Getz Prince Wells LLP
Corporate & Securities Lawyers

Suite 530, 355 Burrard Street
Vancouver, BC, Canada V6C 2G8
Tel: 604-685-6367
Fax: 604-685-9798

February 26, 2024

VIA EMAIL

Alberta Securities Commission
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority (Saskatchewan)
L'Autorité des marchés financiers (Quebec)
Manitoba Securities Commission
Northwest Territories Superintendent of Securities
Nova Scotia Securities Commission
Office of the Superintendent of Securities (Nunavut)
Ontario Securities Commission
Prince Edward Island Office of the Superintendent of Securities
Service NL (Newfoundland and Labrador Securities Regulation)
Yukon Superintendent of Securities

c/o 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
mtassie@bcsc.bc.ca

c/o The Secretary, Ontario Securities Commission
20 Queen Street West 22nd Floor, Box 55
Toronto, Ontario M5H 3S8
comments@osc.gov.on.ca

c/o Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment: Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service (the "Notice")

We welcome the opportunity to provide comments about the proposed framework concerning the proposed amendments described in the Notice. The definitions used in the Notice are adopted in this letter.

Getz Prince Wells LLP primarily practices securities law and regulation. We advise investment firms, across various registration categories, who are Participating Members of OBSI ("Members"). Our Member clients include Canada's and British Columbia's two largest independent, employee-owned, self-clearing investment dealers. Our 35 years of experience handling retail client complaints includes 20 years of OBSI experience, representing Members and Complainants.

The Importance of an Accessible, Efficient and Fair Ombud Service

Accessible, fair, and efficient ombud services for Canadian retail investors is an important public interest objective. We support the intended outcome of the proposed amendments and embrace the overarching view stated in the Notice about "the importance of having an efficient system that resolves complaints fairly and effectively without creating undue burden for either party to a dispute". We also support OBSI being designated as the IDRS by Canada's securities regulatory authorities, provided that a harmonized approach can be achieved.

The continued use by OBSI of its inquisitorial approach and fairness standard is well-founded for lower dollar claims. They are proven elements of the OBSI process and have generally served its mandate well. The proposed essential process test is welcomed, and frankly much needed, provided it is employed judiciously and democratically to Members and complainants alike. Providing a level playing field for complainants is an important role for OBSI provided it does not come at the expense of losing its independence or impartiality.

We are very cautious about the merit of OBSI having a binding authority jurisdiction. We are doubtful it will make OBSI a more accessible, fair, or efficient ombud service. Regardless, the binding authority regime proposed in the Notice is very problematic. It will not make the current process fairer or more efficient for both parties. To be fair and effective, a binding authority regime needs to be reciprocal, have limitation periods that are aligned with the applicable provincial law, and provide for a meaningful and independent appeal process. The proposed framework lacks each of these essential requirements. We expand on these themes below, after reviewing some relevant data.

A Review of Selected Data

Our review of COMSET and METS complaint data for the past 5 years, OBSI's Annual Reports (2011-2022), and Tables 1 and 2 of the Notice support the following about OBSI investment cases:

- Cases have increased in recent years.
- On average, there are 425 cases annually (2018-2022).
- For the period 2016-2019, 56% of OBSI cases were closed without a recommendation for compensation.
- For the period 2020-2022, 66% of OBSI cases were closed without a recommendation for compensation.
- For the period 2012-2015, the average recommended amount for cases closed with a recommendation was $23,572.
- For the period 2020-2022, the average recommended amount was $9,077.
- For the period 2020-2022, the mean recommended amount is less than $2,000.
- For cases closed with a recommendation for compensation for the period 2018-2022:
    - over 70% were for amounts less than $10,000.
    - over 90% were for amounts less than $50,000.
    - only 4% were for amounts over $100,000.

- Since 2016, there has only been one recommendation over $300,000. The highest recommended amounts in each of the last three years were $191,000, $156,635, and $242,931.
- The number of OBSI cases closed because they were withdrawn or abandoned is negligible.
- For the period 2018-2022 there were only two refusals on recommendations which averaged less than $50,000.
- The number of low settlement cases reported for the 2018-2022 period totaled 42, of which 24 involved monetary recommendations over $50,000.
- In percentage terms, the total of low settlement cases relative to the number of cases closed with a monetary recommendation were less than 2%; and less than 1% relative to all OBSI cases.
- The Notice does not provide any information about the number of cases which settle for more than the recommended amount or the number of cases closed with a recommendation for compensation that was the same or less than what the Member offered the client in first instance.

As Members can attest, they typically resolve well over 90% of their client complaints directly with their clients. SROs do not keep or publish data of the exact percentage of client complaints Members resolved directly with their clients, however the data referenced above is corroborative of the >90% estimate above.

The Proposed Binding Authority Regime

Is a binding authority regime needed?

The recent increase in OBSI cases supports the view that retail clients are well-informed about the availability of OBSI[1]. The recent decline in the percentage of cases closing with a monetary recommendation supports the view that Members are getting better in dealing with client complaints. The marked decline in the average amount of recommended compensation is corroborative. SROs have done a commendable job improving Members' client complaint handling processes. The data supports this.

Despite the power imbalance that exists between Members and retail clients, Members are typically very motivated to resolve client complaints directly with their clients. It is not only good business, but unresolved client complaints involve considerable Member resources that are best invested elsewhere in their business.

