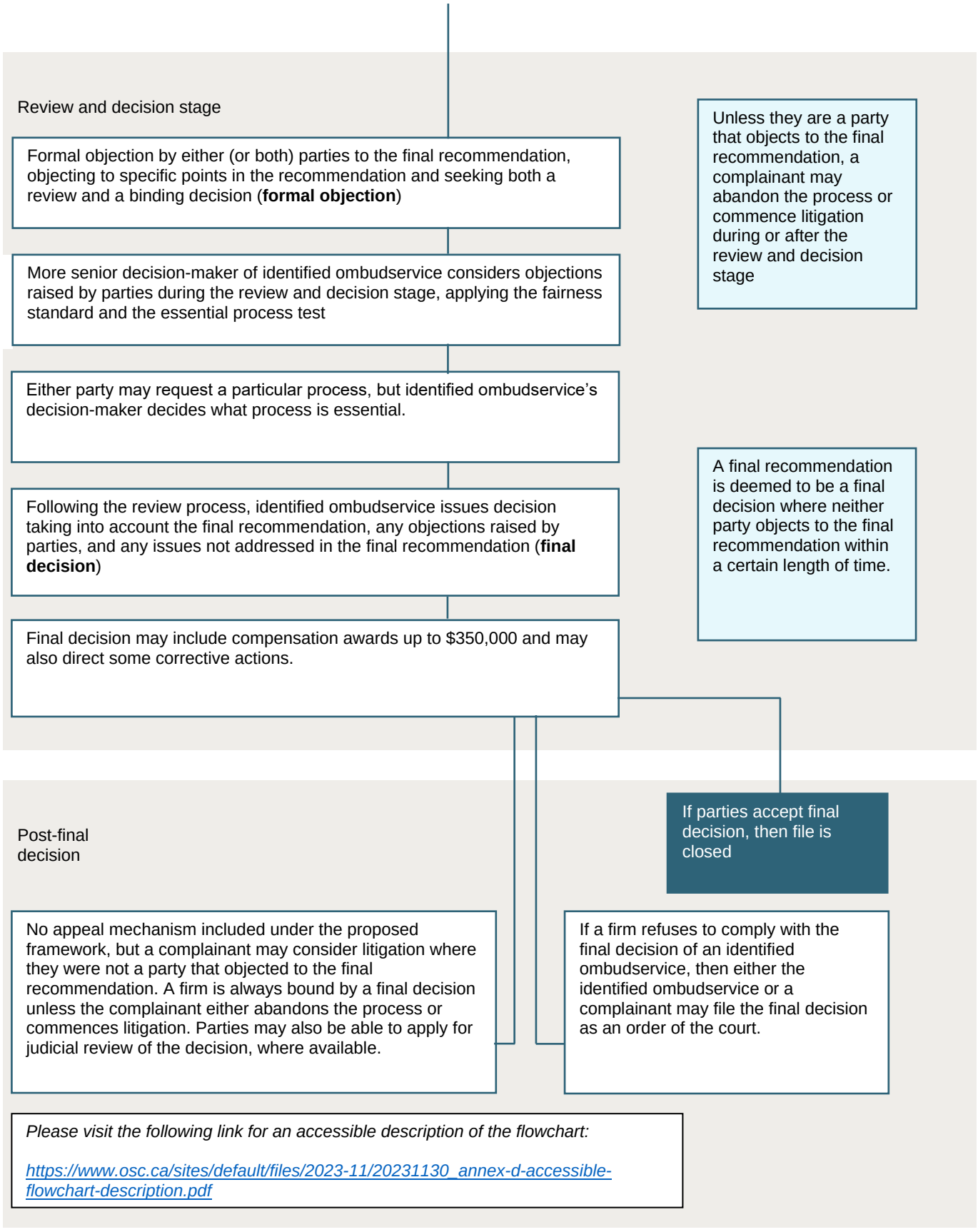
Review and decision stage
Formal objection by either (or both) parties to the final recommendation, objecting to specific points in the recommendation and seeking both a review and a binding decision (**formal objection**)
More senior decision-maker of identified ombudservice considers objections raised by parties during the review and decision stage, applying the fairness standard and the essential process test
Either party may request a particular process, but identified ombudservice's decision-maker decides what process is essential.
Following the review process, identified ombudservice issues decision taking into account the final recommendation, any objections raised by parties, and any issues not addressed in the final recommendation (**final decision**)
Final decision may include compensation awards up to $350,000 and may also direct some corrective actions.
Unless they are a party that objects to the final recommendation, a complainant may abandon the process or commence litigation during or after the review and decision stage
A final recommendation is deemed to be a final decision where neither party objects to the final recommendation within a certain length of time.
Post-final decision
If parties accept final decision, then file is closed
No appeal mechanism included under the proposed framework, but a complainant may consider litigation where they were not a party that objected to the final recommendation. A firm is always bound by a final decision unless the complainant either abandons the process or commences litigation. Parties may also be able to apply for judicial review of the decision, where available.
If a firm refuses to comply with the final decision of an identified ombudservice, then either the identified ombudservice or a complainant may file the final decision as an order of the court.
Please visit the following link for an accessible description of the flowchart:
https://www.osc.ca/sites/default/files/2023-11/20231130_annex-d-accessible-flowchart-description.pdf

ANNEX E

LOCAL MATTERS

ONTARIO SECURITIES COMMISSION

1. Introduction

The Ontario Securities Commission (the **Commission**) is publishing this Annex to supplement the CSA Notice and Request for Comment (the **CSA Notice**) and to set out matters required to be addressed by the *Securities Act* (Ontario) (the **Act**).

