CFA Societies Canada

Canadian Advocacy Council

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February 28, 2024

VIA EMAIL

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

The Canadian Advocacy Council of CFA Societies Canada (the "**CAC**")[1] appreciates the opportunity to comment on the Consultation.

We have long called for granting OBSI the authority to issue binding decisions in respect of investor complaints, and we are pleased with the progress towards this goal. Binding authority will facilitate access to justice for investors and mitigate the imbalance of power and resources among investors and regulated firms.

We are pleased to join a cross-Canada coalition of consumer organizations and advocates in endorsing this vital investor protection proposal.[2] Like other members of

[1] The CAC is an advocacy council for CFA Societies Canada, representing the 12 CFA Institute Member Societies across Canada and over 21,000 Canadian CFA Charterholders. The council includes investment professionals across Canada who review regulatory, legislative, and standard setting developments affecting investors, investment professionals, and the capital markets in Canada. Visit http://www.cfacanada.org to access the advocacy work of the CAC.

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors' interests come first, markets function at their best, and economies grow. There are nearly 200,000 CFA® charterholders worldwide in 160 markets. CFA Institute has ten offices worldwide, and 160 local societies. For more information, visit www.cfainstitute.org or follow us on LinkedIn and X at @CFAInstitute.

[2] See Consumer Coalition Letter (28 February 2024).

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this coalition, we believe provincial and territorial legislatures should move forward with granting binding authority as soon as practicable, even if it means this authority is granted by different jurisdictions at different times.

We also believe that any oversight framework applied to OBSI should be tailored to reflect its role as an ombudservice—a role that includes drawing attention to patterns and trends in consumer complaints and industry misconduct, even when this raises uncomfortable issues for regulators and politicians. Regulators should give OBSI a clear, consumer-oriented mandate to achieve and give that organization scope to operationalize that mandate. And reflecting its ultimate accountability to the public, OBSI in turn should report to the public (as it does now) on its work towards these objectives.

As observed in the Consultation, the provincial and territorial legislatures will need to enact legislative amendments that allow regulators to grant binding authority to OBSI. We believe these amendments should be introduced without delay, and would be happy to provide feedback that might be helpful in their design.

Our comments on the specific consultation questions posed in the Consultation are set out below.

Consultation Question #1 – The CSA contemplates that under the proposed framework, an independent dispute resolution service ("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 the Ombudsman for Banking Services and Investments ("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?

We strongly believe that the benefits to investors of gaining timely access to IDRS outweigh any burdens that might result from different jurisdictions' acting at different times. If anything, the potential costs to firms and investors arising from inconsistent treatment across jurisdictions weighs in favour of all jurisdictions moving quickly to implement the reforms contemplated in the Consultation. Investor access to binding dispute resolution services is already long overdue. A framework in which no reform occurs until the last jurisdiction takes action will harm investors and seems prone to give rise to a prolonged and unnecessary period of uncertainty for regulated firms.

What is more, there may be benefits to a staggered approach to implementation. Firms will have time to develop familiarity with the new framework with a smaller investor base in those jurisdiction(s) that are first to act, prior to the regime applying across Canada. This approach may allow firms to better ensure they have the necessary internal

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governance practices in place. And in the meantime, retaining the status quo in jurisdictions which have not yet designated or recognized OBSI as the identified ombudservice would have limited operational impact.

We encourage the CSA to provide ongoing updates regarding the status of each new jurisdiction successfully designating or recognizing OBSI as the identified ombudservice, to better ensure compliance with the new regime.

Consultation Question #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, or 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.**

We join other consumer coalition members in supporting a 30-day period as a sufficient length of time for a recommendation and a decision to be deemed final. The investigation and recommendation stage of the current framework typically involves multiple touchpoints between OBSI and the parties involved in a dispute. The ongoing engagement of the parties, along with the fact that both parties are concerned with timely, efficient and cost-effective resolution of the dispute, suggests parties will not need substantial amounts of time to consider their options.

We also note that the framework proposed in the Consultation already reflects a significant concession to industry relative to peer jurisdictions—in the United Kingdom, ombudservice decisions are binding immediately upon their acceptance by the

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consumer.[3] Before making further concessions by accepting a longer review period at either stage, regulators should insist on evidence that this delay is necessary and would not give rise to unintended consequences (e.g., that consumers may settle on a low-ball offer rather than wait through a series of extended review periods and appeals).

