*The Financial Loss Litigation Expert**

February 28, 2024

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

PREPARED FOR:

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
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Who We Are

The following comment is submitted on behalf of Harold Geller and H. Geller Professional Corporation o/a Geller Law (collectively "Geller Law"). Geller Law advocates for investors and consumers concerning the distribution of financial products. Geller Law also represents investors and consumers in financial loss recovery litigation. Harold Geller's experience as an advocate and lawyer began with completing the CSI course in 1983 and becoming a member of the Law Society of Ontario in 1993. Harold Geller has served on numerous committees with regulators, the Ontario and Canadian Bar Association and was the last chair of OBSI's disbanded Consumer and Investor Advisory Committee.

Summary

Geller Law commends the Canadian Securities Administrators for the 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 proposal represents limited progress towards a fairer, if not fair, dispute resolution option for Canadian investors with gross losses of $350,000 or less. The Proposed Framework should not be considered as a substitute for loss recovery through the CIRO Arbitration Program or the courts. It is an alternative path particularly well suited for claims of $50,000 or less.

The existing and proposed frameworks do not address the common root causes of investor harms, being systemic breaches. They do not address the abuse of complaint handling obligations by dealers, except the overdue and welcomed proposed elimination of the use of "ombuds" as a term associated with dealer risk management through complaint handling tactics.

Even with the proposed changes, dealers, advisors and their lawyers will continue to have an unfair advantage in avoiding, complicating and wrongfully denying investor complaints. Canadians will continue to be denied justice when negligence and wrongdoing visits harm on their crucial investments for retirement and other long-term goals.

Canadians have no prospect of protection against systemic breaches by dealers until regulators and the designated ombudsoffice take steps to uncover, and refer for enforcement breaches, of the duty to warn investors of potential and known negligence or wrongdoing; and until breaches in complaint handling obligation trigger immediate referral for and subsequent enforcement actions.

The Issue

Currently, NI 31-103 provides for the Ombudsman for Banking Services and Investments (OBSI) as an independent service to resolve a limited subset of disputes. The current framework has resulted in dealers gaming the system resulting in continuing the harm to Canadian investors. The fundamental problem is that OBSI's investigations lack the necessary self-defining

investigations and related powers that are hallmarks of true inquisitorial justice. Instead, OBSI uses a modified inquisitorial process which falsely assumes that an investor has the knowledge, skills and access to documents which are necessary components of a meaningful complaint. Furthermore, OBSI lacks access to documents (other than as maybe voluntarily provided by the dealer) and lacks access to a key source of information, being the advisor. The OBSI investigation framework is built to be inferior and, the result, is a process that is biased towards the protection of industry and the results of its investigation reflect these foundational flaws.

As recognized by the CSA, one of the core problems undermining the credibility of OBSI and its work is that OBSI does not have the authority to make binding decisions. The proposed framework would modify the complaint handling process and, subject to the obstacles of continued embedded flaws, require that firms comply with a final decision of the identified ombud service. This is a step towards overdue reforms that could make OBSI a credible and crucial part of fairness in Canadian financial markets involving retail investors.

The professed goal of the proposed framework is to implement a binding investment Ombud service regime in Canada. This is subject to potential disunity in timing and process between the provinces. The CSA proposes that this will improve confidence in our markets and provide retail clients who are dissatisfied with their firm's response to a complaint.

The CSA has failed to improve the funnel which diverts most valid investor complaints, that is the framework used by firms for complaint handling.

The proposed framework focuses on those few complainants who have the skill, knowledge, resources and endurance to pursue their complaints after dealers' complaint diversion steps have run their course. Those few who take their dispute to OBSI for resolution will benefit from the marginal improvements proposed subject to the inclusion of additional hardship such as the OBSI result being binding on the investor and the mooted further obstacle posed by a potential appeal mechanism.

The grail of implementing a fair and binding investment ombud service regime in Canada would improve confidence in our markets. This proposal addresses the binding element of this admirable goal, but not the fairness element of the existing framework.

While there is much to hope for, as an investor advocate Geller Law must take care not to be overly critical of the positive step in the proposed framework while recognizing that the goal as espoused by the CSA is achieved by minor changes when much foundational change is overdue.

