February 27, 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
mtassie@bcsc.bc.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
comments@osc.gov.on.ca

Re: 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

I am pleased to provide comments on the above noted CSA Notice and its request for comments.

This letter is supportive of the proposal to implement a binding protocol in the context that it may provide a way forward for Canadian external dispute resolution to iterate towards an optimal binding solution and for dispute resolution to continue to emerge and develop and in the understanding that the proposal itself is a genuine attempt to provide binding decisions for complainants. There are nevertheless concerns about the proposed solution:

Concerns

The principal concerns are as follows:

When comparing the proposed two stage solution noted in the consultation to international jurisdictions referenced we find that the proposed solution is actually a 3rd stage, assuming a first stage of informal mediation/conciliation/negotiation[1] followed by a formal two-step process (preliminary and final decision) of written determination.

1. Informal stage.

2. Written determination divided into preliminary view and final report.

3. Proposed Review and Decision (R&D) stage.

By the time you reach the proposed R&D stage the complaint should be well worn with all reasonable objections, especially those of the more informed firm/regulated entity, out in the open and addressed within the ombuds process. A proportionate R&D stage would arguably discount known objections rendering a review superfluous in most, if not all, circumstances. Providing prior stages have followed proper process it is unlikely that a review would find in favour of the objecting party.

But, we have an evidence informed consultation that recommends a review of specific objections and there must be good reason for this. What type of objections need to be reviewed? If these are fundamental differences, that is systemic issues relating to differences of opinion over the fairness construct itself, then how is the R&D stage expected to address these issues? Regulatory engagement with the review process in some form may therefore be necessary.

An ombuds organisation is there to level the playing field and takes on a robust independent, impartial, objective, technically informed inquisitorial methodology. A consumer, in the proposed construct, will have gone through the firm complaint process, then on to the ombuds, or external dispute resolution provider, and then, unlike other external dispute resolution providers, onto a final third stage with the possibility of adversarial engagement. Is this the place to impose an adversarial layer? At the end of the process.

A robust ombuds construct would have the independence and regulatory support to address adversarial challenge so why are regulators bringing it into the fold?

If on the other hand there are issues of consumer credibility requiring of adversarial engagement, or of evidence, then how exposed is the consumer in the final decision moment and how is the vital ombuds fairness construct affected?

If we accept adversarial engagement, then are we questioning the credibility, independence and effectiveness of OBSI's inquisitorial and decision making process? Are the regulators questioning the integrity of the ombuds concept or just the OBSI? The proposed introduction of adversarial and legal process needs to be more fully explained. If doubt is cast on the process then this may affect firm conduct, encouraging lowballing and delay earlier in the process.

[1] Different jurisdictions have different terms and nuance in process.

If we are being evidence informed (practise of international jurisdictions and OBSI oversight), why have international jurisdictions with much deeper evolutionary profiles not decided to use the same R&D process and why, likewise, has the OBSI itself not introduced such a similar additional stage for review integrity?

The third R&D stage proposed looks to be a non ombuds construct and could represent a move outside of the ombuds frame. Consumers could well need legal representation for a number of reasons. The potential adversarial component, no matter how remote its probability is painted, is a cause for concern and uncertainty. What impact does the spectre of adversarial process have on consumer and firm engagement in the external dispute resolution process?

One important component that is missed in this consultation is the issue of consumer vulnerability and how the additional time and decision making complexity will affect complainants.

Summary of proposal

It is understood that the proposal aims to provide the OBSI with "the authority to issue binding final decisions". It intends to do this by adding a Review and Decision stage to the OBSI decision making process. Supposedly "Existing investigation and recommendation processes" would be retained or preserved "as much….as possible[2]". It is intended that the R&D stage use "only procedures proportionate to the dispute[3] in reviewing a recommendation".

OBSI recommendations from the investigation and recommendation stage would be deemed to be binding in the absence of any objection from either the consumer or the firm/regulated entity.

