

February 28, 2024

CSA Notice and Request for Comment – Registered Registrant 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
<https://www.osc.ca/en/securities-law/instruments-rules-policies/3/31-103/csa-notice-and-request-comment-registered-Registrant-requirements-pertaining-independent-dispute>

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Kenmar are proud members of a Coalition of consumer groups calling for OBSI to be granted binding authority on decisions related to complaint cases filed against registered Dealers. This letter complements that submission located at https://faircanada.ca/wp-content/uploads/2024/02/2024_02_28_Comment-Letter_CSA-Binding-Authority-Proposal_Eng_ver.0.pdf .

Introduction

Kenmar welcome the opportunity to comment on the consultation paper on binding authority .We fully support a free, strong and vibrant financial Ombudsman Service, OBSI, with binding authority and appreciate the amount of work the CSA has deployed in preparing the framework and this consultation paper. We are delighted to note that the identified ombudservice recognition would include a Public interest

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obligation and that most of OBSI's existing efficient, fast processes would be preserved.

Kenmar Associates is an Ontario-based privately-funded organization focused on investor hosted at www.canadianfundwatch.com. Kenmar also publishes ***the Fund OBSERVER*** on a monthly basis discussing consumer protection issues for retail investors. Kenmar are active participants in regulatory consultations affecting retail investors. An affiliate, Kenmar Portfolio Analytics, assists, on a no-charge basis, abused consumers and/or their counsel in filing investor complaints and restitution claims.

OBSI plays an important role in the financial lives of Canadians and is a core component of Canada's investor protection framework. With an increasing number of Canadians living on fixed income, increased longevity, a decline in Defined Benefit Pension plans, a weak economy, a volatile return environment, inflation and the continuing impact of COVID-19, Canadians need an independent, trusted and impactful ombudsman service as never before.

Retail investors are at a relative disadvantage when it comes to a complaint against a financial institution; they cannot afford the cost of a thorough legal opinion, legal advice, or representation while Registrants either have counsel on staff or are retained to answer any question that arises. **A durable binding decision mandate is essential to level the playing field and improve complaint handling quality in the investment industry.**

Despite some inefficiency, we support a phasing in of different provinces at different times so the binding framework can finally get launched.

At all stages during a ombudservice complaint-handling process, there should be enough flexibility to allow each complainant to feel that they are being treated as an individual and that the complaint will be dealt with fairly on its own merits.

One important component that is missing in this consultation paper is the issue of consumer vulnerability and how the additional time and decision making complexity will affect vulnerable complainants. This is an ideal opportunity to apply behavioural finance and investor testing.

Without legal support, vulnerable investors, especially, may not have the capacity to make an informed decision regarding their objections. Guidelines should be made available to inform complainants on what constitutes a meaningful objection and the implications of filing an objection.

With recent governance amendments, we believe OBSI Board are well positioned to oversee operations to ensure the MOU is respected. Our only exception would be the practice of allowing ex-industry individuals to become Community Directors after a two year cooling off period from the industry.

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All consumer communications materials should be written in plain language, investor-friendly format.

The Consultation paper does not address how the framework would deal with lowball settlements except that it would not disallow “negotiated” settlements initiated by Firms. If there is a negotiated low-ball settlement (cases where the amount is less than what OBSI recommends), the dealer is shielded from public “Name and Shame” posting on OBSI’s website and public reporting.

In congruency with the coalition we are not recommending an increase in the compensation limit at this time but we note that the limit has not changed in 25 years, a number of credible third party reports have recommended an increase to \$500K and the current \$350K figure lags other international jurisdictions.

We recommend that it should be made clear that the statute of limitations time clock remains stopped until the complaint is closed by OBSI.

This letter highlights a number of issues that lurk in the background that merit regulatory attention.

These include, but are not limited to:

Limitation of access to the identified ombudservice

The CP amendments state *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* (this is a little late in the game for such communication). In effect, this means that a complainant can only access the identified ombudservice/OBSI for ill-defined “registerable activities”. If the client expresses dissatisfaction with a Registrant’s other services she/he might not have access to the identified ombudservice/OBSI.