With this in mind, Geller Law supports the proposal as is subject to a few notable conditions:

1. The final decision bind the dealer
2. The final decision not be subject to further steps such as an appeal

3. The investor at all times has the unilateral option of reverting to the CIRO Arbitration Program or litigation. (for former IIROC dealers)

The Problem

The CSA has recognized that in Canada, most retail clients' complaints are "resolved" by firms. In the proposed framework the CSA has not considered the empirical evidence which is available and could be analysed to support the fairness of the processes and results of dealer level "resolutions". There are three key parts of how consumer harm results from the complaint diversion process that are mandatory pre-cursors to an OBSI complaint. To state the obvious, OBSI receives a small percentage of claims which are escalated to the ombud service. There is no evidence that the claims diverted from OBSI were settled fairly, honestly or in good faith. There is no evidence that the claims handling by dealers result in resolutions satisfactory to the parties.

The proposed framework misses the mark of fair consumer protection in that it has chosen not to investigate the pre-OBSI steps by obligations of dealers when discovering potential harm to investors or receiving dealer-level complaints. These include:

a. Dealers' duty to act fairly, honestly and in good faith in dealing with investor harm and potential harm;
b. Dealers' duty to warn of identified and potential harm to their clients;
c. Dealers' duty to avoid or, as a last resort, clearly communicate when they are favouring their own interests over the interests of their clients.

The CSA has chosen not to task its SRO on obtaining empirical evidence of suspected systemic breaches in the existing dealer investigation of and reporting of dealer-level investor complaints. The CSA has chosen not to task its SRO with commencing enforcement actions against dealers who fail to warn their investors when negligence or wrongdoing by advisors or the dealer is suspect, and which may have caused damages.

The CSA has not required dealers to communicate to investors using plain language. Instead, the CSA accepts the continuing abuse of investors through the use of industry-specific words and phrases and legal words and phrases in complaint handling dealer level responses. This continues the misdirection of investors without concern with the resulting harm to investments and the credibility of Canadian financial markets.

The CSA's proposed framework is lessened by the absence of OBSI mandate over licensed salespeople and individual branch managers. OBSI is unduly constrained interpretation of its mandate to exclude consideration of many of the products and services offered to Canadians by dealers and their salesforce. The CSA must pursue a unified approach to investor and consumer complaints, a holistic approach in line with the services promised by most advisors and dealers – wealth management products and services not a pigeon-holed approach limited to securities

only.

The CSA failed to address the barriers to investors being able to conduct their own inquiries into the advice and products sold to them. Investors who request access to the documents related to their investments are routinely denied full and unedited access to their own documents. In responding to document requests, dealers act in their own interests and do not include evidence of negligence or wrongdoing even when known to the dealer. At the OBSI investigation stage, OBSI lacks the power to force full production and testimony. As a result, investors and OBSI receives curated evidence; this curation is a conflict of interest and fundamentally both unfair to the complaint process and likely to undermine investors' face in Canadian financial markets.

The CSA must require that OBSI take on an inquisitorial role (such as the French and German justice systems use, not the modified process presently used) and OBSI should be tasked with defining the nature of the complaint after a thorough investigation. Why after an investigation, because neither an investor can know what went wrong until after a holistic and unfettered inquisitorial investigation. To start with a ill defined pre-investigation agenda and limit the investigation to that agenda is to be all but guaranteed to miss the mark, if the mark is fairness and getting to the root cause of the investor harm.

It is commendable that in the proposed framework the CSA recognized historic:

a. patterns of refusals by dealers to pay complainants at all; and
b. patterns of settling disputes for less than OBSI recommends.
c. historic misdirection of investors through the abusive and misleading use of the terms “ombuds” to describe dealer-level complaint diversion by employees acting in the dealer's best interest.

The solution to these historic harms does not need new regulation. The tools for change are available to CIRO for securities and securities commissions for EMDs if the CSA had the will to get to the root causes that undermine fairness in the investor complaint and restitution process. They can and should commence enforcement actions against dealers for refusals, for lowballing, and for failing to handle complaints “fairly, honestly and in good faith” and “in the best interests of the investor.” Notably, there is no legislative exemption for dealers such as these duties do not apply to their complaint handling obligations.

The proposed framework marginally addresses these patterns. The effectiveness of the improvement is subject to the potential of adding further delay and complication by adding an appeal step to the Ombuds process.

The proposed framework misses an opportunity by failing to take action to immediately address this pattern through the available tools of enforcement.

The Positives

The CSA recognition of the importance of having an efficient system that resolves complaints

fairly and effectively without creating an undue burden for either party to a dispute is a positive. The promotion of OBSI as a dispute resolution process that can give Canadians a high degree of confidence is a welcome aspirational goal.

The CSA could easily address a cornerstone missing from OBSI role in investor protection if it were to give a broad mandate to OBSI to investigate and report systemic problems in dealers handling of investors' complaints and dealers' complaint responses.