Unless otherwise defined in this Annex, defined terms or expressions used in this Annex share the meanings provided in the CSA Notice.

Today, NI 31-103 provides that, except in Québec, registered firms must take reasonable steps to make OBSI the independent dispute resolution service available to its clients with respect to a complaint. After investigating a complaint, OBSI may make a recommendation for payment of compensation or other action if, in OBSI's opinion, a client has suffered loss, damage or harm because of an act or omission of a registered firm, but OBSI does not have authority to make binding decisions. If implemented, the proposed rule amendments would impose new requirements on firms regarding the identified ombudservice. If the proposed framework is implemented, it is anticipated that OBSI would be the independent dispute resolution service considered by securities regulatory authorities for designation or recognition as the identified ombudservice, and that the identified ombudservice would have the authority to issue binding final decisions as part of its dispute resolution process.

Some CSA jurisdictions, including Ontario, have suggested legislative amendments as part of the proposed framework which, at this time, local governments have made no decision to proceed with. These suggested legislative amendments are subject to change as a result of the consultation process and as a result of review by the government. They will only become law if they are passed by local governments.

Please refer to the main body of the CSA Notice.

2. Current Regulatory Framework

OBSI is a federally incorporated not-for-profit organization that provides an independent service for resolving banking and investment disputes between participating firms and their retail clients, at no cost to those clients. Under section 13.16(6) of NI 31-103, registered dealers and advisers must make OBSI's services available to their retail clients (except in Québec).

Currently, if OBSI investigates an investment-related complaint and determines that it would be fair for the firm to compensate a complainant, OBSI will attempt to facilitate a settlement between the firm and the complainant. If the parties are unable to reach a settlement, OBSI will issue a non-binding compensation recommendation. As firms are not required to comply with OBSI's recommendation, to encourage compliance, OBSI employs a 'name and shame' system under which OBSI will publish the names of those firms which refuse to follow its recommendations in their entirety. OBSI will not, however, publish the names of firms that settle a complaint at an amount that is lower than OBSI's recommendation. In effect, where a firm disagrees with OBSI's recommendation, they will not be 'named and shamed' if the complainant accepts the firm's lower settlement offer. As OBSI's recommendations are not binding on a firm, complainants may feel compelled to accept a lower settlement offer or risk receiving nothing. While commencing a civil proceeding to seek full compensation from the firm is another option for the complainant, doing so can often be a costly, intimidating, and time-consuming process.

3. Rationale for Proposed Rule Amendments and Proposed CP Changes

In putting forward the proposed rule amendments and proposed CP changes, the Commission aims to enhance the existing framework for investor redress and to promote investor confidence in the capital markets, while ensuring that both investors and firms continue to have available to them an IDRS that is fair, accessible, and efficient.

Financial ombudservices that provide dispute resolution services operate in many jurisdictions globally. While some ombudservices make only non-binding recommendations, other financial ombudservices – including examples in the United Kingdom[1], Australia[2] and Ireland[3], jurisdictions with similar legal systems to Canada's – have the authority to issue binding final decisions. In respect of the current dispute resolution process available through OBSI for investment-related disputes, Canada has not kept pace with these jurisdictions in implementing a binding ombudservice regime. This gap received international comment in the most recent International Monetary Fund (**IMF**) Financial Sector Assessment Program review of Canada.[4]

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1 Financial Ombudsman Service (UK), *How we make decisions,* "Final Binding Decisions", accessed at <https://www.financial-ombudsman.org.uk/who-we-are/make-decisions>.

2 Australian Financial Complaints Authority*, What process we follow,* "Determination (a binding decision)", accessed at < https://www.afca.org.au/what-to-expect/the-process-we-follow>.

3 Financial Services and Pensions Ombudsman, *How we deal with your complaint*, "Formal complaint resolution", accessed at < https://www.fspo.ie/our-services/>.

4 *Canada: Financial System Stability Assessment IMF Country Report No. 19/177*, June 2019 by the International Monetary Fund, at p 30.

In addition to the IMF's international critique, the lack of binding authority has been identified as a concern in each of the 2011, 2016, and 2021 independent evaluations of OBSI, which identified the lack of binding authority as a significant design flaw in Canada's investment dispute resolution system.[5]

In 2021, the Capital Markets Modernization Taskforce (the **Taskforce**) published a final report that recommended statutory authorization for the Commission to designate a dispute resolution system (**DRS**) that would have the power to issue binding decisions, and for the Commission to develop a governing framework for the DRS that provides for procedural fairness and offers limited appeals. The Taskforce noted that a "binding, reputable and efficient DRS framework" will provide redress to harmed investors, particularly where the financial harm may not be high enough to warrant a legal proceeding before the courts.[6]

The proposed rule amendments and proposed CP changes take into account comments received from investor advocates over the years, who have urged securities regulatory authorities to provide OBSI with the authority to render binding decisions.[7]

4. Proposed Rule Amendments and Proposed CP Changes

Under the proposed framework and proposed rule amendments, an identified ombudservice would be the independent dispute resolution service made available to a complainant at the firm's expense.

