Tri View Capital Ltd Response to CSA Notice on Dispute Resolution

February 28, 2024

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

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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment – Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service

Tri View Capital Ltd. (TriView") is pleased to provide our comments in relation to the CSA 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* (the **Proposed Amendments**).

TriView is a registered exempt market dealer (**EMD**) that provides private capital market investment opportunities investors and issuers. Our primary jurisdiction is Alberta and we are also registered in BC, Sask, Manitoba, Ontario and Quebec .We currently employ 5 employees and have 15 dealing representatives. We have been in business for 12 years and raised over $400 million+ during the last 12 years. We are a member of the Private Capital Markets Association of Canada (**PCMA**) who has submitted a more detailed comment letter on the Proposed Amendments and we support the PCMA's comment letter.

We have three concerns with the proposal. First, prior to 2022, our industry had little authority and transparency to many issuers. We are limited in resources due to the size of our trades ($1 million raises based on $10,000 registered investments). EMDs have no cash control of clients' accounts and do not have AUM making difficult to force an issuer to do as promised. If any group should be held accountable, it should be the issuers, not the EMDs. Second, timelines. Are we accountable for investments in the past where investors use hindsight to allege a challenge. Most complaints I have heard is "we lost our money and we want you to pay it back" or "We didn't realize the loss was going to be guaranteed by the EMD". With new rules just beginning to be implemented, the minimum time for this to go into affect is when it is finally approved, not back in time. Lastly, out of our English law that brought democracy and fairness to be heard or case law to understand future decisions by Courts, the need for appeal is paramount to our society and values.

GENERAL CONCERNS WITH THE PROPOSED AMENDMENTS

Our firm values investors since without them we would not be in business. However, we believe the Proposed Amendments do not strike the right balance between investor protection and fair and efficient capital markets. We are concerned that the CSA has created a one-sided dispute resolution model that does not recognize that binding decision-making powers of up to $350,000 have the potential to impose a material financial impact on our firm in the absence of commensurate procedural protections under administrative law. Below are our concerns with the Proposed Amendments.

Change from Non-Binding to Binding Decision-Making Powers

- This change equates OBSI to an administrative tribunal but does not provide additional procedural rights to parties involved such as standards of evidence and the right to appeal.
- The CSA's approach overlooks the importance of an adversarial process to safeguard the rights of all parties and relies on data that does not support the CSA's conclusion of a "power imbalance" between firms and complainants.
- It will encourage investors to go to OBSI as there is little recourse if they try to manipulate or lie to an arbitrator. It will encourage more complaints hoping EMDs will settle than fight large fines without the ability to appeal

OBSI Unilaterally Determines Whether a Matter is a Single Complaint or Multiple Complaints

- The definition of a complaint has been broadened to be "any expression of dissatisfaction" but there is no clear guidance on when a matter is considered a single complaint or a multiple complaint.
- This could significantly impact firms financially, as the classification affects the liability limit per complaint, which can reach up to $350,000 for each complaint.

No Cost to Investors to Make a Complaint

- Investors face no financial risk when making complaints, while firms may incur significant financial and reputational damage.
- The absence of costs for investors can encourage exploitation of the system, creating an imbalance with firms disproportionately affected.
- The CSA is encouraged to implement measures to prevent misuse of the dispute resolution process, such as fees or potential costs for unfounded claims.

Opening the Floodgates of Complaints

- The Proposed Amendments might create a belief that investment losses are always recoverable.
- No cost for making complaints could result in a rise in baseless claims.
- Risk of mischaracterizing investment risks as suitability issues to make a complaint since investors have nothing to lose.
- Potential for overwhelmed resources of registrants and OBSI, especially if there is a failed offering.
- Instances of failed private market offerings may increase complaint volumes.
- Recommendations for the CSA include introducing measures to balance the complaint process and prevent misuse, such as filing fees, screening for merit, and clear guidelines.

OBSI Fee for EMDs will Increase

- The Proposed Amendment is missing a detailed cost/benefit analysis on the impact of increased complaints on OBSI membership fees payable by EMDs due to the potential increase in OBSI's caseload and costs.
- OBSI's fee structure is based on the previous year's sector representative numbers, lacks transparency regarding cost containment or budgetary controls.
- The CSA's suggestion that internal complaint resolution processes could mitigate costs does not account for the likelihood of OBSI complainants escalating as investors have nothing to lose and everything to gain by making a complaint to OBSI.

EMD Complaint Review Costs

- The OSC's projected initial and ongoing costs of $1,080 for the Proposed Amendments implementation are incomplete and/or do not reflect true costs.

- Additional costs, especially legal and compliance expenses due to material procedural changes, are not included in the OSC's analysis.
- Binding decisions of up to $350,000 per complaint, with no appeal rights, necessitate resource allocation by registrant firms to adapt to new processes, which is unaccounted for by the OSC in Annex E of its cost/benefit analysis.
- Potential uninsurability of such complaints under error and omission policies highlights serious financial concerns for firms.

