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

VIA EMAIL ONLY

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RE: CSA Notice and Request for Comment Regarding Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service; and

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

The Federation of Mutual Fund Dealers ("Federation") has been, since 1996, Canada's only dedicated voice of mutual fund dealers. We currently represent dealer firms with over $124 billion of assets under administration and greater than 24 thousand licensed advisors that provide financial services to over 3.8 million Canadians and their families. As such we have a keen interest in all that impacts the dealer community, its large swath of advisors, and their impact upon households across our nation.

We appreciate the opportunity to provide comments.

General comments

We refer to the numbers provided to contextualize the need for such a drastic remake of the national ombudsman. The current state of the ombudsman is improving, and the case numbers portrayed in the consultation can be viewed as this story. What we find is that the last non-bankrupt firm refusal was eight years ago in 2016. In the supplied data the highest volume of cases is found in the below $10,000 segment, with a total of 9.6 cases per year choosing the settlement option, with a grand total of 19.2 cases per year choosing to do so. Case numbers have risen, and refusals appear non-existent outside of the two bankrupted Exempt Market Dealers[1], a credit to improved OBSI investigations and the industry that has paid these recommended settlement amounts.

Given the case numbers, we suspect the costs and delays of mandatory binding arbitration for all cases may be less beneficial for investors than the potential upside that the remedy of a quick resolution provides. The availability of a settlement option can satisfy both parties expediently while avoiding costly litigation and delay for each. Investors don't have to accept settlement offers and have access to free legal resources - some sponsored by CIRO[2] and its member firms - if they decide to litigate.

Furthermore, Investors already have access to binding arbitration, nationally available - offered by CIRO. No one disputes the advantage CIROs expertise can bring to the table in securities matters. While we prefer the status quo of investor access and choice, a lower boundary of access to that CIRO facility could be considered, and thereby enable investors to benefit from choice of procedure. CIROs program would only need to take on *six cases a year* to handle all OBSI monetary settlements over $50,000 with binding arbitration. We don't believe any provincial legislative changes would be required to facilitate this.

OBSI has done commendable work in handling all-time high volumes of client concerns. However, the industry has endured double-digit fee increases annually for years and is interested in active oversight being provided in this area by the Joint Forum. We would like to see OBSI's scope tightly constrained to mandate, ensuring future increases are circumscribed. We expect to see fee increases directly attributed to this proposal due to the increased necessity for training and experienced staff.

As we have maintained over decades of comment letters, the only fee payer is the Canadian investor. We consider it only a remote possibility that increases found in future OBSI binding settlements with investors will outweigh the initial and ongoing cost implications of launching this program; and we urge a well-considered cost versus benefits analysis with an eye towards maximizing existing tools prior to moving forward with disposing of non-binding mediation.

Specific questions

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*

[1] https://www.obsi.ca/en/news-and-publications/firm-refusals.aspx
[2] Osgoode Investor Protection Clinic partners with pan Canadian self-regulator, IIROC https://www.iiroc.ca/news-and-publications/notices-and-guidance/osgoode-investor-protection-clinic-partners-pan-canadian-self-regulator-iiroc

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?

Although our position is against the framework as proposed, we don't see any operational difficulties if there's a staggered implementation. Note that the insurance industry uses the OmbudService for Life and Health Insurance, which is also non-binding.

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.*

A complainant can proceed through the first stage and choose not to initiate the second stage review that triggers binding. If a dealer objects, it doesn't appear to make the decision binding on the complainant unless Stage 2 occurs or the specified number of days pass. It appears a complainant will be able to begin litigation between the proposed two stages. Can a stage one decision become binding once a civil claim has been initiated?

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.*

Included here are a few remarks on OBSI. They operate with a fairness standard that may not be clear to all industry participants. As the regulators work here to evolve the mediation process – which we note will turn it into a necessarily more adversarial process - we request specificity and clarity on the standard to be used, as fairness isn't defined satisfactorily, and we require a reliable standard and process to vigorously dispute each and every complaint brought into a binding arbitration arena. We don't understand the justification for why OBSI's standard is different from the standard a court would apply, or why it's different between cases. In the balance of art and science, this activity should be entirely a science and offer no variance between investigators.