The proposed rule amendments set out principles and prescriptive requirements relating to core elements of the proposed framework. Requirements in the proposed rule amendments would include that firms become members of the identified ombudservice, cooperate with the identified ombudservice in respect of its investigation and review of complaints, and comply with its final decisions.

In addition, to address the potential for retail investor confusion, the proposed rule amendments include a prohibition on the use of certain terminology by firms when referring to their complaint handling procedures or to their internal department or service that engages in complaint handling.

(a) Investigation and Review of a Complaint Before the Identified Ombudservice

The proposed framework would require the identified ombudservice to preserve as much of the investigative processes currently used by OBSI as possible, and add a new binding decision stage.

Likely within harmonized orders among securities regulatory authorities, the proposed framework would require the identified ombudservice to have two stages as part of its dispute resolution process: the investigation and recommendation stage, and the review and decision stage.

The investigation and recommendation stage of an identified ombudservice would preserve OBSI's current investigative processes and yield a recommendation. A recommendation by the identified ombudservice would become binding on firms and deemed to be a final decision if neither the firm nor the complainant object to the recommendation within the time period specified in the identified ombudservice's rules and the complainant has not withdrawn from the dispute resolution process, either through commencing a separate legal proceeding or otherwise.[8]

If either the complainant or the firm submits a written objection to the identified ombudservice's recommendation, the complaint would enter the review and decision stage where a senior decision-maker of the identified ombudservice, who was not involved in the investigation and recommendation stage, would consider the written objection. Once the identified ombudservice has completed its review, it would issue a decision. The firm would always be bound by a decision once it becomes final after a specified period. The complainant would also be bound by a final decision if they had objected to the outcome of the investigation and recommendation stage. If only the firm had objected to the identified ombudservice's recommendation, the complainant would have an opportunity to reject the decision within a specified period and pursue a civil proceeding against the firm regarding their complaint. If the complainant does not reject the final decision and has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice, the decision would become final and binding on the parties. Parties may also be able to apply for judicial review of the decision, where available.

Under the proposed framework, the maximum monetary compensation that could be awarded by the identified ombudservice would be $350,000, which is the current maximum monetary compensation that can be awarded by OBSI and which may be reviewed and increased in the future. Under the proposed framework, the identified ombudservice may also direct the firm to take

5 Navigator Company, *Ombudsman for Banking Services and Investments, 2011 Independent Review* (2011), at p 31 [the *2011 Independent Evaluation*]; Deborah Battell and Nikki Pender, *Independent Evaluation of the Canadian Ombudsman for Banking Services and Investments' (OBSI) Investment Mandate* (2016) at p 30-31 [the *2016 Independent Evaluation*]; Poonam Puri and Dina Milivojevic, *Independent Evaluation of the Canadian Ombudsman for Banking Services and Investments' (OBSI) Investment Mandate* (2022) at p 33-35 [the *2021 Independent Evaluation*].

6 Capital Markets Modernization Taskforce, *Capital Markets Modernization Taskforce – Final Report*, (2021) at p 105.

7 See for instance: Investor Protection Clinic and Living Lab, *2018 Annual Report*, at p 5; "Consumer Coalition Calls for Action on Complaint Handling", GlobeNewsWire (October 20, 2022) online <https://financialpost.com/globe-newswire/fair-canada-consumer-coalition-calls-for-action-on-complaint-handling>.

8 The firm would not be required to comply with a recommendation while the recommendation is under review.

specified corrective action, such as requiring a firm to return documents or to correct erroneous information where the firm's error was harmful to the complainant.

5. Affected Stakeholders

The primary stakeholders who will be impacted by the proposed rule amendments and proposed CP changes are retail investors, OBSI and registered firms.

(a) Investors

While investors would not be required to make use of the identified ombudservice, firms would be required to make an identified ombudservice available to its clients at the firm's expense under the proposed rule amendments.

In 2022, OBSI recommended a total compensation of $1,302,885 for investment complaints, with an average recommended compensation of $8,985.[9] Of the 444 cases closed by OBSI in 2022, 154 resulted in outcomes in favour of the complainant.[10] Demographically, the majority of investors who have opened a case with OBSI under its investment mandate tend to be above the age of 50, employed, with wide ranging household incomes.[11] It is anticipated that if an identified ombudservice has the authority to make binding recommendations, more investors will choose to have their complaints considered by the identified ombudservice as it will be a zero-cost and an enforceable path towards investor redress.

(b) OBSI

Currently, except in Québec, NI 31-103 requires firms to take reasonable steps to make OBSI the independent dispute resolution or mediation service available to clients who are unable to resolve a complaint through the firm's internal complaint-handling process. It is anticipated that OBSI would be the independent dispute resolution service considered by securities regulatory authorities for designation or recognition as the identified ombudservice.

As the identified ombudservice, OBSI would be subject to coordinated oversight by CSA jurisdictions, including through harmonized orders that would include terms and conditions on its designation or recognition. An enhanced CSA oversight regime, including prior CSA approval of certain of the identified ombudservice's procedures and documents, would be implemented.