The new layer, the R&D stage, would be triggered by a written objection to the OBSI recommendation. This stage would be handled by a senior OBSI decision maker not involved in earlier investigative and recommendation stages. The scope of the review would be limited to specific objections and would not engage in any facilitation.

An undefined essential process test/procedural threshold test (to be set out in legislative amendments) would be applied to determine the range of processes to be used in the review – these are expected to range from inquisitorial to adversarial. While "The use of procedural tools that are more commonly found within the adversarial system during the R&D stage is anticipated to be infrequent and would be limited to circumstances that meet the essential process test" it would appear that the R&D stage itself will introduce components that are not reflective of ombuds international best practices.

Where the consumer has not objected to the recommendation at the investigative and recommendation stage (i.e. the firm has initiated the review) the consumer would not be bound by the R&D stage decision provided they noted their rejection of the R&D stage decision in writing. Failure to respond would be deemed as acceptance of the recommendation and the consumer would be bound to the decision. Whichever party initiated the review would be bound to the R&D stage recommendation. The firm or regulated entity would essentially be bound to OBSI's decision whether it be at the investigation and recommendation or R&D stage.

[2] B6, c., (2023),46 OSCB 9650
[3] Proportionate to the dispute itself or the issues raised by the dispute, or both?

The consultation states that "the CSA continues to develop an oversight regime for the identified ombudservice that would complement the proposed framework by balancing independence of the IDRS with a need for robust monitoring and response by securities regulatory authorities". This regime would apparently "follow the approach for oversight of SROs, clearing agencies, and exchanges."

It is unclear what this oversight regime currently comprises given the limited discussion in JRC reporting. The balancing of independence with the need for "robust monitoring and response" suggests some scope for an as yet undefined compromise with respect to the independence of the OBSI. Independence is the primary foundation of an ombuds organisation, taking it away may prejudice its objectivity and impartiality.

The consultation goes on to note that "the securities regulatory authority" could "make decisions with respect to the manner in which an identified ombudservice carries on business or any by-law, rule, regulation, policy, procedure, interpretation or practice of an identified ombudservice". How this might impair OBSI governance (scope of governance) and the independence of the OBSI is unclear. It is also unclear as to what form the designated external dispute resolution provider will take. It is looking less and less like an aspirational ombuds. Is it moving towards being the alternative dispute resolution arm of a regulatory body.

The proposal also notes a higher level public interest requirement, which should already be a fundamental requirement of an independent ombudsman[4] - it is worth noting that independent reviewers have noted industry aversion to the OBSI's developing public interest mandate. The ability to satisfy the public interest requirement is partly determined by its independence. If the OBSI becomes an arm of the regulator then what of the regulator's public interest requirement?

The consultation also notes that "harmonized orders would likely include obligations and requirements pertaining to risk identification, organizational structure and governance, including appropriate expertise and representation, fees, capacity building, reporting, and public transparency through publication of anonymized reasons. CSA jurisdictions would have approval powers over the identified ombudservice's key materials, which may include the Terms of Reference, procedural rules and written guidance. Operationally, CSA oversight of the identified ombudservice is anticipated to include co-ordinated compliance examinations and monitoring of the identified ombudservice's reporting under a new MOU among the CSA jurisdictions"

Given that the consultation has emphasised an evidence informed approach, especially with respect to international best practices, some discussion of international approaches to these issues would have helped inform the public debate and to better define the intended balance of independence and regulatory input. The UK's FOS is required to follow the rules on complaint handling set out by the FCA[5] and the FCA is responsible for ensuring the Financial Ombudsman Service Limited "is, at all times, capable of exercising its statutory functions"[6] amongst other statutory responsibilities.