No Procedural Fairness for Firms

- With the ability to make large awards of up to $350,000 against a firm, the CSA has provided no additional procedural safeguards to ensure the dispute resolution process is fair. The economics at stake for EMDs require a fair process under administrative law. The CSA essentially states that OBSI will continue its reviews, as it has done in the past, with what it now calls an "**essential process test**", which the CSA defines as follows:

  "*[OBSI] would achieve a proportionate process by following a procedural threshold test under which [OBSI] 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)… During the review and decisions stage, the essential process test would enable [OBSI] to use processes ranging from inquisitorial to adversarial, if they are essential to achieving a proportionate process for both parties to resolve a dispute fairly. [OBSI] would decide which procedural tools to apply in each review. In all scenarios, the [OBSI] would apply processes that achieve procedural fairness for both the firm and complainant and that do not create disproportionate burden on the parties. The use of procedural tools that are more commonly found in the adversarial system during the review and decision stage is anticipated to be infrequent and would be limited to circumstances that meet the essential processes test*."

- The CSA's created essential process test lacks empirical support or proven effectiveness from other jurisdictions and introduces uncertainty and arbitrariness into the dispute resolution process. Essentially, the test is whatever OBSI determines is essential is the process to be followed. In such circumstance, OBSI would have wide discretionary power, creating concerns about impartiality and consistency in decisions. The absence of transparent guidelines could result in unpredictable outcomes and questions about accountability.

Final Recommendation Only Binding on Firms

- Final recommendations by OBSI are binding exclusively on firms, not on complainants; firms must comply with OBSI's decisions, while complainants can still take a matter to court if they do not object to a final recommendation at the first stage of OBSI's complaint review.
- An equitable process would ensure both parties are equally bound by OBSI's decisions. This is the approach followed by Ireland, as discussed in the Proposed Amendments, but rejected by the CSA for no reason.

Internal Review by OBSI of Objections at the Review and Decision Stage

- OBSI's internal review by senior executives if a party objects to the final recommendation may compromise the impartiality.
- There is a risk of perceived or actual bias and conflict of interest within an internal review process at OBSI.
- Also as discussed below, the inability to appeal under the Proposed Amendments heightens the need for an independent and unbiased review process.

No Appeal Rights, Only Judicial Review

- OBSI's final decisions are not subject to appeal, potentially creating discrepancies with securities law interpretations by CSA members.
- The lack of appeal rights removes the possibility for correcting perceived errors by OBSI, both procedurally and substantively where the process was not fair or their decision is wrong.
- The Proposed Amendments permit judicial review, however, it is limited to reviewing the legality of the process, not the decision's merits.

No Justification for an Award Limit of $350,000

- The award limit is substantially higher than regulatory capital requirements for EMDs, which is $50,000.
- Also OBSI's data shows that most decisions involve amounts far less than the $350,000 limit (most decisions are for less than $10,000).
- There is a need for empirical data to support the justification for the proposed award limit.

Award Limit May Increase Beyond $350,000

- The CSA has indicated the possibility of future increases to the award limit but has not specified the conditions for such changes.
- We recommend that the CSA provides a clear, structured framework for adjusting the award limit, reflecting economic and market conditions, to ensure informed and transparent decision-making.

No Detailed Loss Calculation Methodology

- OBSI's methodology for calculating losses in private market investments is criticized for its lack of transparency and detail. There are only high-level commentary on OBSI’s website.
- The complexity of private capital market investment valuations requires a clear, objective, and transparent methodology. This is more important in the private capital markets when the market price of many investments are not determinable since they are illiquid.
- We have concerns over OBSI's practice of declaring an entire investment as unsuitable, necessitating buy-backs by an EMD, which may be detrimental, particularly to smaller firms, and can be seen as a “decision of convenience” when OBSI has challenges in making a valuation.

- Despite promises since 2014, OBSI has not released a detailed private market loss calculation methodology for public and industry feedback.

No Insurance 'Deep Pocket' to Pay for Awards

- The OSC's cost/benefit analysis in Annex E of the Proposed Amendments have not considered the impact on E&O Insurance for EMDs. There is uncertainty about how E&O insurance premiums and coverage will adapt to the Proposed Amendments, if at all.
- Without a clear definition of a "complaint" that imposes a binding financial award, such matters are likely uninsurable. Therefore, there is no deep pockets to pay for these awards.
- Simply, there is a potential for EMDs to face significant uninsured losses due to non-coverage by E&O insurance which creates the risk of financial instability and operational viability for EMDs and other registrants.