Under the proposed rule amendments, it is expected that firms (except in Québec) will be required to become members of the identified ombudservice and cooperate with the identified ombudservice's investigation and review of a complaint. Once a decision is rendered (or a recommendation is deemed a binding decision) and becomes final, firms must promptly comply with the decision of the identified ombudservice.

(c) Registrants

Generally, all investment firms regulated by the CSA would be required to be members of the identified ombudservice.[12] The proposed rule amendments would also require that firms cooperate with the identified ombudservice's investigation and review of a complaint and comply with its final decisions. This includes all firms that are members of the Canadian Investment Regulatory Organization (**CIRO**).

According to the OBSI's 2022 Annual Report, 1,331 registrants were participating firms of OBSI at the end of OBSI's fiscal year.[13] On average, approximately 6-7 % of registered firms had at least one case opened with OBSI each year from 2018-2022.[14] Table 1 provides an overview of the participating firms that had at least one opened case in 2022 by registration category.

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9 OBSI, Annual Report 2022, at p 45.

10 See Table 2 below. Outcomes in favour of complainant is defined as cases officially closed by OBSI in which both the consumer and firm has agreed on a settlement (both monetary and non-monetary) and includes resolutions which have occurred before an investigation has formally begun.

11 OBSI, (2023), Data Cube (data visualization tool, November 11, 2016–April, 30 2023, Demographics from investment data only) < https://www.obsi.ca/en/case-data-insights/demographics.aspx>. We note the demographics data is limited to the data that is publicly available on OBSI's data cube, which is currently limited to November 11, 2016 – April 30, 2023.

12 Exceptions include registrants in Québec, investment fund managers acting in that capacity, and firms which deal exclusively with permitted clients that are not individuals, as they will continue to be exempt from the requirement to make OBSI the available DRS under subsection 13.16(7) and (8) respectively.

13 OBSI, Annual Report 2022, at p 20.

14 An opened case is defined by OBSI as a complaint from a consumer that meets the criteria set out in OBSI's Terms of Reference and subsequently assigned to an investigator. Data provided by OBSI.

Table 1: Number of participating firms by registration category

	Total number of participating firms	Number of participating firms with a case opened in 2022	Percentage of participating firms with a case opened in 2022
Exempt Market Dealers	280	1	0.4%
Investment Dealers	176	31	18%
Mutual Fund Dealers	93	24	26%
Portfolio Managers	322	5	2%
Dual Registrants: Portfolio Managers/Exempt Market Dealers	429	3	1%
Restricted Dealers	15	10	67%
Restricted Portfolio Managers	7	0	0%
Scholarship Plan Dealers	6	3	50%
Investment Fund Managers	2	0	0%
Commodity Trading Managers	1	0	0%
Total	1331	77	6%

Source: 2022 OBSI Annual Report p 20, 41-43

Within the same 5-year period, approximately 3-4% of registered firms with at least one case open with OBSI received a recommendation for compensation from OBSI each year. In total, 49 of those recommendations from fiscal years 2018-2022 were for monetary compensation of $50,000 or more.[15]

Table 2 provides an overview of the number of outcomes in favour of the complainant in 2022. The registration categories with the greatest number of outcomes settled in favour of complainants were mutual fund dealers, dual registrants (portfolio managers/exempt market dealers) and investment dealers. Where there is an outcome in favour of the complainant, approximately 90% of those cases involve a large firm.[16]

Table 2: Outcomes in favour of the complainant by registration category

	Total number of closed cases	Number of outcomes in favour of the complainant	Percentage of outcomes in favour of the complainant
Exempt Market Dealers	0	0	0%
Investment Dealers	249	93	37%
Mutual Fund Dealers	96	37	39%
Portfolio Managers	18	3	17%
Dual Registrants: Portfolio Managers/Exempt Market Dealers	11	4	36%
Restricted Dealers	23	2	9%
Restricted Portfolio Managers	0	0	0%
Scholarship Plan Dealers	47	15	32%
Investment Fund Managers	0	0	0%
Commodity Trading Managers	0	0	0%
Total	444	154	35%

Source: OBSI, 2022 Annual Report p 41-43

[15] Data provided by OBSI (June 1, 2023).
[16] Determined using data from OBSI, 2022 Annual Report at p 41, 43, data provided by CIRO (July 18, 2023), and OSC Risk Assessment Questionnaire (2022).

6. Anticipated Costs and Benefits of the Proposed Rule Amendments and Proposed CP Changes

The analysis below is informed by research and stakeholder comments that have been published in the past. The analysis considers the incremental cost of implementing the proposed rule amendments on the stakeholders identified in Section 5, when compared with the current regulatory framework.

We note that implementation of the proposed framework, and in turn the proposed rule amendments, is dependent on legislative amendments being made by the local governments of CSA jurisdictions where existing legislation does not currently grant the securities regulatory authority the power to adopt the proposed framework. At this time, governments in CSA jurisdictions have made no decision to proceed with the legislative amendments, and any legislative amendment proposed by local governments will be subject to change during the drafting process. Consequently, we have made best efforts to assess many of the benefits and costs of implementing the proposed rule amendments as part of the proposed framework.

On balance, we consider that the benefits associated with improving the retail investor protection framework in Ontario by providing an identified ombudservice the power to make binding decisions are proportionate to the costs, which will be primarily incurred by the identified ombudservice and firms from implementing the proposed framework. Details of our analysis are discussed below.