[4] The 2011 Navigator Review of the OBSI noted issues with the OBSI's evolving public interest mandate - https://www.obsi.ca/en/news-and-publications/resources/PresentationsandSubmissions/2011-Independent-Review.pdf

[5] https://www.handbook.fca.org.uk/handbook/DEPP/8/

[6] https://www.fca.org.uk/publication/mou/mou-fos.pdf

ASIC also has oversight responsibilities for AFCA in regulation 267 but also makes the following important statement:

> "while ASIC has an enhanced oversight role over AFCA, the scheme remains independent and responsible for its own internal processes and the management of complaints. ASIC has no role in individual complaints handling and will not intervene in the decision-making processes of AFCA."[7]

Evidence informed proposal and international best practice

The Notice states that "The proposed framework is informed by the CSA's experience overseeing OBSI in its current form, as well as international best practices".

It is unclear the extent to which the CSA has been informed by OBSI oversight and the specific international best practices used to inform the R&D proposals are not detailed. There are indeed significant and important differences between the international ombuds organisations referenced and the proposals themselves. These are worth highlighting.

The key difference is the introduction of what is essentially an appeals process on top of the OBSI's existing facilitation, investigative and recommendation process. OBSI's existing procedures, in terms of their stages (pre R&D stage), are broadly similar to those of AFCA, the FOS and FSPO. Where there is weakness/difference regarding OBSI processes is likely in the domain of informal mediation, which is not fully developed. A good comparison of actual processes and practices is probably needed to help inform future consultation on this issue, and likewise to assure the evidence base used to develop the binding regime.

AFCA starts with informal negotiation and conciliation moving to a formal written determination if informal methods do not resolve the issue or the case itself so requires. The formal stage also involves a preliminary assessment phase before reaching a binding decision.

The FOS start off with an informal initial assessment, broadly similar in scope to AFCA's, and then moves on to a formal ombudsman's written determination, that also likewise may also involve a provisional assessment.

Similarly, the FSPO also moves from informal, non-binding, recommendations to formal written determinations in much the same two step process followed by AFCA and the FOS. The difference here is that the move to a formal stage initiates a binding decision on both consumers and firms/regulated entities.

None of the three international ombuds referenced have an internal appeal/third stage of the type referenced in the current proposal. While the consultation appears to refer to the OBSI's investigation and recommendation and proposed R&D stages as a two-stage process, this will essentially become a three-stage process if we include informal methods.

None of the three referenced bodies allow for adversarial components within their internal adjudication processes. The Irish do allow for a Statutory Appeal to the High Court, but this is outside of the ombuds' processes.

[7] https://download.asic.gov.au/media/veydmskt/rg267-published-2-september-2021.pdf

The UK[8] and AFCA[9] both have Independent Assessor roles that allow for consumer and firm complaints about service standards and practical handling of a case. It is plausible that a great many of the objections that might arise from the door being opened would be better addressed by an independent assessor. It is unclear just what objections the R&D stage is designed to address.

Additionally, the proposed deemed acceptance of the OBSI's decisions also differ from international benchmarks where a consumer would need to explicitly accept a recommendation, and a failure to respond would imply rejection.

Key Concerns

The following express key concerns over the binding proposals:

Lowballing and prevarication

One of the objectives of binding is understood to prevent lowballing and prevarication and to facilitate timeliness.

Will the binding proposals stop low balling, earlier in the process, and facilitate faster resolution, or will they provide further delay opportunity for firms? If firms have confidence in the R&D process then they may wish to move towards this stage quicker rather than later. If they lack confidence in the R&D stage then they may well seek to prevaricate and seek lower restitution amounts via lowballing. Additionally, the spectre of a further review with the potential for adversarial engagement may also force the hand of the consumer to accept a lower offer.

None of the binding proposals on the table address firm conduct or mechanisms for monitoring and addressing low balling and prevarication going forward. While the R&D stage intent may be towards proportionate and timely resolution, we cannot be certain that this will be the outcome. The proposed additional timeframe associated with a review and the uncertainty associated with the introduction of adversarial mechanisms raise concerns.