No Consideration of Alternatives to OBSI

- CSA plans to recognize OBSI as the independent dispute resolution service for binding resolutions without assessing other entities or frameworks beyond maintaining OBSI's status quo.
- The Ontario *Securities Act* requires the OSC to undertake a cost/benefit analysis of alternatives to OBSI. Specifically, the OSC only considered the alleged negative consequences of maintaining the status quo with OBSI, as set out in Annex E of the Proposed Amendments, and no other alternatives. The CSA has selectively identified three jurisdictions to support what appears to be a foregone conclusion that OBSI should be the identified ombudservice. What is conspicuously absent is a head-to-head comparison of each ombudservice using various criteria by which one would compare and contrast their respective features.
- For example, we note that the Investment Industry Association of Canada provided a detailed report where it provided of a lengthy list of ombudservices in Canada and other jurisdictions that have non-binding authority, in both financial and non-financial sectors.[1] Such a review or comparison was not undertaken or mentioned by the CSA or OSC.
- Also, as the OSC is aware, IIROC[2] published a review of its Arbitration Program in 2022 titled "**IIROC Arbitration Program Working Group Recommendations**"[3]. No mention, discussion or consideration was given to the IIROC Arbitration Program as a more viable option relative to OBSI.

EMDs Cannot Force Dealing Representatives to Cooperate

[1] https://iiac-accvm.ca/iiac-research-of-ombudsperson-non-binding-authority/

[2] "**IIROC**" means the Investment Industry Regulatory Organization of Canada which merged with the Mutual Fund Dealers Association of Canada into what is now called "**CIRO**" or the Canadian Investment Regulatory Organization.

[3] See https://www.iiroc.ca/media/20626/download?inline

- EMDs, not dealing representatives, must be the participating members of dispute resolution systems like OBSI. There can be a challenge for EMDs to receive full cooperation from dealing representatives who have left or joined competing firms. This lack of cooperation can hinder an EMDs' ability to defend themselves.
- The CSA hasn't addressed these accountability issues, which are crucial especially with the proposed binding decision-making awards.

Issue Involving Multiple/Concurrent Proceedings

- We urge the CSA to provide explicit guidance on handling concurrent proceedings involving OBSI complaint reviews and simultaneous reviews by CSA members or judicial bodies.
- We propose that the CSA harmonize the review process by establishing a hierarchy of proceedings or creating a framework for deferring one process in favour of another.

Award Cannot Be Used to Fund Litigation

- We suggest clarifying that complainants cannot initiate additional legal proceedings for amounts exceeding the maximum award if the cause of action is the same.
- Concerns arise regarding the potential for complainants to use OBSI awards to support further court proceedings, necessitating clarity on this matter.

ANSWERS TO QUESTIONS IN THE PROPOSED AMENMENTS

Below are our specific responses to questions posed by the CSA in the Proposed Amendment.

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?*

   Lack of harmonization is challenging for registrants. Due to the potentially debilitating effect of a binding decision against a firm, if OBSI is not designated as the identified ombudsman at the same time, dealers would spend more resources on complaints where there is a binding decision.

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.*

   We believe 90 days is an appropriate length of time to allow both parties sufficient time to review the recommendation.

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.*

   We believe 90 days is an appropriate length of time to allow complainants sufficient time to review the decision.

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?*

   This is one-sided and either party should be subject to a binding decision as a matter of fairness under administrative law.

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

   We believe the limit is too high for binding decisions. It is higher than small claims court in Ontario ($35,000) and higher than simplified procedures in Ontario Superior Court ($200,000). A limit of $50,000 is fine if the decisions are not binding.

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?*

   The absence of an appeal process assumes OBSI is infallible in its decision-making process and loss calculations. There does not appear to be room for negotiation on settlements as the OBSI is no longer resolving disputes but taking an adjudicative role, which adds to the procedural unfairness to registrants.

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.*

   We do not believe the OBSI should not have binding authority, especially with no right of appeal to an independent third party with appropriate knowledge of dispute resolution and securities regulations. Binding authority should always include a right of appeal.

   The CSA may want to consider granting:
   - binding authority under $35,000 (the limit for small claims court in certain provinces)
   - As per the table below, most cases are settled for amounts less than $10,000 and a clear majority of less than $50,000.

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

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.*

   An important element of oversight is reporting to interested parties. Therefore, there is a need for data collection that is publicly posted for investors and registrants. The current data reporting of Demographic information on OBSI's website is lacking.

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?*

   The proposed framework does not address accountability to independence, neutrality or procedural fairness. The proposed framework provides:

   - No loss calculation methodology for private market securities
   - No data reporting requirements
   - No physical presence out West and is seen as an Ontario ombudservice
   - No appeal procedures for registrants
   - No educational and training mandates for OBSI staff
   - No pro forma on costs and how any increase in complaints will increase fees
   - No explanation of what is a included in a limit of $350,000. Can an investor have multiple complaints that are all subject to $350,000?

   The Proposed Amendment does not outline the oversight of OBSI and notes that this is currently being developed. We suggest that the oversight regime be transparent and include reporting that is publicly available.

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.*

   Many exempt market dealers are small, therefore, having an internal ombudsman dedicated to this function is not feasible. However, we believe that all registrants, including EMDs, should not be prohibited from referring to their internal dispute resolution service provider as an ombudsman provided that they follow the guidance provided by the CSA set out in 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*.]

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We thank you for the opportunity to provide our comments on the Proposed Amendments.

Best Regards,

Craig Burrows
President & UDP, TriView Capital Ltd

cc: Private Capital Markets Association of Canada (info@pcmacanada.com)