The incorporation of OBSI's existing investigation and recommendation processes is positive. Greater powers should be given to OBSI to change their process and related powers to require the production of the full dealer and advisor files, including all records of oversight of the investor's accounts and the advisor's work not limited to a specific investor. Greater powers should be given to OBSI to compel evidence from the advisor, the branch manager and all responsible compliance officers.

The potential for decisions that bind the dealer is an important step forward. This must not be undermined by the inclusion of an option for the dealer to further delay through an appeal process.

The internal review stage may address some concerns, but the proposed framework is opaque in explaining how OBSI would use the proposed tools. In essence, the CSA is asking commentators to trust OBSI to do the right thing when OBSI has not earned this trust. A leap of faith that is unnecessary. There is no reason why OBSI through the CSA could not provide the draft process, guidance, and rules for comment. The critical details inform meaningful and specific comments are not available at this stage. The promise to publish the rules and procedures for comment is a crucial step prior to the CSA having the necessary input from Canadians on its present framework.

The long overdue commitment to reducing the risk of confusing the dispute resolution services of the identified ombudservice with a firm's internal complaint handling processes is a step forward.

The proposed framework should recognize and address the limitations on how OBSI investigates complaints. OBSI focuses on the investor's complaints as framed. Investors are unlikely to know the root cause or proximate cause of the harm they experienced. As one example, in representing over 1500 investors, I have yet to interview one who understood the difference between a solicited and unsolicited trade or what are the required components of instructions for non-discretionary trade. As a result, these investors would not know to make complaints for discretionary trading in non-discretionary accounts. Nor would an investor, if asked, if this occurred in their accounts have the knowledge of industry jargon and requirements to meaningful answer the question. The point being that the notion of self-representation is undermined by the technical jargon used by dealers (their forms are riddled with technical terms, as are their complaint responses) and the investors lack of knowledge the regulations, rules and standards which are intended to protect investors.

Another problem is that OBSI does not see a need to investigate the root causes of the potential problem that caused the harm. In many cases this would require OBSI to look beyond an investor's complaint to the accounts of other investors who worked with the advisor, branch and/or dealer. In our experience representing over 1500 investors, the vast majority of harm can be traced to systemic root causes in those cases. In addition, and perhaps informing OBSI not seeing a need to investigate for root causes, OBSI's mandate remains limited concerning systemic root causes. This proposed framework fails to address this Achilles heel undermining the rooting out the harm visited on investors, notifying unwitting victims, and informing regulators for enforcement action.

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Another positive is the potential that the jurisdiction of OBSI will overlap with the proposed quantum for the CIRO revived Arbitration Program. OBSI opposes this overlap. OBSI has voiced concern that the Arbitration Program will, to paraphrase and to use a colloquial, eat its lunch. CSA's statistics show the error in OBSI's position. An estimated less than 100 cases received monetary compensation recommendations between 2018 and 2022 where the losses were $50,000 to $350,000. Geller Law and its predecessor, a micro law firm, made more recommendations to investors for litigations settlements in this band of compensation in the last 4 years then OBSI did over the reported 4 year period. This reflects the reality on the ground that investors do not see OBSI as a viable option for cases over $50,000. It is also significant that Geller Law routinely takes on larger claims with OBSI's mandate after an OBSI complaint had been dismissed by OBSI. In each and every one of these rejected claims Geller Law and its predecessor has delivered compensation to investors.

OBSI is an important service of last resort. It is necessary for the claims which cannot carry the high cost of legal representation. The CIRO Arbitration Program should be available in parallel to provide streamlined dispute resolution to the large segment of harmed investors that OBSI has not serviced or has not properly serviced. Nothing in the proposed framework would change the viability of OBSI as an alternative to the Arbitration Program or litigation except for the cases under $50,000 losses.

Consultation Questions

1. *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?*

Operational impacts are a matter that only OBSI can meaningfully address. It is OBSI's operation that would be impacted. From the point of view of the investor, the disunity of dispute resolution providers and procedures is more of the same. More of the gauntlet that the investor must run to both inform themselves about their rights and options as well as the byzantine process for seeking redress. While disunity will sew confusion, it is the continuation of the norm as established by governments, securities commissions, and regulators. What Canadians need is a

unified provider and process for all financial complaints, not limited to the issues caused by securities balkanization. What Canadians need and the scope of this proposal are two very different things. Given that what Canadians need is not being considered by the CSA, the proposed framework as is should be supported as a stepped, if unfortunately, limited step, forward.

2(a) *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.*

The time for deeming is a choice between evils. Further delay is one evil. The lack of education, training and experience of the investor in dealing framing a potential appeal, regardless of the time allotted, is another evil. For an investor to obtain knowledgeable legal counsel necessary for an appeal within the times proposed is a hardship. Not only are there few lawyers who practice in this area but almost all of those lawyers only act for dealers, not investors. The scales of justice are weighted to favour dealers in any review or appeal process. The question is how to limit the further harm potentially suffered by investors by a deeming provision.