Informal mediation

If the R&D stage is to be deemed to be successful, we would need to see quicker movement through the investigative and recommendation stages and/or earlier and timely resolution through better developed informal mediation. We should be seeing quicker and cheaper resolution. One of the barriers to informal mediation has likely been the lack of binding authority. Does the OBSI have the resources and the authority to implement both effective informal resolution and the proposed R&D stage? Does the proposed solution invalidate the development of more effective earlier resolution?

Is the Review and Decision stage necessary?

Critically, if we look at ombuds processes, from the informal stage to the formal preliminary assessment and final written determination, we should see a process of both evidence and objection and assessment and reassessment. The route to the final determination should have already addressed most, if not all, of the accessible objections that would impact a decision.

[8]https://www.financial-ombudsman.org.uk/who-we-are/customer-service/service-complaints/independent-assessor

[9] https://www.afca.org.au/about-afca/accountability/independent-assessor

Indeed, the effectiveness of a final written determination should be partly defined by its ability to a) address objections and b) to collect evidence via the inquisitorial role. It should be noted that no recommendations were provided to enhance the OBSI's inquisitorial function or higher standards earlier in the firm complaint process.

Starting with their own complaint process, firms have had a long time to address and frame their objections. Especially those where the sums are large and where lowballing has appeared more likely. Any objections that remain are likely to be fundamental and may not be easily addressed within the R&D stage.

If anything, the R&D stage proposed is just another one of the many mini steps that feature within iterative decision making processes of external dispute resolution. By the time a final decision is reached, a firm should be well versed in the decision irrespective of their objections. Is the R&D stage, in the context of an ombuds decision making process, superfluous. If it is superfluous will it be effective? If there are issues of significance to be revealed, why have they not been revealed earlier in the process? Are there not better ways to assess the integrity of the process and the system than the proposed 3rd stage?

Where is the evidence that suggests prior stages are not effectively addressing objections? Recommendations from previous independent reviews, with respect to addressing objections to binding, notably the Battel 2016 review, probably addressed these issues better.

Fairness

How does the R&D stage impact the OBSI's fairness construct? It is not the wholesale review of a determination, but could it become so if an objection has significance? In any given decision there may well be individual factors to which an objection could be raised but which may not impact the overall decision. All fairness constructs likely have an implied margin of error.

Most if not all objections already raised are likely to have been adequately addressed within earlier stages and OBSI determinations.

Given that the subject matter expertise required to raise unique objections and arguments may be beyond most consumers, it is unclear what impact the R&D stage may have on the playing field. Disagreeing with the determination is not a specific objection.

The introduction of an adversarial component at the end of the long complaint process is the most concerning issue. What would an adversarial process seek to uncover and would the allowance of an adversarial process at this late stage, for a consumer who may be unprepared, be fair?

With the adversarial component the R&D stage does not appear to be an integral ombuds construct.

Systemic issues

If firm/entity resistance to the OBSI's recommendation is fundamental and systemic, the R&D function may not be able to address such objections. The OBSI also has a restricted systemic remit and which may leave many issues outside of the R&D remit.

A firm/industry perspective may not be interested in the individual outcome but the systemic impact. To what extent could the R&D function enable systemic issue objection at the expense of the consumer outcome?

Consumer legal representation

Another issue is the extent to which the consumer may be better off with legal representation at an earlier stage, especially in those areas where there is fundamental firm/industry resistance to OBSI recommendations? Especially for larger amounts, should consumers seek experienced counsel earlier? Should they even go the OBSI route? The proposals on the table that a) keep the maximum compensation at $350,000 and that b) allow for adversarial input suggest that individuals with larger claims may need to consider experienced legal representation.

Governance and independence

To what extent will the enhanced proposed, and undefined, oversight regime that aims to balance "independence of the IDRS with a need for robust monitoring and response by securities regulatory authorities" impact the independence of the OBSI itself? More details of this rebalancing of independence is needed, especially with respect to defining the type of EDR the OBSI will become. Moreover, how will the essential process test be developed, defined and adjusted over time? Issues such as the definition of complaint may become a R&D issue: how can the OBSI rule on a regulatory/OBSI conflict?