(a) Anticipated Benefits of the Proposed Rule Amendments and Proposed CP Changes

(i) Investors

Address power imbalance between registered firms and retail investors

Requiring firms to comply with a final decision of an identified ombudservice under the proposed rule amendments will give retail investors free access to a dispute resolution forum in which they can have their complaints fairly assessed, and the assurance that firms will generally be required to comply with the determinations of the identified ombudservice. This directly addresses concerns about a power imbalance in the current 'name and shame' system, where some firms may leverage the uncertainty of payment in its settlement negotiations with investors.

In the 2016 independent evaluation of OBSI's investment mandate, the independent evaluators observed that a recommendation from OBSI was perceived as the upper limit from which the firm will negotiate down unless an offer had previously been made to a retail client before the complaint was referred to OBSI.[17]

Improved Investor Redress and Outcomes

From a monetary perspective, binding authority may improve financial outcomes for investors who bring complaints before an identified ombudservice for consideration. It is, however, difficult to quantify this benefit as we cannot predict the volume of complaints that will be brought to the identified ombudservice once the proposed framework is implemented. For OBSI's fiscal years 2018 to 2022, out of 844 cases that resulted in monetary compensation, 42 cases (approximately 5%) involving 24 firms settled below OBSI recommendations.[18] From November 1, 2015 to October 31, 2020, investment firms paid almost $3 million less than what OBSI recommended should be compensated to clients.[19]

Table 3 represents case data provided by OBSI that illustrates the percentage of cases from 2018-2022 that settled below OBSI's recommended amount.

Table 3: 2018 – 2022 Investment Cases Settled Below OBSI's Recommended Amount[20]

OBSI Recommended Amount	% of Cases Settled below OBSI's recommended amount	# of Cases Closed with monetary compensation recommendations
$1 to $9,999	1%	384
$10,000 to $49,999	13%	113
$50,000 to $99,999	46%	26
$100,000 to $199,999	43%	14
$200,000 to $350,000	67%	9

While compliance with OBSI's recommendations is strong where the recommended monetary compensation is below $50,000, there is an increase in low settlements where the recommended compensation exceeds $50,000. This can be problematic given

17 2016 Independent Evaluation at p 27.
18 CSA Staff Notice 31-364 OBSI Joint Regulators Committee Annual Report for 2022 (October 2023), at p 4 [*JRC Annual Report 2023*].
19 2021 Independent Evaluation at p 35.
20 Data provided by OBSI (June 1, 2023).

that complainants who have received a greater monetary compensation recommendation are likely to be those who have suffered greater harm or financial loss. Ontarians relying on the recovery of such losses to help them better endure the stresses of a difficult financial climate, or who experience such losses later in life when savings become more crucial to overall financial well-being, would have greater certainty that they will receive monetary compensation proportionate to the harm that OBSI determined they suffered if OBSI were provided with binding authority.

In addition, currently, under subsection 13.16(4) of NI 31-103, a dispute resolution or mediation service is only required to be made available to a client after the complaint has first been brought to the firm's attention.[21] It is anticipated that this requirement will remain unchanged by the proposed rule amendments, except that the requirement to make a dispute resolution or mediation service available will be satisfied by the availability of the identified ombudservice. The prospect of an identified ombudservice with the authority to issue binding decisions may encourage firms to improve their internal complaint handling process to mitigate the need for investors to seek fair resolution through a third party. If this occurs, under the proposed rule amendments investors might also benefit from an improvement to firms' internal complaint processes.

Lower legal costs and efficient dispute resolution service for retail investors

While investors have the option to seek legal redress through the courts, it is generally acknowledged that this is often a time-consuming and expensive process which often requires the assistance of legal counsel.[22] As seen in Table 3 above, most complaints reviewed by OBSI result in recommendations for monetary compensation below $10,000. Therefore, most cases that are investigated by OBSI under its investment mandate may not be worth the cost of pursuing before the courts. By way of example, a complainant opting to file a claim in small claims court in Ontario would, at minimum, incur the following costs:

- $108 for filing a claim
- $94 for filing of a request for default judgment
- $308 for setting a date for a trial or an assessment hearing
- $127 for filing a Notice of Motion for an Assessment in Writing[23]

In addition to the above, the complainant may have to pay other court fees depending on the steps they and the other party take in the case. In considering the commencement of a civil proceeding, investors may also be concerned with the risk of their case being unsuccessful and being ordered to pay costs to the firm. Consequently, providing an identified ombudservice with the authority to make binding decisions would foreseeably improve access to fair and final monetary redress to investors at no cost to them.

Similarly, requiring firms to comply with a decision of an identified ombudservice will likely allow investors to resolve their complaints with greater efficiency than they can before the courts. Although there is a lack of reliable data about delays in the civil justice system, issues of backlogs and delays before the courts have been universally acknowledged as problematic.[24] A recent report published by *The Advocates Society* provides some examples of delays that civil court systems have been experiencing in recent years, including that:

> In Ontario, it currently takes almost 1.5 years for a motion longer than 2 hours to be heard by a judge in Toronto; more than 1.5 years after the trial management conference (or more than 4 to 5 years from the issuance of the original application) for a 3-week family law trial to be heard by a judge in Brampton; and more than 4 to 5 years for a civil action to proceed from commencement to trial.[25]

Currently, OBSI closes most investment complaints in less than 90 days, and almost all investment complaints in less than 120 days.[26] Even after considering the time it could take for a binding decision to be deemed or issued under the proposed framework, it is clear that investors will likely be able to obtain redress far sooner through the identified ombudservice than they would through the civil court system. Much of this efficiency is achieved by the streamlined processes that OBSI already uses to resolve complaints, which the proposed framework aims to maintain.