As a result, the NI31-103 CP text could prevent a reputable Registrant from making the free identified ombudservice available to its valued clients related to some services it provides. We recommend that the CSA not limit access to the identified ombudservice for any product or service offered by a Registrant of a CSA/ CIRO registered Firm. A limitation of access can impair the client-Firm relationship, trust in the investment industry and impair investor protection.

However, we believe, to the extent a financial or retirement plan could be qualified or reasonably characterized as *advice* in furtherance of a trade in securities (which we think it would be in most cases) any dissatisfaction would, in practice, generate a securities-related complaint eligible for identified ombudservice consideration.

It is our firm conviction that unrestricted access to a financial ombudservice is an essential component of the consumer protection framework – allowing consumers to make complaints and receive compensation for the conduct of financial service

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providers and banks (the banking sector has a broader definition of a *complaint* so the issue does not arise).

Harmonization of loss calculation methodology

OBSI use the recognized opportunity cost calculation methodology for advised accounts while most of industry use the book loss method. Harmonization with OBSI will cut down on the number of disputes sent to OBSI, be more fair and improve the Registrant –OBSI relationship. A common methodology will reduce conflict and bickering with industry and lead to better, faster and fairer outcomes for victims of financial assault. An example is the long standing disagreement between exempt market dealers and OBSI that has gone on for too long. We cannot overstate the importance of harmonization under a OBSI binding decision authority.

Client best interests

The CP states “*We take the view that registered Registrant s should take an objective and balanced approach to the gathering of facts including concerning the actions of the complainant, the registered representative and the Firm*”. Registrants should put clients’ interests first when dealing with complaints (NOT balance the interests of clients with the Registrant or rep) as they are when dealing with clients generally under the CSA Client-Focused Reforms.

Potential exploitation of stage 2 review

The associated implementation policies, procedures and other documentation must, among other pieces of information, make it crystal clear to complainants that the stage 2 review is limited to specific objections and what type of objections are expected to be reviewed at stage 2.

The prospect of a further review with the potential for adversarial engagement may force the hand of the complainant to accept a lower offer. The design of the framework should incorporate mechanisms to alleviate such an eventuality.

The framework proposal permits the Firm to negotiate with the client *at any time*, including the time during which the senior investigator is reviewing the objection raised by the Firm. Such negotiations virtually always end in a low- ball settlement. Firms should be charged a fee when triggering a stage 2 review as a means to deter frivolous objections. For transparency and accountability, the framework should require publication of all objections filed and low-ball offers effected by Firms.

The judicial review

The judicial review could extend over several months thus providing an anxious period for a complainant. This is an ideal scenario for a Firm to offer a low settlement to bring so- called *finality* to the complaint. To help deter such

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behaviour, we recommend that all compensation that has been recommended for payment bear interest until paid, such interest not being part of the \$350,000 OBSI compensation limit. Independent legal assistance should be available if and when required.

To accommodate individuals with travel constraints or mobility issues, virtual hearings should be permitted.

Court filing for enforcement

Once a final decision is rendered by the ombudservice at the conclusion of the review and decision stage, the ombudservice or the complainant would be able to file the ombudservice's decision with a superior court as an order of the court, making it enforceable. Based on our experience, very few retail investor complainants will have the capability, time or energy to effect such a filing. In addition, there are court costs and significant time delays involved. OBSI should do the filing when filing is deemed necessary. We recommend also that the applicable regulator commence enforcement action against the Registrant when the binding and final decision is not respected.

CSA oversight and ombudservice independence

The oversight regime would apparently "follow the approach for oversight of SROs, clearing agencies, and exchanges." Would the OBSI, in effect, become a dispute resolution SRO? Would independence be impaired?

