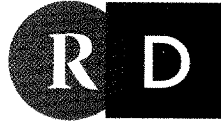

Robertson-Devir
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January 15, 2013

Via Email

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55800,
Toronto, ON M5H 3S8
Fax: 416-593-2318
E-mail: comments@osc.gov.on.ca

Me Anne-Marie Beaudoin
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Autorité de marchés financiers
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Dear Sirs and Mesdames:

RE: CSA Request for Comment on Proposed Amendments to National Instrument 31-301 Registration Requirements, Exemptions and Ongoing Registrant Obligations

Thank you for the opportunity to comment on the proposed amendments to National Instrument 31-103 that will require all registered dealers and advisers, outside of Quebec, to use the Ombudsman for Banking Services and Investments (OBSI) as the common

dispute resolution service (DRS) for the securities industry. According to the CSA the proposed amendments allows investors to benefit from

- A common DRS standard;
- An independent DRS provider;
- Enhanced awareness of where to go for DRS services; and
- Consistent expectations of terms of service levels and outcomes.

I am a principal of Robertson-Devir and assist clients in the resolution of investment and financial disputes. I provide mediation and neutral evaluation services and assistance to clients in the regulatory complaint process. Over the past five years, I have worked with the OBSI and MFDA and IRROC registered firms in the role of a complaints investigator/manager. I have the following comments with respect to the proposed amendments.

According to Annex A, Section 2 of the draft proposal, registered firms (the "Registrant") must make available either an independent dispute resolution service or a mediation service to clients at their expense. According to Annex A, Section 4 and 4(a), for the purposes of subsection 2 but outside of Quebec, a registered firm must ensure that the dispute resolution services of OBSI are made available to the client if OBSI is willing and able to consider the complaint. Based on this drafting it is unclear whether the intention is that a firm must utilize OBSI to the exclusion of a mediation option or whether a firm still has a choice to offer its clients a dispute resolution service (exclusively OBSI) or alternatively a mediation option. We feel that this needs to be clarified. Since the OBSI does not provide mediation services, we submit that it should be made clear that a mediation service is an available alternative.

We agree that using the OBSI as the single service provider of dispute resolution services is a good idea for the reasons put forward in the proposal. However, we do not agree that requiring all disputes be referred to OBSI should be the only mechanism available to Registrants and investors. Mediation and the ombudsman process are very different processes to address disputes between parties. While there are situations where the use of an ombudsman service is attractive, there are many reasons to offer instead a mediation option as an alternative or in addition to an ombudsman service. Firms associated with the Exempt Market Association of Canada and the Portfolio Management Association of Canada have in many instances already put a mediation roster in place.

The use of mediation to deal with disputes is different from an ombudsman service. One difference is that the OBSI is funded by and depends on Registrants that use its services, which often raises questions of neutrality. While the cost of mediation is also borne by the Registrant, the mediator is not dependent on the Registrant for funding and is chosen

by the parties, often from a roster and after the parties to the mediation have conducted due diligence regarding the mediator's expertise and neutrality. Questions over the neutrality of OBSI often arise when a report recommendation is not in favor of a complainant. Both the OBSI and the Registrant are frequently seen as one and the same. In mediation however, the complainant and Registrant actively participate in the resolution of the complaint and therefore assume responsibility for the outcome.

Also OBSI's process is not as transparent as a mediation process. The OBSI process involves a review of the Registrant's file, a separate interview with the parties and a recommendation in the form of a written report. If the OBSI report is in favor of the complainant, the report is initially reviewed by the firm, where it has an opportunity to challenge the conclusions, introduce new information and potentially negotiate the calculation of financial harm. While OBSI's approach to the calculations of financial harm is published, the detailed analysis and rationale for the approach taken in each case, is not typically discussed with the complainant. Negotiations around the findings and the analysis of financial harm result in a process that is less than transparent. If the parties were able to meet together to discuss the issues, clarify their concerns, discuss compensation or a methodology in calculating compensation, this would result in greater transparency and more acceptance of the results by all parties to the dispute.

The OBSI's process is longer than the mediation process. In cases where the complainants' concerns are provoked by a lack of understanding or a need for acknowledgment as a result of poor communication with the Registrant, OBSI must still complete an investigation and provide a full report. If mediation could be used, significant time delays could be avoided. In a case where a recommendation is unfavourable to the Registrant, it may attempt to negotiate with the OBSI. This can cause a delay in the final recommendation of a few months or longer. Mediation is quicker as the parties control the speed of resolution.

The OBSI process is more formal than the mediation process. The OBSI investigation includes one or two phone interviews with the parties, and the outcome of the investigation is recorded in a formal written report or decision. OBSI investigators are often lawyers whose experience is primarily rights based or staff with investment or operations background. Although they may receive ADR training they are generally not hired from the mediation community and do not have the expertise or the time to employ mediation techniques. The formality of the process can intimidate parties and the interview technique has limitations. Parties are unable to tell their story, to hear other perspectives, to brainstorm options, or reality test. Formal phone interviews can be limiting when you are talking to someone in their non- native language, to an elderly person, who may have special needs or to an advisor who has no access to client files (as

they have moved to a new registrant or left the industry) or who is reluctant to participate. A mediation, with all parties "at the table", can overcome many of these limitations and a trained mediator can deploy many mediation techniques that increase the chances of bringing the complainant and the registrant closer together to resolve their dispute.

The OBSI dispute resolution process has limitations built into their terms of reference such as a cap on liability. In mediation the terms of reference can be discussed and set by the parties prior to or at the mediation.

Therefore, while we agree that the selection of OBSI is an appropriate choice for a dispute resolution service, we believe that it is in the interest of Registrants and complainants that a mediation option be available as well.

With respect to the other issues you have raised for comment:

1. Would the time limit on complaints be more appropriate if it was counted from the time when the trading or advising activity that it relates to occurred, rather than from the time when the client knew or reasonably ought to have known of the trading or advising activity?

   Response- The appropriate time period is when the client knew or reasonably ought to have known of the trading or advising activity. This will serve to protect the registrant in cases where there is evidence that a client was aware of a trade or investment activity at the time of the trade/activity as in a disputed trade but will also serve to protect a complainant in instances where the complainant could not be aware of the ramifications of a trade or advice given except with the passage of time as in the case of fraud or misrepresentation.

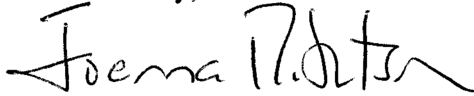
2. OBSI's current terms of reference require a complaint to be made to the ombudsman within 180 days of the client's receipt of notice of the firm's rejection of their complaint or recommended resolution of the complaint, subject to the ombudsman's authority to receive and investigate a complaint in other circumstances if the ombudsman considers it fair to do so. Should NI31-103 include a deadline for clients to bring complaints to it? If so is 180 days the appropriate period?

   Response- Based on my experience it would be reasonable to impose a shorter deadline. Lengthy delays can jeopardize the possibility of a successful resolution. Recollection of events and conversations erode over time. Advisors change firms or industries and become unavailable for interviews.

Also firms may no longer have access to statements needed for compensation calculations. It is my view that this deadline could be shortened without harm to investors or Registrants.

Please do not hesitate to contact me with any questions.

Yours truly,



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