(ii) OBSI

OBSI seen as a more effective ombudservice

The proposed rule amendments are intended to equip an identified ombudservice with adequate powers to effectively secure redress for affected investors, namely by requiring firms to cooperate with an identified ombudservice's investigation and to comply

21 See National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* at subsection 13.16(4) [NI 31-103].
22 2021 *Independent Evaluation,* at p 12.
23 Government of Ontario, *Small claims court: suing someone,* "Cost of filing a claim" accessed at <https://www.ontario.ca/page/suing-someone-small-claims-court>.
24 The Advocates' Society, *Delay No Longer. The Time to Act is Now. A Call for Action on Delay in the Civil Justice* System (2023) at p 3.
25 *Ibid*.
26 OBSI, Annual Report 2022 at p 40.

with its final decisions. Requiring firms to comply with a final decision of an identified ombudservice will bring Canada's investment-related external dispute resolution regime in line with the analogous regimes in international jurisdictions such as the United Kingdom[27], Australia[28] and Ireland[29], which all have financial ombudservices capable of rendering binding decisions.

If the proposed rule amendments come into effect, firms may come to view OBSI as a more effective ombudservice and increase their level of engagement with OBSI's processes.[30] Similarly, investor confidence in external dispute resolution may increase and encourage more investors to bring their complaints before OBSI where they are unable to resolve them directly with their firm.

(iii) Registrants

Efficient dispute resolution process

The proposed framework does not create an overly formalized system, but instead preserves much of OBSI's current processes unless and until either the firm or a complainant makes a written objection seeking an internal review of the identified ombudservice's initial recommendation. Once a recommendation becomes a deemed decision under the proposed framework, the proposed rule amendments will require firms to promptly comply with the terms of the final decision without awaiting further confirmation from the complainant or identified ombudservice.

In the review and decision stage, the identified ombudservice's recommendation will be subject to a limited scope review by a senior decision maker within the identified ombudservice. Consequently, firms will only be required to participate within the limited scope of the identified ombudservices review during the review and decision stage. The streamlined process under the proposed framework is intended to ensure both parties to a complaint have the benefit of a formalized review process if they raise a concern about the identified ombudservice's recommendation, without creating undue burden on parties with an overly complex and formalized appeals process. In addition, if the complainant initiates the review and decision stage, the proposed framework will require the complainant to comply with the identified ombudservice's decision, which helps provide finality for firms.

Overall, we expect that the efficient dispute resolution process under the proposed framework will reduce the need for more adversarial processes and better assist in preserving the firm-client relationship after a complaint has been lodged.

Lower legal costs for firms

It is expected that if an identified ombudservice is given binding authority, the identified ombudservice will become the preferable forum for complainants to have their disputes resolved, including because investors can expect an enforceable outcome without the time and cost typically associated with initiating a civil proceeding. As such, registrants may see a reduction in legal costs associated with being a responding party to civil proceedings brought against them to resolve disputes that the identified ombudservice can readily address, with greater expediency and at lower cost to all parties involved.

It is difficult to accurately quantify any cost reduction to firms as we do not know the number of investment-related disputes within OBSI's mandate that ultimately proceeds to court. However, we do know that adjudicating matters before the courts is generally an expensive process. Even if a matter were to proceed under simplified procedures,[31] the adversarial process remains a costly one. In contrast, while firms must still cooperate with the identified ombudservice's investigation and review, the costs are foreseeably lower than hiring counsel, either in-house or external, to manage ongoing litigation files.

(b) Anticipated Costs of the Proposed Rule Amendments and Proposed CP Changes

(i) Investors

Longer decision process and time required to receive compensation

As already discussed above, requiring firms to comply with a decision of the identified ombudservice under the proposed rule amendments will help alleviate any pressure felt by investors to settle their complaints for less than what may be fair for them to receive. On average, this will likely increase the monetary compensation paid to complainants. However, since a recommendation does not become a binding decision until a specified amount of time has passed, investors may have to wait longer to receive their compensation relative to if they settled prior to a recommendation being made, or in the present framework, where cases are typically closed by OBSI within 90-120 days. Where a firm initiates the review and decision stage by objecting to the identified ombudservice's recommendation, investors would have to wait until the decision is rendered and for an additional specified period of time to pass before a firm would be required to comply with the identified ombudservice's decision under the proposed rule amendments.

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27 Financial Ombudsman Service (UK), *How we make decisions,* "Final Binding Decisions", accessed at <https://www.financial-ombudsman.org.uk/who-we-are/make-decisions>.

28 Australian Financial Complaints Authority, *What process we follow,* "Determination (a binding decision)", at < https://www.afca.org.au/what-to-expect/the-process-we-follow>.

29 Financial Services and Pensions Ombudsman, *How we deal with your complaint*, "Formal complaint resolution", accessed at < https://www.fspo.ie/our-services/>.