OBSI's independence is absolutely critical and must be respected in any potential oversight regime- accountability must be balanced with independence and any oversight regime should be proportionate to the concerns that regulators may have about OBSI's actual performance - which has been independently reviewed and endorsed times by multiple independent reviews. The Federal government recently granted OBSI the sole mandate as an External Complaint Body for banking complaints in Canada as a demonstration of their confidence in OBSI.

Given the shared oversight of OBSI by the CSA and FCAC and given that OBSI will be responsible for implementing the framework that the CSA adopts, it is vital that the CSA engage with these two organizations on this proposal. The division of roles/responsibilities among these three organizations needs to be formalized to ensure that organizational stability is maintained.

Deemed acceptance

The proposal suggests that a decision would be binding on the complainant if no response to a recommendation has been received within a prescribed period. A number of commenters have suggested a period of 30 calendar days as fair with the understanding that OBSI will make the criterion clear in investor-friendly language in all its written and verbal communications with complainants. There is an alternate view expressed by several individual commenters that feel that *silence*

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equals acceptance should be replaced with *silence equals rejection* with the complainant then able to seek other channels of redress such as civil litigation, IIROC arbitration.

Non-monetary remedies /corrective action binding decisions

Non-financial loss binding awards are especially important for seniors, retirees and vulnerable clients. Non-monetary remedies would include OBSI recommending that Registrants compensate clients in ways such as a letter of apology, restoring a product or service, correcting a credit bureau record or explanatory letters to a client's creditors to address the Registrants errors or negligence. It is not clear if OBSI can direct a Registrant to unwind an unsuitable loan agreement, reverse the sale of an unsuitable product with a fixed hold period/lack of liquidity, or compensate complainants for aggravation associated with exceptionally poor complaint handling. This should be clarified.

The criteria for non-financial loss redress should be made clearer and possibly expanded. The CSA/JRC/ OBSI should review eligibility criteria and type/size of awards that can be made by the identified ombudservice to ensure they are up to date and proportionate to the nature and impact of the complaint in question.

Use of the term "ombudsman" or similar nomenclature

We agree that it is certainly important to prevent misleading nomenclature of any function in the complaint process stream. This has caused an untold number of complaints to be diverted away from OBSI. Banking legislation has pretty well wiped out fake "ombudsman ".Registrants have developed new brands like Chief Complaints Office and new declarations of being *unbiased*.

The real issue is Registrant practices that mislead complainants who have received a final response letter into believing that an extra internal step must be engaged before accessing OBSI. NI31-103 (not just the CP) should make it clear that no matter the nomenclature, unregulated CSA entities should not be part of the Registrant's client complaint handling system. The time standard for a final response letter from a Registrant should be no more than 90 calendar days (the indirectly prescribed cycle time by CSA NI31-103), including ALL internal complaint process steps.

Firms should be required to inform complainants that if a complaint is escalated within the Firm's internal complaint process , any time spent will reduce the time available to file a complaint to OBSI (180 day limit after receipt of written response) and will consume the time available to file a civil action.(statute of limitation).

Uncollectible compensation

The introduction of a binding mandate should consider the creation of a fund, or the use of an existing industry fund, to ensure that where investor losses are

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attributable to a Firm that is no longer solvent or no longer registered, compensation is available for harmed investors. An investor redress fund established to address such shortcomings would support investors' confidence in the regulated provision of investment products and services.

Address systemic issues

The consultation paper does not address the handling of systemic issues. Dealing with systemic issues is a particularly critical function of a binding complaint resolution system, Systemic issues are of considerable importance to fairness outcomes for consumers and impact confidence in financial services. An ombudservice is intended to serve the wider Public interest, and not just the surviving individual complainant, and hence investor confidence is tightly wound around the ability to address systemic issues. Systemic issues are founded on and impact fairness. We recommend the adoption of the protocol that would address systemic issues. A good start would be to adopt the recommendations contained in the latest independent review of OBSI.

If a binding and final decision provides for a compensation award, all similarly impacted victims should be awarded appropriate compensation even if they did not complain. This is entirely consistent with acting in the Public interest, fairness, integrity and common sense.