The proposal for review is inherently flawed. As described "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-makers review would be *limited to the specific objections raised* by the parties and the decision-maker would apply the fairness standard." [emphasis added] This overlooks the lack of appeal expertise of a self-represented investor's as compared to the dealer's internal lawyers and expert external lawyers. A constrained appeal process limited to specific objections raised by the parties undeniable is a process structural biased to favour dealers. This bias cannot be ignored and cannot be imbedded into OBSI complaint handling processes.

To state the obvious source of the core flaw:

- The dealer has control of and access to all relevant documents from its records, the investor does not.
- The dealer is experienced in how to frame and what to include in "formal objections." In all but the rarest of cases, the investor has no experience or no relevant experience.
- The dealer has constant legal support in the appeal process. The proposal and OBSI's communications do not provide or encourage legal support for the investor.
- The dealer has ongoing access to OBSI specialized training on OBSI's processes. The investor is limited to the paltry materials posted online by OBSI.

- The dealer has ongoing social engagements with OBSI (examples include OBSI holiday gatherings) and benefits from the revolving door between OBSI and industry employment. The investor is an outsider.

The only limited way to address OBSI's processes inherent biases is to accommodate the investor's unfair situation. Not only must any appeals not be limited to specific objections raised by the investor but the proposed binding authority should bind the dealer while leaving open to the investor the right to seek redress through the CIRO Arbitration Program or before the courts.

2(b) 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.

Please see the comments to 2(a) above. Given the above listed OBSI biases, this answer assumes that the decision is binding on the dealer only. Also, this answer recognizes the dealer ongoing access to legal representation and specialized employees. Given this access by dealers, a 30-day period should be more than sufficient. This takes into account that a decision follows the dealer's own internal investigation and the length engagement by dealers in the OBSI process. Even over the winter holiday period, a decision should not take more than 5 working days, thus the 30-day period takes into account holidays etc.

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?

Please see above. The decision should not be binding on the investor. To address the structural and embedded OBSI bias, a decision should only bind the dealer.

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

The $350,000 is an arbitrary amount set many years ago without consideration of inflation or the increased size of RRSP, TFSA, etc. as accumulated over time. The limit should be increased to $500,000 and then automatically increased by COLA each year thereafter. The only reason to continue the limit at $350,000 or less (perhaps $150,000) is if CSA chooses to prioritize the mandate of OBSI over the interests of Canadians in having the option of OBSI or the CIRO Arbitration Program, as opposed to a free market choice between the two.

5. 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?

As the process continues embedded unfairness which favours dealers, the question is how an appeal process may hinder efforts toward bringing fairness to the complaint process for Canadian

investors. Practically speaking, only exceptionally would an investor seek redress by appeal. An appeal results in further delay and further process, both favour the interests of dealers and are contrary to the interests of investors. An appeal mechanism would unfairly benefit dealers only.

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.*

No for the reasons in 5, above

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.*

A key change to oversight must be provide a systemic mandate that is fit for purpose and direction to OBSI to seek out root causes. OBSI must be given the powers to go beyond an investor's complaint and the investor related files to fulfill an enhanced and meaningful systemic mandate.

Another key change is the appointment to the board of investor advocates who are not: former industry participants, former regulators nor former persons servicing industry. It is highly encouraged that future Investor representatives on the board have in-the-trenches experiences with complaint handling. Academics and persons with a general view of investor issues cannot bring the oversight needed to OBSI from OBSI's board. An example of this is the failure of the board to recognize and advocate for broader powers and broader mandate to seek out systemic problems.

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?*

OBSI is not accountable. It remains beholden to industry through the appointment of industry representatives, those who service or who had serviced industry, and those with long ties to industry. While OBSI announced additional board members to represent investors and consumers it has not appointed board members with experience representing investors in financial loss complaints or OBSI claims. This compares unfavourably to the appointed board members who represent the industry and have long experience in complaint handling from a dealer's perspective.

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

This is a long overdue investor protection step. Investors have been misled to believe that fresh and independent holistic investigations were undertaken by industries so-called ombudsoffices. In fact, these offices were not independent, did not conduct holistic investigations and were directly or indirectly part of the dealers' complaint diversion team.

Eliminating these terms from industry use has no downside. Eliminating the dealer use of this term has the clear benefit of lessening investor confusion. More importantly, all final response letters should emanate only from entities bound by securities Acts.

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