INVESTOR ADVISORY PANEL

February 28, 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

Re: Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service

On behalf of the Investor Advisory Panel (the "Panel"), I wish to thank you for this opportunity to comment on the Canadian Securities Administrators' ("CSA") proposal for a new regulatory framework under which an independent dispute resolution service ("IDRS") would have the authority to issue final, binding decisions ("the proposed framework").[1]

The Panel's mandate

The Panel is an initiative of the Ontario Securities Commission ("OSC") to ensure investor concerns and voices are represented in the OSC's policy development and rulemaking process. Our mandate is to solicit and articulate the views of investors on regulatory initiatives that have investor protection implications.

The Panel's general comments

The Panel has long recommended that the Ombudsman for Banking Services and Investments ("OBSI") be the single, fully integrated dispute resolution service for banking and investment-related complaints and that it be granted binding decision-making authority. We commend securities regulators for their leadership in developing the proposed framework and for working to elevate Canada's dispute resolution framework to align with international best practices of relevant comparable jurisdictions.

[1] 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 and Proposed Changes to Companion Policy 31-103CP Registration Requirements, Exemptions and Ongoing Registrant Obligations, Canadian Securities Administrators (November 2023).

By implementing the proposed framework, Canada's external dispute resolution scheme will join the schemes of relevant comparable jurisdictions, being the UK Financial Ombudsman Service, the Australian Financial Complaints Authority and Ireland's Financial Services and Pensions Ombudsman, in having authority to issue binding decisions. It will also be following a recommendation of the International Monetary Fund ("IMF"), which observed in its 2019 assessment of the stability, quality and resilience of Canada's financial sector and regulatory framework that "Stronger investor protection can be achieved through giving the Ombudsman for Banking Services and Investments binding jurisdiction on firms."[2]

The IMF's recommendation recognizes that fair dispute resolution processes are integral to the quality and resilience of a country's financial sector as a whole. The Panel regards the proposed framework as a key reform that will benefit investors, firms and all capital market participants. The fundamental principles of integrity and fairness support granting OBSI binding authority. To paraphrase an observation we made in a 2021 comment letter, nothing is more unfair — and more apt to undermine public confidence in the integrity of the capital markets — than a disregarded finding that compensation is warranted to a retail investor.

The benefits to investors are clear. In its 2021 report, Ontario's Capital Markets Modernization Taskforce recommended that the OSC be given the power to designate a dispute resolution service with binding decision authority. The report recognized that the existing framework leads to unfair outcomes for some investors:

> "[B]ecause OBSI's recommendations are not binding, registered firms that have harmed retail investors sometimes refuse to follow OBSI's recommendations or offer settlements that fall below OBSI's recommendations. Furthermore, harmed investors could be induced to accept lesser settlements because of the likelihood they may receive nothing if OBSI's recommendations are ignored. In these circumstances, the harmed investors' only alternative is to resort to the courts, which may not be possible given the legal costs involved and the time it takes to pursue a civil action."[3]

This passage aptly summarizes many of the Panel's key concerns with the existing framework. In particular, previous reviews of OBSI have revealed that some firms offer settlements below what OBSI has recommended or refuse to offer any compensation at all. In their 2022 independent evaluation of OBSI, Professor Poonam Puri and Dina Milivojevic noted that "although refusals and low settlements account for a minority of OBSI's files, the aggregate deficiency of compensation paid to consumers ($2,962,140.71 in low settlements and $179,610 in refusals during the five-year period) is significant."[4]

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[2] Canada: Financial System Stability Assessment – IMF Country Report No. 19/177, International Monetary Fund (June 2019), p. 30.
[3] Capital Markets Modernization Taskforce Final Report, (January 2021), p. 104.
[4] Independent Evaluation of the Ombudsman for Banking Services and Investments (OBSI) Investments Mandate, OBSI (June 2022), p. 36.

While investors have the option to pursue litigation, many investors lack the resources or financial literacy to do so. Litigation may also be unsuitable where a claim is not sizable enough to justify incurring substantial litigation costs. In its 2022 Annual Report, OBSI noted that the average amount of an investor complaint that ended with monetary compensation was $8,985[5] — an amount that many would consider too low to warrant the more complex steps and costs of litigation. By comparison, OBSI offers investors a free dispute resolution channel for complaints and requires firms to cooperate and participate.

Granting OBSI binding authority is a means to maintain the integrity of the dispute resolution system by ensuring every harmed investor has access to a fair dispute resolution process and can be confident of a fair outcome. The current process can lead to unfair outcomes for investors. While at least one commentator[6] has suggested the dearth of cases where firms offer settlements below what OBSI has recommended[7] means binding authority is not necessary, the current framework does not guarantee this trend will continue in the future, and in fact may itself incentivize parties to settle for amounts below OBSI's recommendation.[8] The number of cases where firms refuse settlement or offer amounts below what is recommended could increase, particularly if OBSI increases the number of cases it hears and the amount of its recommended settlements. More importantly, from an investor protection perspective, a single case of an unfair outcome is too many.