The Federation wants the best staff on a case in the first place to take their 'best swing'. The perception and actuality of an independent (from OBSI) second review is important and doesn't necessarily have to be a multi-year court process. Consider that if this binding mediation is desirable, why not propose to bind the client from the first stage.

We would like to see addressed the issue of clients who change their complaint and explanations. We would like to see a planned strategy for handling objective falsehoods, which could include a written obligation for truthfulness, and for investigators to weigh the value of years of written and signed KYC documentation and advisory notes more adequately. OBSI should discontinue substituting their own current-date KYC assessments in their place. Acknowledge that a complainant's current verbal perspective will necessarily be biased towards achieving a compensatory outcome. We find that while clients have their word taken at face value, dealers' words are not, and must provide proof.

If this framework comes into force, we need to have accommodation for the timelines of our E&O insurance companies going through their review and decision-making process.

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?*

We find it unlikely that a second-stage review handled by a colleague of the first reviewer would diverge and reduce a settlement recommendation. It's a poor substitute for a proper appeal to the expertise and experience of securities regulators. Larger binding cases could be very damaging and even threaten firm viability and will need the most robust analysis available.

Provincial securities regulators would need to adjudicate a manageable *maximum* of twenty three appeals over the course of two years.

> *„"out of the 316 OBSI cases that ended with monetary compensation in its fiscal years of 2018 and 2019, 23 cases (about 7%) involving 15 firms were settled at an amount lower than OBSI's recommendations."* [3]

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

After considering whether the OBSI limit should be reduced below the established binding mediation threshold offered by CIRO at $100,000, we agree that OBSI's current limit should remain the same. This will continue to offer multiple options to aggrieved investors and prevent confusion and cost.

- OBSI mediation below $100,000.
- Up to $350,000 the investor can choose:
  a. binding arbitration with CIRO's binding arbitration, or
  b. non-binding with OBSI.
- Over $350,000, CIRO's binding arbitration limit is $500k, or
- a complainant can move into the court system (at any time and amount).

[3] https://www.investmentexecutive.com/news/industry-news/two-year-streak-without-compensation-refusal-ends-for-obsi/

We don't see OBSI investigators being able to manage complaints above the existing threshold due to the necessary expertise and experience required. The court process would be relied upon with its fulsome procedural rules, standards and obligations.

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?*

As proposed, the framework only removes the right of appeal from securities firms. A client can silently withdraw and pursue another option after hearing the result of the first stage mediation. We object to the proposed framework in its current form.

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.*

Securities firms should retain a right to appeal, due process, and to the properly formed procedures of a tribunal or the courts at all stages. Firms do not flagrantly nor frivolously use a right of appeal to waste resources in order to abuse complainants, nor to deprive them of just settlement. Firms will use a right of appeal only when viewed as necessary in response to a poor decision. Since the process was hastened to six months decisions have been more rushed. If binding authority is established, resolution time must be extended to allow for thorough investigation of all pertinent matters. The judicial review of process as proposed is of meagre value to firms, given that it will not be able to review flaws in the decision.

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.*

The practice of OBSI selecting their own Independent Reviewer needs to be ended. We consider three years between independent reviews to be more reasonable. Establishing a panel of non-conflicted professional industry members to review a selection of cases on a regular basis could be of use to support the OBSI decision making processes and help to identify areas for improvement. We find that there can be issues and even errors with the calculations; comparative investments are cherry picked, the comparator indexes selected are broad, and each client is and should be handled individually.

OBSI should be anxious to be reviewed more often to inspire industry confidence in their decisions and disprove bias.

We would like to see many more case studies published.

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?*

We do not, referring to the recent technology expenditures and staff count growth in response to significant complaint increase volume. Decisions are made and presented for non-disapproval on a delayed and infrequent basis. We need to see the OBSI operating within its colaborative resolution-seeking mandate, with a steady-state of constant iteration and improvement rather than moving into new goals and directions. We request advance approvals of direction and control of increased expenditures by the CSA, who oversees the needs of both investors and the industry that serves them.