30 2021 *Independent Evaluation*, at p 39.

31 See *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 76.

Additionally, investors who wish to object to a recommendation may find the additional steps difficult to navigate. Despite these possible qualitative costs to investors, the length of time and complexity required to resolve a case before the identified ombudservice is likely to be far lower than if investors were to bring their matter before the courts to obtain a binding decision.

In anticipation of potentially higher fees to be a member of the identified ombudservice, it is also possible that registered firms may pass on their increased costs to investors in the form of higher fees.

(ii) OBSI

Increased operational costs

It is expected that the proposed framework will result in an increase to OBSI's operating costs given the anticipated increase in complaints being brought to the identified ombudservice and implementation of an internal review process. The anticipated cost increases will likely pertain to hiring of additional personnel and updating of operating procedures and training processes and materials. We note some of the costs related to the training of new investigators may be mitigated by the proposed framework maintaining most of OBSI's current processes, and the new internal review process is expected to be similar to the existing internal reconsideration process at OBSI.

Likewise, OBSI may see higher administrative costs relating to enhanced oversight by the CSA, including due to the imposition of potentially greater and more stringent obligations, as part of the proposed framework.

We do not have specific estimates of the cost to OBSI in implementing elements of the proposed framework. To help gauge the cost of implementation, we note that OBSI's total expenses in 2022 totaled $10.5 million. These expenses covered the direct cost of addressing investment- and banking-related inquiries and cases, and the costs related to managing and administering OBSI such as rent, salaries of support personnel and services, and capital depreciation.[32] Personnel costs accounted for around three-quarters ($7.8 million) of OBSI's total budget. In 2022, participating investment firms accounted for 15% of inquiries to OBSI and 40% of cases opened.

It is noted that the Financial Consumer Agency of Canada (**FCAC**) recently announced the designation of OBSI as Canada's single external complaints body (**ECB**) for banking, and OBSI will assume its responsibilities as the single ECB on November 1, 2024.[33] Consequently, the anticipated costs of implementing the proposed framework may be reduced if there is overlap in hiring and training of new personnel to address an increase in volume of cases under OBSI's banking mandate.

(iii) Registrants

Potentially higher membership fees

Currently, OBSI's budget is funded through membership fees from participating firms. Within the investment sector, fees paid by firms are assessed based on a firm's size relative to other firms in the same sector. OBSI's total fees are divided proportionally across the sectors based on the number and complexity of cases.[34] Given that the proposed framework will likely attract more investment related complaints to OBSI in the future, and that there will be an internal review process put in place, it is highly likely that there will be an increase in membership fees for firms. However, as discussed above, costs to firms may be mitigated by overlapping changes to OBSI's banking mandate as OBSI assumes its responsibilities as the single ECB for banking.

In addition, costs of OBSI's initial and ongoing implementation of the proposed framework could be passed on to firms in the form of higher membership fees. As discussed above, the proposed framework, which includes the proposed rule amendments and proposed CP changes, maintains much of the dispute resolution processes employed by OBSI today. While the ability to issue a binding decision at the conclusion of an identified ombudservice's review is a new component introduced through the proposed framework, we note that the review and decision stage is expected to share many of the core attributes of OBSI's existing reconsideration process, such as review of the recommendation by a "Reconsideration Officer" who was not previously involved in the case, and written reasons for a decision.[35]

Greater monetary compensation to complainants

As firms would be required to comply with a decision of the identified ombudservice under the proposed rule amendments, some may see some increase in monetary compensation to complainants, as complainants may be less likely to accept a settlement offer that is lower than what is set out in the identified ombudservice's recommendation (which may be deemed a decision later on). However, it is important to consider that firms have generally had strong compliance where OBSI recommendations are below $50,000, and most cases closed by OBSI typically result in recommendations in this lower range. Consequently, for most firms,

32 OBSI, Annual Report 2022 at p 61.

33 Financial Agency of Canada, *Designation of Canada's single external complaints body for banking* (October 17, 2023), online <https://www.canada.ca/en/financial-consumer-agency/news/2023/10/designation-dun-organisme-externe-de-traitement-des-plaintes-unique-pour-le-secteur-bancaire-au-canada.html>.

34 OBSI, Annual Report 2022 at p 61.

35 OBSI, *How We Work,* "Complaints about the outcome of your case" at <https://www.obsi.ca/en/how-we-work/reconsideration.aspx#Investment-Complaints-Regulatory-Framework>.

the increase in costs associated with payment of monetary compensation consistent with an identified ombudservice's recommendation or final decision may not be significant relative to the status quo, on average.