Non-disclosure Agreements (NDA)

Non-disclosure Agreements, also known as Confidentiality Agreements, Gag orders or hush money are a tool used by firms to silence victims of financial assault. In effect, they hold the monetary compensation rightfully due to the complainant hostage until they are signed. This allows the Firm to protect its reputation, protects the wrongdoers(s) and prevents warning others who may be harmed.

In some cases, victims have walked away from the compensation rather than face the indignity of being silenced and losing the ability to warn others. Because of the final and binding nature of the framework, we expect Firms will not be enabled to impose conditions on the payment, a real positive for the binding framework. The decision becomes legally binding on the Registrant and where compensation is involved, the compensation is due and payable. The Registrant could not impose terms and conditions e.g. an NDA or a non-disparagement clause on a final binding decision.

Regulators ought to ensure the entire complaint system bars the use of these non-negotiable harmful gag orders. It should be noted that there also serious longer term harmful health effects on people that have signed a gag order. Non-disparagement clauses should also be eliminated as they prevent the complainant of even saying a bad word to anyone as to how they were treated. See *How NDA's can impact mental health* <https://yr.media/health/how-ndas-can-impact-your-mental-health/> and *CBC News: Lawyers across Canada approve groundbreaking resolution to help prevent abuse of non-disclosure agreements*.

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<https://www.cbc.ca/news/canada/british-columbia/lawyers-across-canada-approve-groundbreaking-resolution-to-help-prevent-abuse-of-non-disclosure-agreements-1.6741976>

NI31-103 complaint handling rules unfit for purpose

The larger issue in complaint handling is the tens of millions of dollars incurred by investors in the time leading up to the OBSI stage. Kenmar recommend that NI31-103 rules for complaint handling be overhauled to bring them up to international standards. See Appendix I for a description of the deficiencies and gaps. This modernization would improve investor outcomes and reduce the flow of complaints to OBSI. Fair complaint handling would have the benefit of improving retail investor trust in capital markets.

National Instruments 31-103 complaint handling provisions for Firms are antiquated, incomplete and contain gaps. We provided comprehensive evidence to the CSA and await action. To its credit the AMF is moving ahead with a modern complaint system for Dealers under its cognizance. Among other changes, it slashes the time to respond to 60 days (the CSA National Instrument doesn't even set a standard but it is generally understood to be 90 calendar days).

Summary

Since COVID-19, financial consumers in Canada are ever more fragile, and losses are felt ever more deeply. OBSI has more cases than it ever has. Deficient Registrant complaint handling is unduly harming retirement savings and children education funds.

Now is the time for Government and the CSA to do the socially-responsible thing and provide OBSI a binding (on Registrants) authority and a functional systemic issues protocol.

Kenmar agree to public posting of this letter.

We sincerely hope this feedback proves useful to Policy and decision makers.

Do not hesitate to contact us if there any questions or clarifications needed. We would be honoured to meet with you to assist accelerating binding authority legislation and rules on Registrants a reality for Canadian investors.

Respectfully,

Ken Kivenko, President
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APPENDIX I: NI 31-103 complaint handling requirements should be modernized in parallel with the transition to binding

The central problem with the complaint system in Canada is the antiquated CSA rules regarding Registrant complaint handling and limited enforcement of even the weak rules. It is left to OBSI to clean up the mess and take the flak. The CSA must react to this issue if this, or any binding framework, is to function efficiently, effectively and fairly.

OBSI requires that complaints first be reviewed by the Registrant, yet the Registrant complaint system is known to be weak and riddled with conflicts-of-interest. The consultation states that *On average, low settlement cases settled for 60% of OBSI's recommended amount of compensation*. It appears that for recommended amounts over \$50K, there is a fair chance the recommended amount will not be paid by the Registrant (Table 1). One can only imagine what is going on when OBSI is not involved.