Finally, we are cognizant that a key value to the inquisitorial approach is that it addresses the power and resource imbalance that often exists between complainants and firms. Any objection or withdrawal may result in a process that is more adversarial in nature, likely necessitating more cost and time and introducing further complexity. We thus think it is imperative that OBSI ensure a system is in place to properly inform complainants from the onset about the nature of the two stages, and the cost, time and complexity implications of objecting or withdrawing from the investigation and recommendation stage. We believe this would further incentivize an early-stage resolution to the dispute and ensure that complainants consider their approach carefully.

Consultation Question #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?

The proposed framework is designed to promote efficient dispute resolution process, and we agree that allowing a consumer to reject a decision and proceed with new civil litigation following the two stages would seem prone to impose undue costs for firms and the court system. But we are mindful that this reflects a concession to industry that many peer jurisdictions have not made—they allow consumers to walk away from the ombudservice process even after the review stage.[4] We would be interested in gaining insights into these jurisdictions' experience on this score.

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

We regard this issue as separate from the question of whether to move forward with binding authority, but the current compensation limit of $350,000 is obviously inadequate. This limit, set in **1996**, has been left unchanged for almost 30 years. It has never been adjusted for inflation or cost of living. What is more, it is far out of alignment with the compensation limits applied to ombudservices in peer jurisdictions. For context, we note that UK's Financial Ombudsman Service, which has binding authority, has a redress limit more than double that of OBSI—approximately $710,000 (£415,000).

To bring us closer into alignment with international standards, we would support an increase to a limit of $500,000 with regular cost of living adjustments as recommended by the Ontario Capital Markets Modernization Taskforce. We believe this to be particularly warranted given the multi-stage review framework set out in the Consultation and the degree of process that may be afforded to the parties.

[3] FCA Handbook, rule 3.6.6(3) ("if the complainant notifies the Ombudsman that he accepts the determination within that time limit, it is final and binding on both parties").
[4] See e.g. *ibid*, rule 3.6.6(4).

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Consultation Question #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.

OBSI should be subject to an oversight framework tailored to its role. This role is distinct from that of SROs—rather than making policy, an ombudservice resolves complaints and reports on trends and patterns in these complaints. Because an ombudservice is independent of industry, it also does not raise the kinds of risks that justify relatively close oversight of SROs.

In reporting on consumer complaints, an ombudservice may raise issues that are uncomfortable for regulators and politicians. In doing so, they spark conversations that foster the continuous improvement of public policy, for the ultimate benefit of the public. A healthy degree of insulation from the CSA and CIRO will help ensure OBSI is able to fulfill this core role.[5] To this end, the CSA should give OBSI a clear, public interest-oriented mandate, but give that organization operational freedom to pursue this mandate.

OBSI's governance also should be designed in a way preserves its independence. As we have observed in previous comments, members of the OBSI board should be selected based on their skills, expertise, and individual perspectives rather than as representatives of a particular government or stakeholder group.[6]

And reflecting its ultimate accountability to the public, OBSI should report to the public (as it does now) on its work towards these objectives, as well as on the effectiveness of its binding framework as it comes into place.

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.

Like other consumer coalition members, we support the prohibition on the use of terminology that may misguide or confuse a complainant on the independence of internal complaint handling personnel, departments or procedures. In our view, this prohibition will add further clarity to the process for complainants and the distinction in terminology will further assist complainants in considering whether to avail themselves of the services of OBSI for independent dispute resolution.

Concluding Remarks

Effective and accessible independent dispute resolution with final binding authority, in alignment with international standards, is a welcome addition to the Canadian securities industry. In furtherance of this, we encourage the CSA to emphasize accessibility to

[5] See Anita Anand & Andrew Green, "Regulating Financial Institutions" (2012) 57:3 McGill LJ 399.
[6] CAC Comment Letter on OBSI Governance Review (31 January 2023).

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dispute resolution over operational burden when considering the timely rollout of the amendments.

As regulators move forward with implementation, we would stress the importance of OBSI remaining an independent decision-maker, notwithstanding the oversight contemplated by the CSA. We also want to emphasize how important it will be for OBSI to monitor the effectiveness of this framework as it comes into place, and to report to the public on this score.

We thank you for the opportunity to provide these comments and would be happy to address any questions you may have. Please feel free to contact us at cac@cfacanada.org on this or any other issue in the future.

(Signed) *The Canadian Advocacy Council of*
CFA Societies Canada

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