Costs and efficiency

Do the proposals run the risk of making of OBSI complaint processing too costly and long? Many commentators are recommending that those who initiate an appeal stage should cover the cost of such as well as the consumers costs of legal representation and other counsel.

Questions

Consultation 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?

Assuming that the OBSI would remain as the sole identified EDR but not necessarily EDR with binding powers, it would depend. Decisions by the OBSI in a R&D review would likely impact non-binding jurisdictions and written determinations for complaints assessed in those

jurisdictions. Consumers in non-binding jurisdictions may quite rightly challenge the integrity of their securities regulators in this respect. Given that many firms are national and not just provincial you might find firms weight challenges towards participating jurisdictions in order to gain strategic intelligence.

Complying with multiple regimes may present challenges. More importantly how will this impact oversight by securities regulators and how will responsibility for such oversight be apportioned, if at all?

Keeping the OBSI operationally independent would simplify matters as would keeping out adversarial and legal process from the R&D stage, but this may render this final stage irrelevant.

Consultation question 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.

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.

Unlike most other schemes the CSA has chosen to propose a binding recommendation after a third stage. By doing so consumers and firms may be faced with a decision making and time frame conundrum prior to and post the re R&D phase.

With respect to a):

In jurisdictions where there is binding on the firm and not the consumer a 4 week to 30 day time frame appears acceptable to acknowledge consumer acceptance. AFCA also provide an option to accept a preliminary decision within a 30 day time frame (excluding fast track) before proceeding to a written determination.

Where decisions are binding on both parties, as in the case of the FSPO, a 35 day time frame is provided for the decision to be challenged via statutory appeal to the high court.

It is unclear as to why the deeming provision is being adopted. Other jurisdictions require consumer acceptance of a decision, although this may be predicated by the fact that an acceptance binds the consumer and the firm and therefore needs to be explicitly recorded. However, timely acceptance of a determination should help inform the firm/registered entity of the consumer's wish to proceed with restitution and to bring closure. Irrespective, consumer acceptance/rejection of the determination needs to be explicitly recorded because of the potential corresponding liabilities. A determination in favour of the firm has a lower immediate systemic liability, a determination in favour of the consumer a higher immediate one.

It should be noted that the initial informal and secondary formal stages, along with preliminary analysis of a written determination, are likely to help prepare decision making with respect to acceptance/rejection/objection. Longer time frames should not therefore be necessary.

It is worth noting that there is no data or evidence concerning the needs of consumers faced with the more complex decision making scenario presented by the CSA proposals. Financially vulnerable consumers may be further impacted by this final stage.

With respect to b):

There does not appear to be any reason as to why the time frame for b should exceed the time frame for a. Clarification over timing issues associated with a judicial review need to be made. Otherwise, firms/regulated entities should be held immediately liable for determinations in consumers' favour. Acceptance cannot be deemed and needs to be expressly made given the potential associated liabilities with rejection. Consistency in communication of acceptance/rejection needs to be maintained throughout the R&D process.

Consultation 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?

It is worth noting that the proposed R&D stage is not primarily for consumers who disagree with the OBSI's determinations but for firms who are looking to pay below the OBSI's recommended compensation amounts and to delay settlement. A firm's decision to contest is likely much more informed and cognizant of the process itself and the consequences. While many consumers may disagree with OBSI's recommendations, many of their points of disagreement are likely well assessed in OBSI decision making and are unlikely to have impact in the proposed review process. The lack of a specific independent assessor function to address many of these issues may mean a higher level of consumer objections unwittingly winding their way to this higher-level review stage.

Vulnerable consumers, especially, may not have the capacity to make an informed decision regarding their objections. Is the intended process outcome a fair one given the playing field?

Consultation question 4

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

The issue of the compensation limit is not a primary focus of this consultation. The need to raise the limit and to regularly update the limit is well addressed in numerous texts and consultations. Globally Canada lags not only in its ability to bind firms to EDR recommendations but also in its failure to raise compensation limits over time. It lags its international peers in many respects. That said the focus of this consultation is binding and the focus of the comments in this letter will focus on those specific issues.