The Panel is also of the view that the proposed framework is in the best interests of firms. The 'investigation and recommendation' phase provides an opportunity to resolve an investor complaint in an expeditious manner, while the 'review and decision' phase enables firms to obtain a formal review if they disagree with the original recommendation. This framework removes the need for firms to devote significant internal or external resources to dispute resolution, case management or litigation, and helps firms maintain and bolster their reputation for fair dealing.

Lastly, the Panel is of the view that this initiative is an important step forward for capital markets. An accessible, efficient and fair dispute resolution process that ensures parties receive full compensation for wrongdoing is essential to promoting capital formation and robust capital markets.

The Panel's position and recommendations

Turning to the specific questions raised in the consultation document, we wish to offer the following comments:

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*

[5] Annual Report 2022, Ombudsman for Banking Services and Investments, p. 45.
[6] Re: Bill 150 - The Securities (Saskatchewan Investors Protection) Amendment Act, 2023, Investment Industry Association of Canada (November 2023).
[7] *Ibid* 4, p. 36.
[8] *Ibid* 4, p. 33-34.

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?

For the reasons noted above, investors and capital markets benefit from the proposed framework taking effect as expeditiously as possible. If proclamation is withheld until all of the jurisdictions have granted OBSI binding authority, there is more than likely to be a considerable delay in advancing investor redress and bolstering confidence in capital markets.

The Panel recognizes the risk that gradual implementation of OBSI's binding authority may lead to investor confusion or result in some complainants trying to bring claims in jurisdictions where they lack the required connection to that jurisdiction.

To minimize these risks, the Panel recommends that the CSA make the process as clear and easy for retail investors to understand as possible. The Panel encourages the CSA to publish a plain language single resource that articulates the criteria for determining where an investor can bring a complaint, and the processes it must follow in jurisdictions where OBSI has and does not have binding authority.

2. *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:*

   (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.

The proposed framework serves as an alternative to litigation, which is generally more time-consuming, complex, expensive and arduous. To serve as an effective alternative, the timeline for participating in the process should be relatively expeditious, particularly at the 'investigation and recommendation' stage.

The Panel regards 30 days as an adequate length of time for a recommendation to be deemed as final at the 'investigation and recommendation' stage. A 30-day period would be consistent with the duration of OBSI's current review process.

In addition, the structure of the 'investigation and review' stage also makes it likely that both parties will be familiar with the direction of the investigation outcome before OBSI's recommendation is formally communicated.[9] This factor also suggests a 30-day period is appropriate.

> *(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.*

At the 'review and decision' stage, the Panel regards 60 days as an appropriate length of time for a decision to be deemed as final. A 60-day period balances the need to provide parties with adequate time to review a formal, detailed recommendation (including seeking legal advice) with the need to ensure the process remains expeditious.

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?*

The Panel is supportive of deeming provisions that make OBSI's recommendations and decisions final in some scenarios. This framework promotes finality, efficiency and fairness to both parties, which is essential.

However, the Panel is of the view that complainants should receive comprehensive and investor-friendly disclosure, at both the first and second stages of the process. This includes any evidence provided by the firm and detailed decisions with an outline of the rationale and considerations supporting the decision.

Without adequate disclosure, complainants cannot know what the other party has submitted as evidence or arguments and, by extension, the strength of their case. This lack of disclosure impairs the ability of a complainant (and their legal advisor, if so retained) to make an informed decision about whether to withdraw from the process or to accept a recommendation or decision as final.

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

The Panel regards a $350,000 compensation limit as too low and its adjustment is long overdue.

The Panel notes that a higher limit would accord with expert recommendations and international best practices. In its 2021 report, the Capital Markets Modernization Taskforce noted that the $350,000

[9] The proposed framework states that, "Currently, when OBSI investigates a complaint and determines that it would be fair for the firm to provide monetary compensation to a complainant, OBSI first attempts to facilitate a settlement between the complainant and the firm." *Ibid* 1, p. 9647.

limit has not been increased since OBSI's inception in 1996 and recommended that the limit be increased to $500,000.[10] The Panel endorses that recommendation.

The CSA notes in the proposed framework that it intends to periodically revisit the compensation limit. The Panel recommends in the alternative that the compensation limit be adjusted automatically in line with inflation, to ensure investors are not inadequately compensated in the event that revisiting the compensation limit is sidelined by other priorities. The Panel notes that the UK Financial Ombudsman Service's compensation limit is £415,000[11] (equivalent to approximately $715,000) and is adjusted each year in line with inflation.

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?*

The Panel supports limiting appeal rights under the proposed framework. The Panel agrees with the CSA's observation that a "right of appeal may re-introduce a power imbalance between complainants and firms, with firms likely being in a better-resourced position to pursue appeals from a final decision of the identified ombudservice."

The Panel is of the view that limits on the right of appeal may also have a broader salutary effect, potentially incentivizing more complainants to seek recourse through this channel. As we noted in a 2016 comment letter, "why would anyone want to engage in an onerous and challenging process with a regulator whose decisions are not binding?"

The Panel does regard judicial review as an important accountability feature of the proposed framework, and is supportive of parties having the right to seek judicial review of any decision. In addition, it will be important that OBSI be subject to appropriate oversight and regular review by regulators.