Costs from potentially higher caseload

Similar to the impact on OBSI, we expect that registrants may receive a higher number of complaints as a result of the proposed framework, as investors become more confident in the processes for seeking and receiving redress. However, this cost on firms may be mitigated by implementing more robust complaint handling processes within the firm itself that resolve complaints effectively and efficiently, as clients may only bring their complaint forward to OBSI where it remains unresolved after first being brought to the firm.[36]

We do not have complete information on the number of inquiries that firms see and the cost to firms from addressing these inquiries and complaints. OBSI reported that around 10% of all banking- and investment-related inquiries in 2022 resulted in cases being opened, while 31% were redirected to be dealt with by the firms.[37]

Potentially higher insurance costs

Sections 12.3 to 12.5 of NI 31-103 require all firms to maintain bonding or insurance that contains certain specific clauses and coverage as outlined in Appendix A – Bonding and Insurance Clauses of NI 31-103 (**Appendix A**). Under Appendix A, firms must obtain insurance that contains a "fidelity clause" that insures against any loss through dishonest or fraudulent act of employees and a "forgery or alterations clause" that insures against any loss through forgery or alteration of any cheques, drafts, promissory notes or other written orders or directions to pay sums in money, excluding securities.[38]

Generally, the firms more likely to be impacted by an increase to their insurance costs would be firms that have refused to follow OBSI's recommendation or have settled complaints at an amount lower than what OBSI recommended. Between 2018 and 2022, out of 844 cases that ended with monetary compensation, 42 cases (approximately 5%) involving 24 firms settled below OBSI recommendations.[39] We do not have the required data to estimate the potential impact on those firms' insurance costs because of variables specific to each firm. We note, however, that large and medium sized firms accounted for approximately 86% of low settlement cases.

Initial and ongoing implementation costs

It is anticipated that the initial cost of implementing the proposed framework would not be significant given that the core dispute resolution processes used by OBSI are expected to remain largely the same.

We estimate that each impacted firm will incur approximately $1080[40] in initial costs associated with reviewing and learning about the proposed rule amendments and proposed CP changes and updating existing policies, procedures and client-facing documents. The estimated costs are based on the following assumptions:

- All impacted firms will undertake the same activities and incur the same initial compliance costs. We do not anticipate significant costs associated with IT/systems modification as a result of the proposed rule amendments.
- We expect that impacted firms will incur minimal costs to update the written acknowledgement of a complaint to disclose the firm's obligations under proposed section 13.16.1(1), specifically that the firm is required to become a member of the identified ombudservice, cooperate in the investigation and review of the identified ombudservice, and promptly comply with a decision of the identified ombudservice. We anticipate minor revisions to the existing written acknowledgement provided to complainants today.
- We assume that impacted firms will not incur significant costs to update complaint handling documents provided to their clients. Previously, both self-regulatory organizations provided registered firms with approved brochures/forms to be provided to clients at account opening.[41] We assume that CIRO would continue to provide updated versions of these documents.

36 See NI 31-103, subsection 13.16(4)
37 OBSI, 2022 Annual Report 2022 at p 18. OBSI received 10,650 inquiries in 2022, of which 1,710 related to participating investment firms. A breakdown of investment-related inquiries by outcome is not readily available.
38 The other clauses are "On Premises", "In transit" and "Securities".
39 JRC Annual Report 2023, *supra*, at p 4.
40 There were 1308 participating firms as at August 1, 2023. We estimate that these participating firms would incur aggregate initial compliance costs of approximately $1.4M.
41 IIROC (as it then was) provided dealers with two forms to provide to clients at account opening: Making a Complaint: A Guide for Investors (Part 1 of 2, pdf) and How Can I Get My Money Back? A Guide for Investors (part 2 of 2, pdf). The MFDA (as it then was) provided dealers with an approved Client Complaint Information Form.

- We do not anticipate there will be any significant ongoing costs associated with the proposed rule amendments. Given that the identified ombudservice's final decisions will be binding, we expect there will be less necessary follow-up by the registered firm after a decision is made.

Table 4: Estimated initial per entity compliance costs

Activity	Staff category	Hourly rate[42]	Total hours per activity	Total cost per activity
1. Learning about the regulation	Compliance Analyst	$60	2	$120
	Senior Compliance Analyst	$77	2	$150
	Chief Compliance Officer	$133	1	$130
2. Updating policies, procedures and client facing documents	Compliance Analyst	$60	3	$180
	Senior Compliance Analyst	$77	3	$230
	Chief Compliance Officer	$133	2	$270
			Total cost per firm	$1,080

7. Alternatives Considered

The Commission considered maintaining the status quo, which would mean not proceeding with the proposed rule amendments and proposed CP changes to establish obligations and guidance in furtherance of the proposed framework. By not proceeding with implementation of the proposed framework, previously highlighted issues regarding the lack of binding authority for OBSI would persist. These issues include: i) the risk of lower settlements resulting from the power imbalance in settlement negotiations between a firm and a complainant; ii) the public perception that OBSI's effectiveness is diminished due to its lack of binding authority; and iii) that Canada's external dispute resolution mechanisms remain misaligned with the financial ombudservices in jurisdictions with comparable legal systems – such as the UK, Australia, and Ireland – which all have the authority to issue binding decisions.

Given the factors noted above, the Commission determined that the benefits to implementing the proposed framework outweigh the costs of doing so.

8. Reliance on Unpublished Studies

The Commission is not relying on any significant unpublished study, report, or other written material in proposing the proposed rule amendments and proposed CP changes.

9. Rule-Making Authority

In Ontario, the Commission is seeking amendments to the *Securities Act* (Ontario) to provide it with the requisite authority to make certain provisions in the proposed rule amendments. The remaining provisions are made under the authority of paragraph 2 of subsection 143(1) of the *Securities Act* (Ontario).

[42] All hourly rates are obtained from the Robert Half 2023 Salary Guide.