The wealth management services industry complaint handling process is complex, adversarial and puts an unsophisticated investor against a Registrant's highly sophisticated complaint handling team. As one would expect, the process is less than fair and retail investors receive far less in compensation (or no compensation) than they should. For most complainants, the cost of civil litigation is simply out of reach. This situation is precisely why the OBSI was created. As OBSI does not currently have a binding decision mandate on Registrants, this results in cases where Registrants have simply exploited investors and provided low-ball or no compensation.

The securities industry complaint handling system is broken, to the detriment of ordinary Canadians. It should be modernized in conjunction with OBSI obtaining a binding authority mandate.

Timeliness is critically important in complaint handling because it shows concerns are taken seriously and that there is a commitment to providing excellent customer service. It also helps to prevent the escalation of the complaint, which can damage the organization's reputation and relationship with clients. With a binding authority, NI31-103 should be amended to include a quantitative cycle time performance standard for investment complaints in calendar days (measured from the date of receipt of client complaint).

From our perspective, the current Registrant complaint handling rules rest on a foundation of Jell-O and quicksand.

National Instrument 31-103:

- Does not provide a broad definition of *complaint*. How organizations define what constitutes a complaint is important. While a narrow definition may act to exclude less serious matters, a broader definition is preferable because it provides Firms with a more accurate understanding of the range of concerns that clients users have about the Firm

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- Does not articulate underlying principles required of a modern complaint system
- Does not define basic criteria for fair and effective complaint handling
- Does not specify a time constraint for acknowledging a complaint
- Does not directly specify a time for responding to a complaint
- There is no robust requirement to review complaints to identify systemic issues, ensure they are investigated, followed up, resolved and reported upon
- Does not unequivocally identify OBSI as the exclusive dispute resolution service; it only states that the Registrant take must take *reasonable steps*
- Does not set out any expectations for using OBSI as a strategic source of information that could improve regulations, investor protection, disclosure practices, products, or wealth management industry service / conduct standards.

This National Instrument is embarrassingly light on Registrant complaint handling rules compared to other jurisdictions. The modernized standards will help reduce the number of complaints and improve investor outcomes. At the same time, the reduced complaint flow to OBSI will reduce their operating costs and the cost to Participating Registrants and increase investor trust in the financial services industry.

Registrants do not publish their loss calculation methodology or much detail on their approach to investigating a complaint. Transparency is at a very low level compared to OBSI. If the CSA were to effect a sweep of Registrant complaint handling practices we expect it would be congruent with the unsatisfactory findings of a recent Client Focused Reforms (CFR) conflicts-of-interest report and the 2020 FCAC audit of bank complaint handling.

We provide two examples of Guides as benchmarks

- **ASIC Guide Internal Dispute resolution**
<https://download.asic.gov.au/media/3olo5aq5/rg271-published-2-september-2021.pdf>
- **DISP 1.3 Complaints handling rules - FCA Handbook**
<https://www.handbook.fca.org.uk/handbook/DISP/1/3.html>

See also **Principles of good complaint handling** | Ombudsman Association
<https://www.ombudsmanassociation.org/best-practice-and-publications/principles-good-complaint-handling>

The CSA should ensure that the complaint process is transparent by requiring regular Registrant updates on the number and type of complaints received, the number resolved, and the average resolution time. This helps to build trust with the Public and demonstrate accountability. OBSI currently provides excellent statistical public reporting on the complaints it receives.

Quebec's AMF has done some excellent work on Registrant complaint handling. We recommend the CSA connect with them. The AMF's proposed rule for Quebec

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Registrant s is superior to existing CSA and IIROC (now part of CIRO) rules. The legislated cycle time is 60 calendar days not the 90 calendar days permitted by the SRO's (now CIRO). Banks must now resolve complaints within 56 calendar days.

Providing OBSI with binding authority is essential but suboptimal if the CSA permit Registrants to continue to employ an antiquated complaint system. A modernized CSA Registrant complaint handling regulation/rule will, together with a OBSI binding decision authority (on Registrants) deliver better outcomes for Main Street investors and increase trust in the financial services industry .