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VIA ELECTRONIC MAIL

Alberta Securities Commission
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority (Saskatchewan)
L'Autorité des marchés financiers (Québec)
Manitoba Securities Commission
Northwest Territories Superintendent of Securities
Nova Scotia Securities Commission
Office of the Superintendent of Securities (Nunavut)
Ontario Securities Commission
Prince Edward Island Office of the Superintendent of Securities Service NL (Newfoundland and Labrador Securities Regulation)
Yukon Superintendent of Securities

c/o Meg Tassie, Senior Advisor, Legal Services
Capital Markets Regulation, British Columbia Securities Commission
1200 - 701 West Georgia Street P.O. Box 10142, Pacific Centre
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c/o The Secretary, Ontario Securities Commission
20 Queen Street West 22nd Floor, Box 55
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c/o Philippe Lebel, Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
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Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment 25-314 — Proposed approach to oversight and refinements to the proposed binding authority framework for an identified ombudservice (Notice)

Getz Prince Wells LLP primarily practices securities law and regulation. We advise investment firms, across various registration categories, who are Participating Members of OBSI ("Members"). Our clients include Canada's two largest independent, employee-owned, self-clearing investment dealers. Our 35 years of experience handling retail client complaints include over 20 years of OBSI experience, representing Members and investors.

We welcome the opportunity to provide further comments about the refinements to the proposed binding authority framework for an identified ombudservice.

The Importance of an Accessible, Efficient and Fair Ombudservice

Accessible, fair, and efficient ombudservices for Canadian retail investors is an important public interest objective for investors and industry firms alike. We support the intended outcome of the proposed binding authority, if it makes the current OBSI process fairer and more efficient for both parties. To be fair and effective, a binding authority regime should be reciprocal, have limitation periods that promote the fair and speedy determination of complaints on their merits, and provide for a meaningful, accessible, and independent appeal process. The initial framework proposed by the CSA in its November 2023 Notice (**2023 Notice**) lacked these essential requirements. The refined process addresses some of these requirements and offers a welcomed opportunity for further comment to address how further improvements can still be made to the proposed binding authority regime.

The comments below focus on a singular theme: fairness. Fairness for investors; fairness for Members, at a fair cost to Members, who ultimately underwrite the cost of the process.

The questions posed by the Notice are answered in turn below.

1. **Is $75,000 an appropriate threshold amount to require OBSI to appoint an external decision maker or a panel of external decision makers at stage 2?**

The appropriate threshold should be $50,000.

For the period 2018-2022, over 50% of OBSI cases closed without a monetary recommendation, and over 90% of the cases that closed with a monetary recommendation, closed with a recommendation less than $50,000.

For the period 2020-2022, 66% of OBSI cases were closed without any monetary recommendation. The balance of the cases closed with an average recommended amount of $9,077.

The number of low settlement cases reported for 2018-2022 totaled 42, of which 24 (or 4.8 cases a year) involved monetary recommendations over $50,000: 2023 Notice.

At pages 8 and 9 of the 2023 Notice, the CSA observed:

> the percentage of cases that settle below OBSI's recommended amount (**low settlement cases**) increases as the value of the recommended monetary compensation increases. While compliance with OBSI recommendations is generally strong where the recommended monetary compensation is below $50,000, the percentage of low settlements increases where the recommended compensation exceeds $50,000. This observed pattern can be problematic, given that complainants who have received a greater monetary compensation recommendation are likely to be those who have suffered greater harm.

The observed pattern is indeed problematic for investors, at least in some cases. It is also problematic for Members in others. Low settlement cases in higher dollar recommendations sometimes result from a flawed process and are magnified in higher dollar cases because the disputed amounts are more meaningful to Members. The published data strongly suggests that $50,000 is the optimal threshold amount to require OBSI to appoint an external decision maker or a panel of external decision makers (at stage 2).

While Table 1 in the Notice provides detail about the number of case recommendations in 2020-2024 between $50,000 to $74,999, $75,000 to $99,999, and $100,000 & over, no detail is given for number of low settlement cases for these dollar value categories. It is unclear why a $75,000 threshold is proposed except to save the cost of potential appeals. Even a 50% appeal experience with a $50,000 threshold would only add 2.5 appeals a year. Does the potential cost saving of a $75,000 threshold outweigh the fairness to Members and investors to have $50,000 to $74,999 awards reviewed? The incremental cost of 2 or 3 more appeals a year should not displace access to the independent review process.

A right of appeal is fundamental to procedural fairness. A $50,000 threshold will exclude more than 90% of cases involving a recommended amount. The proposed $75,000 threshold will limit reviewable cases to 3% of decided cases. A $50,000 threshold would permit appeals in approximately 6% of decided cases. To achieve substantial fairness, the scale tips heavily in favor of a $50,000 threshold. It is supported by the data and even by the CSA's own analysis in the 2023 Notice.

Binding authority will address the interests of investors in cases where Members are simply being obstinate. Having the ability to have higher dollar cases reviewed, will address the interests of Member and investors.