Consultation 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?

The 2016 OBSI Independent Review addresses appeal rights and provides a well argued and well informed position that supports judicial review but not a broader appeals mechanism. Ireland does have a right to appeal but it is also worth noting that the costs and time associated with addressing the appeals process might well be prohibitive for the OBSI.

Allowing for an appeal could however invalidate the present R&D process and as such the consultation would have needed to be more expansive in its discussion of these issues to properly address them. The UK and Australia allow for judicial review but not an appeal as to the merits of the case. But all these jurisdictions allow for wider systemic issue powers within the ombuds construct. Allowing for appeal to the courts would introduce systemic issue consideration, something which firms may not wish to bring to the fore unless they are defending against much more substantial systemic liabilities[10]. Considering such a right to appeal should not be entertained without a robust assessment of evidence-based outcomes in other jurisdictions.

Making sure an ombuds is accountable and transparent, subject to robust and regular review with supportive and engaged regulation as well as informed by robust and clear standards of regulation and professional competency should reinforce the fairness and effectiveness of the framework.

Consultation 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

It is worth remembering that established ombuds organisations have strong, robust evidence informed and evidence based processes whose principles and decisions are based on a well established, legal, regulatory and professional knowledge base. Their ability to deal with similar cases and issues, day after day, should afford confidence in the fairness of their decision

[10] https://www.irishtimes.com/business/2023/12/04/ulster-bank-end-your-legal-battle-with-account-holders-over-their-right-to-a-tracker-rate/

making. In many respects they have advantages over the courts and the legal system. Key to their ability to deliver fairness is of course their independence, their accountability and their transparency. Unfortunately, the OBSI lacks specific transparency with respect to its decision making, specifically its written determinations and this needs to be addressed going forward.

Limiting binding to such a small amount and forcing individuals to the legal system or alternative ADR for larger amounts is confusing, likely system inefficient and lacks cogent rationale.

Judges do not have the time to become subject matter experts and rely on the experts to illuminate issues and points of disagreement. But making sure the right experts get before the court is also an issue.

The issue of bias and conflicting opinion vitiating the ability of the court to make an informed determination is not new. Robertson (2010), in Blind Expertise talks about expert witnesses "depriving factfinders of a clear view of the facts" thereby "undermining the deterrence and compensation functions of litigation" with the result that errors in litigation "can harm blameless parties, fail to compensate deserving victims, and provide poor guidance for settlement negotiations in other cases". Referencing the small sample of opinions thus represented he notes "Through selection, affiliation, and compensation biases, litigants make experts more favorable but less accurate compared to their base rates of accuracy in the real world."

The issue of selection and compensation biases is also noted in securities arbitration. Egan et al (2021) using a data set of 5,000 disputes between 1998 and 2019 noted that "firms hold an informational advantage over consumers in selecting arbitrators, resulting in industry-friendly arbitration outcomes" and that arbitrators "who are compensated only if chosen, compete with each other to be selected."

With respect to arbitration again, Sharma M (2020)[11] in "A Fair Alternative to Unfair Arbitration: Proposing an Ombudsman Scheme for Consumer Dispute Resolution in the USA" argues that "In the interest of fairness, adversarial legalism of mandatory arbitration should therefore make way for an inquisitorial approach of ombudsman." The article references bias in favour of businesses and a lack of transparency and accountability and discusses the many benefits of an ombuds approach vis a vis the restricted and narrowly focused confines of arbitration.

Financial services accountability, standards and calibration are also impacted by understanding of vulnerability[12], cognitive neuroscience[13], multi layered and diverse professional

[11] Sharma, M. (2020). A Fair Alternative to Unfair Arbitration: Proposing an Ombudsman Scheme for Consumer Dispute Resolution in the USA. Journal of the International Ombudsman Association .

