

February 27, 2024

To: 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

c/o Meg Tassie
Senior Advisor, Legal Services,
Capital Markets Regulation
British Columbia Securities Commission

c/o The Secretary
Ontario Securities Commission

c/o Me Philippe Lebel
Corporate Secretary and Executive Director,
Legal Affairs
Autorité des marchés financiers

Dear Sirs and Mesdames:

Re: Response to Canadian Securities Administrators' (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*

The CSA Investor Advisory Panel (the “IAP” or “we”)¹ is pleased to have this opportunity to provide the following comments in response to the CSA’s proposal for a new regulatory framework under which an independent dispute resolution service (“OBSI”) would have the authority to issue final and binding decisions (the “proposed framework”). The Panel’s mandate is to represent the interests of retail investors across Canada by providing advice to the CSA on its policy and rule making initiatives that have impact on retail investors to promote coordination and enhancement of pan-Canadian investor-related issues.

¹ The members of the IAP are Eric Spink, Chair, Millie Acuna, Jason Alcorn, Brigitte Catellier, Cristie Ford, Neil Gross, Annick Kwetcheu Gamo, Sophie Jean and Susan Milburn.

Our general comments below are followed by our responses to the questions in the November 30, 2023, CSA Notice and Request for Comment.

I – General comments

(a) Support for binding authority for OBSI

The IAP strongly supports giving OBSI the power to make binding decisions, which we view as necessary to improve the fairness of our capital markets.

OBSI plays a crucial role in maintaining the fairness of Canada’s capital markets by providing free and fair dispute resolution of retail investors’ complaints. However, its current lack of binding authority creates a power imbalance that causes some investors to settle for less than OBSI recommended. Regardless of how often this has occurred, it is unfair to investors and reduces their confidence in the securities industry and in OBSI. The proposed framework reflects a proper balance that will improve the fairness and efficiency of the process for investors and firms.

Canada is currently an outlier in this area. Financial ombudservices in comparable countries already have binding authority. The International Monetary Fund commented in its 2019 Financial System Stability Assessment for Canada that “stronger investor protection can be achieved through giving the Ombudsman for Banking Services and Investments binding jurisdiction on firms”.

(b) Proposed framework

The IAP recognizes that the proposed framework will be refined and more details will emerge as the process moves forward. We commend the way the proposed framework builds upon the existing strengths of OBSI and preserves its current processes. The IAP agrees with the introduction of the “review and decision stage”, and the use of the “essential process test” to minimize adversarial procedures and ensure that the process is efficient and fair to firms and complainants.

We urge the CSA to consider introducing a mechanism that would allow OBSI’s recommendations and decisions for monetary compensation to automatically bear interest, so that complainants will not be prejudiced by subsequent delays caused by the second-stage review, or judicial review.

(c) Plain language explanations and roadmap for complainants

We strongly recommend that the framework should formalize, as a regulatory requirement, OBSI’s current practice to provide complainants with plain-language explanations of OBSI’s procedures including, where appropriate, verbal explanations. The proposed framework necessarily adds some complexity to the process and imposes certain requirements on complainants. In order to achieve the desired outcomes, it will be critical for OBSI to assist investors, and particularly vulnerable investors, in understanding the process and their options.

OBSI’s obligation to assist complainants in understanding its procedures should be recognized as part of OBSI’s obligation to provide procedural fairness to both parties. Specific examples of the importance of this recommendation are found in our responses to CSA Questions.

We also recommend that the final CSA publication of the proposed framework include a chart or table showing the status of OBSI's decisions and the complaint-handling process in each CSA jurisdiction.

(d) Ongoing review of the proposed framework

We understand that the CSA will monitor the efficiency and procedural fairness of the proposed framework, and the IAP recommends that supervision be as transparent as possible, by way of staff notices or otherwise.

We also recommend that the CSA conduct a retrospective review of the proposed framework 3-5 years after implementation.

II - CSA Questions:

Question 1. Provincial implementation of the proposed framework

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?

Response: The IAP is of the view that that OBSI binding authority is overdue and that it should be implemented as quickly as possible in each jurisdiction because delays would extend the current unfair outcomes to investors. The operational impacts of OBSI being designated or recognized in some but not all jurisdictions should be manageable because OBSI's "investigation and recommendation stage" remains the same.

Question 2(a) – Time when the decision becomes final

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.

Response: The IAP suggests that complainants should have 60 days to explicitly accept or object to a recommendation and, if they do neither, they should be deemed to have withdrawn from the process and remain free to pursue other avenues. Complainants should not be bound by OBSI's recommendation unless they explicitly accept it.

Firms should have 30 days to object to a recommendation and, if they do not object, and the complainant accepts the recommendation, then it becomes a final decision. That sequencing will enable complainants to make better-informed decisions about the options available.

Question 2(b) – Post-decision period

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.

Response: The IAP suggests that complainants (who did not trigger the review and decision stage) should have 30 days to explicitly accept or reject a decision and, if they do neither, they should be deemed to have withdrawn from the process and remain free to pursue other avenues. Decisions should be binding on complainants only if the complainant triggered the review and decision stage, or if the complainant explicitly accepts the decision.

Question 3 - Complainants initiating the second-stage review

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?

Response: The IAP agrees that this approach is reasonable to promote finality, efficiency and fairness to both parties. If a complainant is willing and able to go to court, and disagrees with OBSI's recommendation, it is fair to require that complainant to commit to a path at that point.

Question 4 - Limits on compensation

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

Response: The compensation limit of \$350,000 is currently satisfactory. It should be reviewed, and adjusted if necessary, as part of the retrospective review recommended at paragraph (d) above.

Question 5 - No appeal

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?

Response: The IAP is of the view that an appeal mechanism is unnecessary and undesirable. It is unnecessary because the availability of judicial review is sufficient to ensure the goals of fairness, balance and finality are achieved in this dispute resolution process. An appeal mechanism is undesirable because it would reintroduce a power imbalance between complainants and firms that would defeat the basic purpose of the proposed framework.

Question 6 - Appeal for disputes above a prescribed monetary threshold

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.

Response: This is not necessary or desirable for the same reasons described above in our response to question 5.

Question 7 - Oversight

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.

Response: The following elements of oversight are particularly important:

- *the highest priority should be to ensure OBSI's independence and impartiality as a dispute-resolution service with binding authority. CSA oversight should be proportionate and designed to preserve and maintain OBSI's ability to deliver independent, fair dispute resolution, and*
- *OBSI should provide public transparency through annual reporting and the publication of anonymized reasons for all its decisions. Data on any complaints submitted that fall outside the 6-year limitation period should also be published.*

Question 8 – Accountability

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?

Response: Yes.

Question 9 – Terminology prohibition

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.

Response: This prohibition is aligned with the current prohibition for banks, which became necessary to protect consumers. It should mitigate confusion for investors if it is effectively enforced.

We thank you for the opportunity to comment on the proposed framework. We consent to the publication of this letter on the CSA's or the CSA members' website. We would be pleased to clarify or elaborate on our comments. Please contact the IAP at IAP.GCI@acvm-csa.ca should you wish to discuss.

Sincerely,

“Eric Spink”

Eric Spink, Chair