Waverley Corporate Financial Services Ltd.
Suite 1600 – 150 York Street
Toronto ON M5H 3S5

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

Meg Tassie
Senior Advisor, Legal Services,
Capital Markets Regulation
British Columbia Securities Commission
1200 - 701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, British Columbia V7Y 1L2
Fax: 604 899-6506
mtassie@bcsc.bc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, ON M5H 3S8
Fax: 416-593-2318
comments@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514 864-8381
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment – Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service

Waverley Corporate Financial Services Ltd. ("Waverley") appreciates the chance to contribute our insights and recommendations regarding the CSA's proposed amendments to National Instrument 31-103 (NI 31-103) and its Companion Policy 31-103CP (the Proposed Amendments).

Waverley is a registered exempt market dealer (**EMD**) that provides private capital market investment opportunities to investors and numerous services to issuers to help break down the barriers that exist for issuers raising capital in Canada. Our primary jurisdiction is Ontario and we are also registered in six other provinces. We currently employ 42 dealing representatives. We have been in business for twelve years and in 2023 raised $200M for 35 Canadian businesses. We are a member of the Private Capital Markets Association of Canada (**PCMA**), which has submitted a more detailed comment letter on the Proposed Amendments and we support the PCMA's comment letter.

In summary, the CSA has proposed empowering OBSA with binding authority for penalties against dealers, with no right to appeal, no standards of evidence, no cost to investors to file a frivolous complaint, and no procedural fairness for firms. EMDs, with regulatory capital of $50,000, could face unfair judgments of up to $350,000 with no right of appeal. These changes will also make it extremely difficult or impossible to obtain E&O insurance. We fear if these proposals go through as proposed, they could have catastrophic consequences, including:

1. Deterring new entrants to the market;
2. Driving existing registrants from the market;
3. Increased costs to dealers, which will ultimately be passed onto investors potentially making the cost of capital more expensive for issuers and returns lower for investors;
4. Fewer options for issuers to raise funds in a compliant and cost-effective manner;
5. Few private equity investment options available for investors.

OUR CONCERNS WITH THE PROPOSED AMENDMENTS

We believe the proposed amendments fall short of striking a balance between protecting investors and fostering a fair and efficient capital market**.** We are concerned that the Canadian Securities Administrators (CSA) has developed a dispute resolution process that may be unbalanced, as it does not acknowledge the potentially significant financial consequences for our firm (up to $350,000) without providing the corresponding procedural protections available under administrative law. We outline our specific concerns with the proposed amendments below.

Change to Binding Decision-Making Powers

- While the proposed changes elevate OBSI's decisions to a binding status akin to administrative tribunals, they do not convey corresponding procedural safeguard**s** to

the involved parties. These safeguards could encompass established and the right to appeal decisions.

- The CSA's approach seems to disregard the potential benefits of an adversarial process in ensuring the protection of rights for all parties involved. Additionally, concerns have been raised regarding the lack of robust data supporting the CSA's claim of an inherent "power imbalance" favouring firms over complainants.

No Procedural Fairness for Firms

- With the potential for significant awards against firms (up to $350,000), the Canadian Securities Administrators (CSA) have not introduced additional procedural guarantees to ensure fairness in the dispute resolution process. Given the financial implications for Exempt Market Dealers (EMDs), they are entitled to a fair and transparent process based on established administrative law principles. While the CSA states that OBSI will continue its current review practices under the new "essential process test," concerns remain regarding the lack of defined and robust procedural safeguards.
- The CSA's newly created "essential process test" lacks supporting evidence from other jurisdictions and could introduce uncertainty and inconsistency into the dispute resolution process. Essentially, the test relies solely on OBSI's judgment of what constitutes an "essential process," granting them **broad discretionary power**. This raises concerns about potential bias and inconsistent decision-making. The absence of clear and transparent guidelines could lead to unpredictable outcomes and questions surrounding OBSI's accountability.

Final Recommendation Only Binding on Firms, not Complainants

- The OBSI issues final recommendations that are legally enforceable only for firms, not for complainants. While firms are obligated to follow OBSI's decisions, complainants have the option to pursue legal action if they are dissatisfied with the recommendation issued during the initial stage of OBSI's review process. Where is the fairness?

E&O Insurance May Become Unattainable

- There is uncertainty about how E&O insurance premiums and coverage will adapt to the Proposed Amendments.
- Without a clear definition of a "complaint" that imposes a binding financial award, such matters are likely uninsurable.
- The proposed amendments pose a potential risk for EMDs to incur significant out-of-pocket losses due to potential non-coverage by E&O insurance. This scenario could threaten the stability of the capital markets**, causing harm to issuers and investors.**

No Cost to Investors to Make a Complaint

- While investors suffer no financial consequences for their complaints, firms risk significant financial and reputational damage.