[12] The UK FCA's "Guidance for firms on the fair treatment of vulnerable customers" (2019) noted that 50% of UK adults "display one or more characteristics of being potentially vulnerable". The FCA also considers those who provide financial advice as one of the risk factors impacting vulnerable consumers. "A vulnerable consumer is somebody who, due to their personal circumstances, is especially susceptible to harm, particularly when a firm is not acting with appropriate levels of care." - https://www.fca.org.uk/publication/guidance-consultation/gc20-03.pdf p3

[13] Frydman C, Camerer CF. The Psychology and Neuroscience of Financial Decision Making. Trends Cogn Sci. 2016 Sep;20(9):661-675. doi: 10.1016/j.tics.2016.07.003. Epub 2016 Aug 5. PMID: 27499348.

competences, relationships and industry and cultural norms[14]. This arena is all the while developing and emerging.

If you pay attention to the broad, expansive, complex and multi-layered evidence base, it is difficult to see how the legal system or alternative forms of ADR (i.e. arbitration) can compete with an experienced, multi-disciplined, well resourced entity that specialises in complaint handling and is an established subject matter expert in its own right across many domains. Much however depends on regulatory support for the ombuds, its ability to carry out its inquisitorial function and its independence.

Consultation Question 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 is unclear just what the proposed oversight elements are and the extent to which regulatory decision making will override the OBSI. That said, an ombuds should thrive under conditions of transparency and accountability as well as engagement of regulators and professional bodies in developing standards of conduct and competency to guide decision making.

Much higher levels of transparency with respect to OBSI decision making is however needed to help raise accountability. Additionally greater regulatory support for fundamental OBSI powers and ombuds characteristics is also necessary to support the effectiveness of the evidenced based inquisitorial function.

Regulators have also lacked transparency with respect to their oversight and could become much more involved in a) supporting OBSI complaint standards and their application within firms and b) engaging with the OBSI with respect to systemic issues and complaints and registrant standards and conduct. Oversight also means engagement and commitment to the OBSI and the evolution of addressing complaints and the public interest within regulatory circles.

Consultation Question 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?

Again, the oversight framework is unclear and broader commitment to an ombuds function within Canada lacking. Accountability on its own does not determine efficacy. The proposed R&D framework itself appears superfluous at many levels to the effective operation of the OBSI and it is unclear just what issues can and will be addressed by the R&D stage and how much regulatory engagement will be needed. Regulators should place high level emphasis on active and engaged oversight of an ombuds because of the importance of the ombuds to system integrity. Encroaching on an ombuds independence however is another matter and is central to confidence in and the integrity of external dispute resolution, just as independence is central to the legal system itself.

[14] SAH, S. (2017). Policy solutions to conflicts of interest: The value of professional norms. Behavioural Public Policy, 1(2), 177-189. doi:10.1017/bpp.2016.9

Consultation Question 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.

Discussion of this issue is well addressed in numerous consultations and independent reviews. This comment letter supports prohibiting such terminology. Importantly, the OBSI itself, if we reference previous independent reviews and international best practise, with respect to the operation and function of an ombuds organisation, is not an ombuds. This is an important public interest issue, and regulators need to clarify their position and their use of terminology when referencing the OBSI. A comprehensive review of complaint processing, similar to that carried out by the FCAC within banking, would be welcomed and substantial upgrades to the CSAs own complaint handling rules and standards would also likely be needed to support complaint handling fairness at all levels.

Summary and conclusion

As stated, this comment letter supports moves towards instituting binding authority for the OBSI with respect to external dispute resolution in the domain of securities and associated financial advising by securities registrants and firms. The current proposals are an important start and implementing a binding regime will be a substantial learning experience. This letter raises many concerns, but this does not necessarily mean that a framework cannot mitigate them.

Clearly, within a robust OBSI process, if we take the proposals at face value, a review of specific objections could well be proportionate and relatively quick with little or no change recommended to determinations made. But of course, that is not why we are still here submitting on the issue.

Yours sincerely

Kind regards

Andrew Teasdale, CFA