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.*

The Panel does not support the proposed framework including a statutory right of appeal to courts or alternative dispute procedures for disputes involving amounts above a certain monetary threshold.

Investors are able to bring their complaints to the courts if they choose. The proposed framework is intended to be a more efficient and informal process for redress. If parties can appeal decisions to the courts, the complaint process will be prolonged. Investors will also often be at a disadvantage, because many will lack the resources to effectively challenge firms on appeal.

[10] Capital Markets Modernization Taskforce Final Report, (January 2021), p. 105-106.
[11] Award Limits Increase, UK Financial Ombudsman Service (March 2023).

The Panel also does not support parties being able to bring appeals to other dispute bodies such as securities regulators. Such a framework could overburden securities regulators and detract from their enforcement mandates.

7. *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.*

It will be important that OBSI collect data and feedback and publish reports that summarize its activities, processes and outcomes. Its reports should be clear and easy for retail investors to follow.

It is also important that OBSI publish the reasons for its decisions. We note that the UK Financial Ombudsman Service has, since 2013, published all ombudsman decisions, which are anonymized to ensure complainants are not identified.[12] As a 2011 report by that agency noted, stakeholders should have access to a full, accurate and balanced picture of all of ombudsman decisions to minimize the possibility of stakeholders forming a distorted view of the ombudsman's decisions.[13]

The Panel also notes that it will be important for the CSA to have the flexibility to adjust its processes in response to the data and feedback it receives.

8. *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?*

The proposed framework states that OBSI is expected to be subject to "coordinated oversight by CSA jurisdictions, which the CSA continues to develop, and which is expected to reflect certain existing oversight regimes such as those in place for self-regulatory organizations (SROs), clearing agencies and exchanges. Oversight is anticipated to include purview over governance and organizational aspects of the identified ombudservice."[14]

This passage suggests that OBSI will be subject to an additional degree of scrutiny and oversight. The Panel regards it as important that OBSI remain an independent entity under this enhanced oversight regime, as independence is an essential component of serving as an impartial dispute resolution service.

9. *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.*

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[12] Ombudsman decisions, UK Financial Ombudsman Service.
[13] Transparency and the Financial Ombudsman Service: Publishing ombudsman decisions, UK Financial Ombudsman Service, September 2011, p. 9.
[14] *Ibid* 1, p. 9650.

The Panel supports the proposal to prohibit firms from using terminology such as “ombudsman” or “ombudservice.”

For the proposed framework to be effective, investors must be aware of OBSI’s dispute resolution framework, how it differs from firms’ dispute resolution processes and how to access it. If firms are able to use terminology for their internal complaint-handling procedures that imply independence and can be confused with OBSI’s services, some investors may — through ignorance or misdirection — miss an opportunity to seek recourse through OBSI. Prohibiting the use of select terms would minimize opportunities for investor confusion while imposing no material costs or disadvantages on firms. The proposal would also be consistent with the prohibition on banks using terminology such as “ombudsman” or “ombudservice” that was introduced as a consumer protection measure. This consistency would reduce confusion and support investors in their understanding of the complaint handling system.

Lastly, we would reiterate our comments made in our 2022 comment letter on the need to amend OBSI’s current limitation period:

"Complainants typically have limited resources and/or low levels of financial literacy, while large financial institutions have substantial resources to defend themselves, including significant expertise in the subject matter of the complaint. This asymmetry cannot be neutralized simply by making ECBs independent and impartial. Fundamentally, a process that affords asymmetrically capable parties the same means and opportunity to present their case really favours the better resourced party — in this instance, the financial institution.

The asymmetry is compounded by OBSI’s administrative practice of applying its limitation period to screen all complaints for timeliness. We believe OBSI’s impartiality would be better preserved if this practice were abandoned, since complainants often lack the knowledge and sophistication needed to determine that they’ve been misadvised, misled or otherwise disadvantaged. It may dawn only slowly on them that they have something to complain about, and then they typically need time to discover and sort through the avenues available to pursue redress, including OBSI. Consequently, the limitation period should be considered only where the financial institution raises timeliness as an issue, and they should bear the burden of establishing that the complaint has been commenced beyond a “reasonable” time (see further discussion of this point under “Limitation Period” below).

[...]

a) Limitation Period: To help ensure that harm is rectified through compensation, and thereby to promote fairness and public confidence in our financial system, OBSI should refrain from using a specific limitation period. Consumers should be permitted to make complaints within a “reasonable” time, as determined under guidelines taking into account many factors that contribute to the time it takes for an investor or bank customer to make a complaint. These factors should include such things as poor financial literacy, lack of awareness of material facts, language barriers, health difficulties or other intervening factors."

The Panel regards the proposed framework to grant OBSI the authority to issue final, binding decisions as a valuable, important, and timely initiative that will benefit investors, firms and capital

markets as a whole. We strongly support its expeditious adoption and implementation. We thank you again for the opportunity to comment on the proposed framework. We would be pleased to clarify or elaborate on our comments should the need arise.

Regards,

Ilana Singer
Chair, Investor Advisory Panel