We desire detail and CSA approval of the referenced 'additional measures' and or procedures that stage two of mediation may incorporate, and the maximum scope. We do not wish to see OBSI become an unconstrained entity with the right to investigate and create ad-hoc resolution processes, while also having the ability to bankrupt a firm via mandatory decisions without a right of appeal. With binding arbitration and without delineated procedural powers, it begins to look like OBSI may enjoy unimpeded oversight of member firms throughout the complaints process.

What we require is the oft-culpable advisor named in OBSI complaints as there are benefits of doing so, and the Terms of Reference are now open during this consultation. Name the advisor in the claim. We will support the change, costs associated with it, and provide input as needed to facilitate this necessary evolution. While it is a dealer's responsibility to oversee their advisors, and it is expedient to collect fines from dealers; fairness demands the culpable party share in the consequences of their actions.

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.*

Over the years we have seen numerous initiatives to reduce investor confusion fail to do so. Investor education programs, Investor Advocacy Panels, Prospectus, Fund Facts, CRM, CRM2, CFR, and even removing DSC were launched (at least in part) to reduce investor confusion. It's a stubborn problem that plagues every aspect of financial services, in that we cannot force clients to read statements or disclosures.

If the regulator feels that the existing ombudman services are not striving to fully investigate complaints, they should take action. A name change seems unnecessary as firms are either trusted to maintain the overhead and objectives of internal ombuds departments, or they aren't. Once renamed we can predict the complaint will be the services are hard to locate, have inconsistent naming, or an unclear purpose.

We advise restraint. Existing rules ensure unresolved complaints will be referred to OBSI, and investors are notified in writing. As a final point to consider – the proposed framework's changes will not be rolled out in a harmonized manner across the insurance sector and will cause further regulatory arbitrage. The CIRO binding mediation program mitigates these to a large degree.

We briefly note further points and concerns surrounding any discussion of binding authority being granted to an IDRS.

- There is a lack of clarity on binding decision publication, which is effectively a name and shame on all complaints.
- The lack of recourse for firms on binding decisions could lead to an investor bias at the IDRS, along with increased awards, limited review of decisions, and added cost.
- Industry needs to be able to access the expertise of a provincial securities regulator or the SRO when needed to review concerning decisions.
- Is the dealer publication ban on OBSI cases and decisions to remain in place?
- How can an investment firm place a client into any investment product other than low risk, as you a problem could be created. There will be a shelf review on products made available to clients.

- Promotes ‘compliance advice’.
- Clients who are ‘likely to complain’ could be impacted during the de-risking of businesses.
- Mistakes by OBSI will not be tolerated.
- With removal of legal recourse, firms will treat *this* as the legal process.
- An unfair process – one which is biased to any degree towards clients or uses an unbalanced assessment process could result in millions of dollars of awards against a dealer with no recourse to the securities regulator or the courts.
- Knock-on effects from this legislation will reduce advice distribution, particularly to small investors. They tend to have less knowledge and average more complaints per invested dollar.

We don't find value in the included remark of a need to be 'closely reflecting' international ombudservice practices. We seek and deserve a custom Canadian solution. As noted, 'some ombud services make only non-binding recommendations', including Canada's.

In conclusion, the proposed framework considers whether OBSI needs a mandate, cost, process and staffing reconfiguration; and if largely compliant and participating firms should lose their rights to appeal. Reviewing our experiences and concerns with the ombudservice and this proposal, we are against it.

We could envision a carve-out for CIRO firms, and/or bringing down the access level for the CIRO binding mediation somewhat to include the higher complexity and dollar value mediations where the client wants to choose binding over non-binding. OBSI can then remain a free-to-access, efficient, resolution seeking mechanism that engages both investors and firms on a level playing field.

With 99% of recommendations fully paid below $10,000, we suggest the most effective action if the CSA does decide to enable the power of binding authority, is to establish a maximum of $35,000. Institute robust appeal options to an independent third party to protect against erroneous or poor recommendations above $35,000. The proposed judicial review offers no value. Investors have choices, the concerns raised affect a low number of complaints, there isn’t evidence that every settled complaint wants an appeals process to occur, and proposed solutions are unlikely to provide benefit above cost.

Thank you to the CSA for publishing the proposal for consultation, we are grateful for the opportunity to provide our thoughts and perspective, and welcome opportunities to elucidate upon particulars or answer questions.

Respectfully,

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