The relatively small number of low settlement cases further supports the view that Members are generally doing a good job resolving their clients' complaints, and when they are unable to, they are engaged participants in the OBSI process. It is incongruous that the relative dearth of low settlement cases has become the impetus for the proposed binding authority regime. The paucity of discussion and analysis in the Notice about the reasons for low settlement cases is regrettable. A robust reform measure like the one proposed in the Notice should be based on data, analysis, and informed discussion, not on mere speculation or anecdote.

The unevidenced suggestion that low settlement cases are simply the product of unreasonable or obstructive Members is misplaced. Low settlement cases occur for various reasons. Sometimes there is a legal defence available to Members which OBSI's mandate does not recognize, e.g. a limitation defence recognized by applicable provincial legislation. Other times Members have a genuinely held belief that an OBSI recommendation is flawed in some material respect because OBSI's process failed to adequately consider the Member's interest.

---

[1] When a client makes a complaint to a Member, the Member is required at the outset and conclusion of the complaint handling process to notify the client of the options available to them if they are dissatisfied with the way the Member has proposed to resolve their complaint. IDRS is one of the prescribed options.

OBSI's process has improved over the years but it is far from perfect. The vulnerability in the processes OBSI employs to collect evidence, make important factual and credibility determinations, assess damages, and apportion fault often become exposed when there is more at stake. An ombud service dealing with six figure claims should not expect the techniques it employs to deal with lower dollar claims will generate the same buy-in or confidence from its stakeholders when dealing with higher dollar claims. A binding authority regime will not change this reality.

Before proceeding down an uncertain path of binding authority, OBSI should first reform the processes it uses for its higher dollar cases. The outcome of the new processes can then be assessed, informed discussion can take place, and legislative reform can be reconsidered, if deemed necessary.

Will a binding authority regime for OBSI make it a more fair, efficient, and effective ombuds service?

If OBSI is given a binding authority jurisdiction, it needs to be conditioned on complaints being made subject to applicable provincial limitation periods, which is 2 years in the case of British Columbia and the provinces west of Quebec. There is no compelling policy or public interest reason why retail investor clients need to be given a six-year limitation period to make complaints, in particular in Canada's 2-year limitation period jurisdictions. There is nothing unique to retail investor claims that warrant maintaining OBSI's 6-year limitation period[2]. When BC overhauled its limitation legislation, the BC Legislature recognized that a basic limitation period of 2 years simplified the law, eliminated uncertainty over which limitation period applies, and ensured that individuals pursued their legal claims within a reasonable time after discovering the right to bring an action. Similar public policy considerations informed limitation reform in Canada's other 2-year limitation jurisdictions. These same public policy considerations should apply to OBSI complaints as a condition of it gaining binding authority. Otherwise, it would undermine one of the main objectives of provincial limitation reform and create an anomaly that defies any rational exception.

A binding authority regime creates a more adjudicative process. With that comes the need for corresponding processes, especially for higher dollar cases. The essential process test may provide one of the required processes, assuming OBSI is able to employ and adequately train its investigators. A trial period would provide stakeholders with much needed data and experience to assess the merits of OBSI adding an adversarial approach to its established inquisitorial approach and whether a binding authority regime is even necessary.

Regardless of the amount at stake, a binding authority regime needs to be reciprocal if it is to be fair and efficient to each party. Clients have a choice where to pursue their unresolved complaints. If they do not wish to avail themselves of a binding OBSI process, they can pursue their claims in other forums. It would be inefficient and unfair to Members to be forced into a process that is only binding on them in first instance, but not on their clients who chose the process. Clients should not be given a 'free pass' in a binding authority regime. Under OBSI's current mandate, a client who has commenced a court action is not permitted to pursue an OBSI complaint. Why should the converse not be true in a binding authority regime? Efficiency and fairness dictate it should.

Last, a binding authority regime requires accountability if it is to meet the fairness objective underlying the proposed reform. The proposed review process to employ a senior OBSI decision maker to review OBSI recommendations falls far short of the independence required to achieve accountability. To the contrary, the proposed review process creates the potential for institutional bias and conflict of interest, and would be discrediting of the integrity of the OBSI process. There can be no credibility without accountability. Accountability requires an independent appeal process that employs an experienced and respected roster of

---

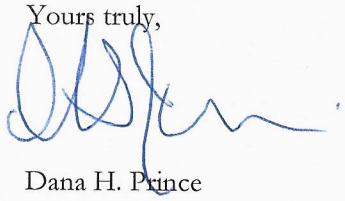
[2] OBSI complaints only involve the Member firm and the Complainant. The individual advisor is not a party to the complaint. This can create prejudice to Members, and a longer limitation period can sometimes exacerbate the prejudice if the individual advisor is no longer employed by the Member.

individuals who are not employed or selected by OBSI, and who are empowered to exercise a reasonable scope of review.

Conclusion

For the reasons stated, OBSI should first be mandated to overhaul its processes for dealing with higher dollar claims and gather data for five years to evaluate whether a binding authority regime is needed, and if so, to bring forward a proposal that is reciprocal, respects provincial limitation laws, includes enhanced processes for dealing with higher dollar cases, and contains an independent appeal process that will ensure OBSI remains accountable to its mandate and stakeholders.

Yours truly,



Dana H. Prince

Email: dana@getzpw.com
Direct Line: 604-605-4291