For context, the monetary limit for small claims courts in Canada range from $15,000 to $35,000. Small claims litigants have an automatic right of appeal.

A $50,000 threshold strikes a fairer balance for Members and investors than the proposed amount. The lower threshold creates a more accessible appeal process for potentially deserving cases without adding unreasonable cost or delay. The greater potential for appeal can only motivate initial decision-makers to exercise greater care in their recommendations and this in turn will promote more consistency in the stage 1 process.

2. **Does setting a monetary threshold for the requirement to appoint an external decision maker at stage 2 impact the accessibility of the proposed framework for investors?**

It shouldn't. Investors have a choice of process to address their complaints – OBSI, Small Claims Court, Superior Courts, and for CIRO Members, arbitration. Under the proposed framework, stage 1 awards are not binding on investors, so assuming this asymmetry is kept in the final framework, investors can always choose to pursue their complaints in other forums if they are dissatisfied with the outcome of stage 1.

Moving to a binding authority regime inevitably changes the character of OBSI as an ombudservice to an adjudicator. While OBSI can still function at stage 1 using its established and newer processes, having the power to convert its recommendations into enforceable judgments is a game changer. It is regrettable that the stage 1 process is still a voluntary one for investors, but binding on Members. What is the compelling rationale why the stage 1 process isn't binding on both parties, especially when the investor has the choice of forum? No one is forcing the investor into the OBSI process, but if they choose it, it should be equally binding on Member and investor alike.

3. **What would be potential advantages and disadvantages of permitting OBSI to appoint senior OBSI staff not involved in the stage 1 process to a panel conducting the stage 2 process in cases that meet or exceed the proposed monetary threshold, if the majority of the panel is comprised of external decision makers?**

There is no credible reason to believe that a roster of highly qualified, independent panelists across professional disciplines cannot be set up to conduct stage 2 proceedings. The participation of senior OBSI persons in stage 2 can only serve to undermine the (perceived) independence of the review panel and the integrity of the stage 2 process. Credibility and fairness of any appeal process requires the process to be fair, and to have the

appearance of fairness. The adage 'Justice must not only be done, but it must also be seen to be done', is apropos.

4. Does the oversight framework strike the appropriate balance between ensuring OBSI's accountability and maintaining OBSI's organizational and decision-making independence?

The proposed oversight framework could be enhanced in two respects. First, there should be more consideration given to how OBSI selects stage 2 panelists both in terms of their professional area of expertise required for the case, and to ensure there is a fair rotation of the panel roster. Second, the training of panelists by OBSI staff needs to be considered in terms of not affecting their ultimate independence.

5. What would the impact be of maintaining OBSI's current six-year limitation period?

Most Canadians live in 2-year limitation jurisdictions which employ a 'reasonable discovery' test. The exceptions are Quebec, which is a 3-year limitation jurisdiction, and the territories and the provinces east of Quebec which are 6-year limitation jurisdictions. Limitation reform in Canada has consistently moved to shorten limitation periods and adopt a general 2-year 'reasonable discovery' limitation period. A 2-year 'reasonable discovery' limitation period should also be adopted for OBSI claims, running from the date the investor either knows of, or reasonably ought to have known of, the basic elements of their claim. Alternatively, the limitation period of the jurisdiction where the investor lives should govern.

There is no compelling policy or public interest reason retail investors require a six-year limitation period to make complaints under a binding jurisdiction regime. There is nothing unique to retail investor claims that warrant giving an investor more than two years to start an OBSI process from the date the investor either knows of, or reasonably ought to have known of, the basic elements of their claim.

Most Canadian provinces overhauled their limitation legislation and adopted a general 2-year limitation period based on 'reasonable discovery' to ensure that individuals pursue their legal claims within a reasonable time after discovering the right to bring an action. The same public policy consideration should apply to OBSI complaints as a condition of it gaining binding authority. Otherwise, it would undermine one of the main goals of provincial limitation reform, the speedy determination of claims on their merits, and create an anomaly that defies any rational exception.

A 6-year limitation period permits if not encourages investors to be dilatory in making their claims. This is not in the public interest. When claims are not made promptly, Members will be increasingly challenged to mount a full defense. Memories fade with time. Advisors sometimes will have moved on or retired. Since advisors are not parties to the OBSI process, they are not compellable witnesses in the OBSI process.

In 2 and 3-year limitation jurisdictions, the Member's ability to claim over against the responsible advisor will be met by a limitation defense when the investor commences their OBSI complaint outside of the applicable provincial limitation period. This is a direct impact of keeping a 6-yeear limitation period. It is neither necessary, or fair, and cannot be justified in a binding authority regime, at least not for claims made by investors who live in Quebec and the provinces west.

A 2-year reasonable discovery limitation period produces a fairer process for Members without creating any undue hardship or unfairness to investors. A 2-year limitation period will go far to gain the support and buy-in of the Member community for binding authority.

Yours truly,

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