- Free access to the complaint process for investors could potentially lead to misuse, creating an uneven playing field where firms bear the brunt of the consequences.
- The CSA should explore options, such as introducing fees for unsubstantiated claims, to discourage the misuse of the complaint process.

Opening the Floodgates for Complaints

- Under the proposed amendments, investors might develop an unrealistic expectation of recouping investment losses in all situations.
- Removing the financial barrier for complaints might encourage the filing of unfounded claims.
- The lack of cost for filing complaints could create an incentive for investors to misconstrue legitimate investment risks as suitability failures.
- Implementing the amendments might overburden both registrants and the OBSI, especially during instances of unsuccessful offerings.
- The number of complaints might dramatically rise if the proposed changes coincide with failed private market offerings.
- To ensure a balanced and responsible system, the CSA should consider measures like filing fees, merit-based screening, and clear guidelines to prevent misuse of the complaint process.

EMD Fees Will Increase

- The proposed amendments lack a comprehensive cost-benefit analysis regarding the potential rise in OBSI caseload and associated costs for EMDs due to increased complaints. This analysis is crucial to assess the financial implications for EMDs and the overall sustainability of the OBSI system.
- The CSA's suggestion that relying solely on internal complaint resolution processes within firms might not effectively mitigate costs. This is because investors, facing no financial repercussions for filing complaints, might be more likely to escalate their grievances to OBSI, potentially negating any cost savings from internal resolution.

Internal Review by OBSI of Objections at the Review and Decision Stage

- OBSI's internal review by senior executives if a party objects to the final recommendation may compromise the impartiality. There is a risk of perceived or actual bias and conflict of interest within an internal review process at OBSI. This was certainly the case with the OSC, before the bifurcation of the administrative branch and the tribunal.
- The inability to appeal under the Proposed Amendments heightens the need for an independent and unbiased review process.

No Appeal Rights, Only Judicial Review

- One of the most concerning aspects of the CSA's proposal is the absence of an appeal process for OBSI's final decisions. This raises concerns about potential inconsistencies between OBSI's interpretations of securities law and those of individual CSA members.

- Without the ability to appeal, there is no mechanism to address potential errors made by OBSI, either in following proper procedures (procedural errors) or in reaching the final decision (substantive errors) if the process was deemed unfair or the decision incorrect.
- While the proposed amendments allow for judicial review, it is restricted to examining the legality of the process followed by OBSI, not the substance or fairness of the final decision itself.

No Justification for an Award Limit of $350,000

- The award limit is substantially higher than the regulatory capital requirements for EMDs, which is $50,000.
- OBSI's data shows 70% of decisions are below $10,000, and 92% are below $50,000. What evidence does the CSA have justifying that $350,000 discretion is warranted?

No Detailed Loss Calculation Methodology

- Concerns have been raised regarding the limited transparency and specificity of OBSI's methodology for calculating losses in private market investments.
- We express concern regarding OBSI's practice of declaring entire investments unsuitable, requiring buy-backs by EMDs. This practice can be particularly detrimental to smaller firms and raises concerns about being a potential alternative to addressing valuation challenges.
- Despite commitments made in 2014, OBSI has yet to release a detailed methodology for calculating private market investment losses for public and industry feedback.

No Consideration of Alternatives to OBSI

- The CSA proposes to designate OBSI as the sole provider of binding dispute resolution services. This decision comes without exploring or evaluating alternative entities or frameworks beyond maintaining the current status of OBSI. The Ontario Securities Act mandates the Ontario Securities Commission (to conduct a cost-benefit analysis that compares and contrasts OBSI with other potential dispute resolution providers. However, the OSC's analysis, detailed in Annex E of the Proposed Amendments, solely focuses on the perceived drawbacks of maintaining the status quo with OBSI and fails to consider other options. Notably absent is a comprehensive and objective comparison of various ombudsman services using established criteria for evaluation.

EMDs Cannot Force Dealing Representatives to Cooperate

- Dispute resolution systems like OBSI should require the participation of EMDs directly, rather than relying solely on dealing representatives. Challenges may arise for EMDs in obtaining full cooperation from representatives who have left the firm or moved to competitors. This lack of cooperation could impede an EMD's ability to effectively defend their case.

- The CSA has not adequately addressed concerns regarding accountability for dealing representatives, particularly in the context of proposed binding decisions with financial awards.

Thank you for the opportunity to convey our thoughts and concerns, and for your consideration.

Yours truly,

WAVERLEY CORPORATE FINANCIAL SERVICES LTD.

Don McDonald

Digitally signed by Don McDonald
DN: cn=Don McDonald, o, ou, email=dmcdonald@waverleycf.com, c=CA
Date: 2024.02.28 16:50:44 -05'00'

Don McDonald, President

CC Private Capital Markets Association of Canada (info@pcmacanada.com)
Chris Black, Chief Compliance Officer