



February 28, 2024

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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

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Dear Sirs/Mesdames:

Re: Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service Proposed Amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations Proposed Changes to Companion Policy 31-103CP Registration Requirements, Exemptions and Ongoing Registrant Obligations (the Consultation or the Proposed Amendments)

We are pleased to provide the members of the Canadian Securities Administrators (the CSA) with comments on the above-noted Proposed Amendments. Capitalized terms used but not defined herein shall have the meaning given to them in the Consultation.

The following viewpoints are those of the individual lawyers of Borden Ladner Gervais LLP (BLG) and AUM Law Professional Corporation (AUM Law) listed below. Our comments cannot be taken as the views of the other lawyers at our respective firms or our clients. BLG and AUM Law are related law firms following BLG's acquisition of AUM Law in May 2021.

Both firms have significant expertise in the investment management industry and with regulatory compliance. In this capacity, we have worked closely with many asset managers registered under NI 31-103 and subject to the dispute resolution requirements of the OBSI with respect to non-permitted clients thereunder. This submission is the result of collaboration between certain of BLG and AUM Law's investment management lawyers and lawyers from BLG's disputes group who have provided their thoughts on how the Proposed Amendments might be improved from a disputes-resolution point of view. From this vantage point, we hope that the views and suggestions set out below assist the CSA in assessing how to proceed with the Proposed Amendments.

We have set out our key observations and recommendations below. We have also responded to certain of the Consultation questions, namely Questions 1-6, inclusive.

KEY RECOMMENDATIONS

1. **Harmonize** the substantive requirements as well as the timing of the coming into force of the Proposed Amendments across all CSA jurisdictions. A jurisdictionally fragmented complaints handling regime does not serve any stakeholders and is especially confusing to investors and costly to firms without any corresponding investor protection or market confidence benefits.
2. **Revisit** the Proposed Amendments as they relate to strengthening the natural justice and procedural fairness concerns that have been raised by various industry associations, including the Portfolio Management Association of Canada (PMAC) and the Investment Funds Institute of Canada (IFIC). As one of the hallmarks of procedural fairness and natural justice, we believe that an independent appeal process should be available to participating parties in respect of final decisions issued by the ombudservice.

CONSULTATION QUESTIONS

Question 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 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?

BLG strongly believes that the Proposed Amendments should be harmonized across all CSA jurisdictions, including Quebec, with respect to both the contents of the requirements and the time when the amendments will become effective. Any fragmentation of this process may result in increased investor confusion, regulatory burden, and complexity for all stakeholders, and may result in different remedies for different investors based solely upon where they live in the country. This outcome should be avoided.

Recognizing the unique legislative challenges presented by implementing these Proposed Amendments across all CSA jurisdictions, we nonetheless urge all members of the CSA to act in concert to agree to one national dispute resolution framework under NI 31-103 and to one implementation date from coast to coast.

Question 2(a): 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: 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.

The Consultation states that a “firm is always bound by a final decision unless the complainant either abandons the process or commences litigation.” We believe that stakeholders would benefit from understanding further particulars of this “deeming provision”. In the absence of such details, it is difficult to assess their impact. For example, it is not clear whether a complainant can subsequently take steps to make the final decision a court order should the complainant not be successful in litigation against the firm.

Given that a final decision will become binding, the participating parties should be provided with sufficient time to consider any reasonable grounds in support of an objection to a recommendation, and/or to engage in settlement negotiations. This process should account for reasonable time for the parties to seek and obtain independent legal advice. We also understand that there may be circumstances where the complainant may decide to abandon the OBSI process before a recommendation becomes a final decision. Regardless of the time period that is determined to be reasonable, the complainant and the firm should have an opportunity to seek an extension to that time period prior to a recommendation becoming a final decision.

Question 2(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.

Similar considerations should apply as identified above in response to question 2(a). The complainant and the firm should also have an opportunity to seek an extension to that time period prior to a recommendation becoming a final decision.

Question 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 believe that this approach permits a firm that successfully defends against a complaint to have the benefit of that decision. We expect it is not the intention for the ombudservice to become a platform for complainants to test out their complaints with no risk that they may receive an unfavourable decision.

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

We are concerned that increasing the current compensation limit may only elevate any natural justice and procedural fairness concerns that arise from the proposed ombudservice process, and that have been raised in previous comment letters submitted by various industry participants. We note the discussion of these concerns in the submissions on the Consultation being made by both PMAC and IFIC. We recognize that these important concerns must be balanced against any benefits to investor protection and accessibility of the dispute resolution process that may arise from an increase in the compensation limit amount.

Question 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?

Under the Proposed Amendments, final decisions rendered by the ombudservice may include the interpretation and application of important statutory and regulatory standards governing the securities industry, as well as assessment of investment losses. While the process contemplates a “review and decision” stage, the review is to be conducted by a “more senior decision-maker” at the ombudservice, and not an independent party. If final decisions are binding, it is essential that both the complainant and the firm have an ability to challenge final decisions through an independent appeal process. The decisions would benefit from appellate scrutiny and confidence in the process would be enhanced.

As set out in the Consultation, final decisions will be made in accordance with the “inquisitorial approach” and “only the processes that are necessary and proportionate to each complaint” will be applied. While outside the scope of the Consultation, we are generally concerned about procedural fairness being compromised in

circumstances where binding final decisions are made by the ombudservice without giving the parties adequate opportunity to present their case, specifically through cross-examination.

Question 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.

A statutory right of appeal is essential to preserve procedural fairness and natural justice. However, given the objectives of the ombudservice to resolve client complaints expeditiously and cost efficiently below a threshold of \$350,000, an alternative independent third party procedure for disputes may also be a workable solution. The CIRO arbitration program may be an appropriate independent third party procedure that could be considered to handle appeals of ombudservice decisions in a more cost-efficient and expeditious manner than a court.

CONCLUSION

We hope our comments will be considered positively by the CSA and will be helpful to advance the considerations of the important matters outlined in the Consultation. Please contact any of the lawyers indicated below if you have any questions or wish to meet with us to discuss our comments.

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