PRIVATE CAPITAL MARKETS ASSOCIATION OF CANADA
THE NATIONAL VOICE OF EXEMPT MARKET DEALERS, ISSUERS AND INDUSTRY PROFESSIONALS

February 28, 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

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Dear Sirs/Mesdames:

Re: PCMA Response to the Proposed Amendments to Give OBSI Binding Decision-Making Powers

The Private Capital Markets Association of Canada (the **PCMA**) is pleased to provide our comments to the proposed amendments published by the Canadian Securities Administrators (the **CSA**) to certain complaint handling provisions of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), as well as proposed changes to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**31-103CP**) (the **Proposed Amendments**).

About the PCMA

The PCMA is a not-for-profit association founded in 2002 as the national voice of the exempt market dealers (**EMDs**), issuers and industry professionals in the private capital markets across Canada. The PCMA plays a critical role in the private capital markets by:

- assisting hundreds of dealers and issuer member firms and individual dealing representatives to understand and implement their regulatory responsibilities;
- providing high-quality and in-depth educational opportunities to the private capital markets professionals;
- encouraging the highest standards of business conduct amongst its membership across Canada;
- increasing public and industry awareness of private capital markets in Canada;
- being the voice of the private capital markets to securities regulators, government agencies and other industry associations and public capital markets;
- providing valuable services and cost-saving opportunities to its member firms and individual dealing representatives; and
- connecting its members across Canada for business and professional networking.

Additional information about the PCMA is available on our website at www.pcmacanada.com.

The PCMA has published select articles about the Proposed Amendments on our newly established advocacy site called **Fair and Balanced Regulation** which is at www.fairandbalancedregs.com.

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Private Capital Markets Are Vital for Capital Raising in Canada

The PCMA has conducted a thorough review of the Proposed Amendments that seek to give the Ombudsman for Banking Services and Investments (**OBSI**) binding decision-making powers for up to $350,000. The implications of giving such unequivocal expanded powers to OBSI cannot be underestimated given that over 70% of capital raised in Canada (just under $90 billion) for the first nine months of 2023 was made under prospectus exemptions in the private markets. Investor protection and confidence in the private markets are critical to allow companies to grow their business while providing jobs and expanding the Canadian economy.

PCMA Advocacy Website – Fair and Balanced Regulation

The PCMA believes in fair and balanced regulation. The PCMA encourages members of the CSA and others to visit the PCMA's new dedicated advocacy website called ***Fair and Balanced Regulation*** (www.fairandbalancedregs.com). This website will be used as part of the PCMA's ongoing advocacy involving securities law and the private capital markets starting with the Proposed Amendments. The PCMA has published articles about the Proposed Amendments and will be adding its comment letter and related articles, videos and podcasts as part of education and training about existing and proposed securities law in Canada.

Investor Protection is Important

Investor protection is critical for a well-functioning capital marketplace. This works in tandem with having fair and efficient capital markets to allow registrants to raise capital for companies to grow their business and create jobs to stimulate the economy. It is an interconnected capital-raising ecosystem. If one part of the ecosystem does not work, then it affects the other.

Proposed Amendments are Unfair by Design

The PCMA believes that the Proposed Amendments do not adequately balance investor protection with the necessity for fair and efficient capital markets. The CSA's proposed framework may impose significant financial burdens on firms without providing the proportional procedural safeguards as recognized under administrative law.

1. The CSA seeks to maintain OBSI's current business and operations without giving firms any additional procedural rights commensurate with giving OBSI binding decision-making powers.

2. The PCMA notes that the data on education and settlement results provided by the CSA does not support a power imbalance between complainants and firms, particularly with certain types of investors, which is the CSA's justification in part, for giving OBSI binding decision-making powers.
    a. OBSI's data suggests there is no power imbalance based on the education of complainants where over 67% have a college, CEGEP or other non-university certificate or diploma or university certificate or Bachelor's Degree or higher. The PCMA also believes that accredited investors and permitted clients have sufficient wealth, education and experience and do not need the protections of the Proposed

Amendments and should be excluded as eligible complainants under the proposed framework.

b. OBSI's data shows only 8% of cases settled below OBSI's recommended amount and only 4% when looking at the majority of settlements, which have compensation amounts between $1 and $49,999.

The PCMA is concerned that the Proposed Amendments seek to make a radical change without sufficient data to support the need for a change.

3. The CSA assumes OBSI's recommended settlement amounts are always correct. The PCMA has concerns since OBSI has not published a detailed loss calculation methodology for the industry to understand the basis of its decisions involving illiquid private market investments. OBSI has only provided general statements on its website about such matters. OBSI's approach, as it stands, lacks the specificity that firms require to anticipate and understand the potential financial outcomes of a dispute.

4. The PCMA is concerned that the CSA has arbitrarily lowered the bar for the definition of a "complaint" where any "expression of dissatisfaction" involving trading or advising activities could trigger a review by a registrant and/or OBSI. The PCMA does not believe there is evidence to support such a change, it is an overly broad definition and it should be more precisely defined, especially if OBSI is to be giving binding decision-making powers. This situation is compounded if OBSI solely determines whether a matter is a single complaint or multiple complaints, with each complaint being subject to a maximum $350,000 limit. It is crucial for the CSA to ensure the definition of a "complaint" is not ambiguous and ensure fairness, particularly if binding economic outcomes are at stake for firms.

5. The Proposed Amendments do not impose any financial costs on investors for making a complaint. The Proposed Amendments do not incorporate mechanisms to discourage or penalize complainants for making complaints that are frivolous, vexatious or without merit. It encourages 'free-riding'. Other legal systems often have checks and balances, such as 'loser pays' rules to prevent such actions. The PCMA believes that the revised definition of a complaint coupled with no financial costs or disincentives on complainants will open the floodgates of complaints. If so, the sheer number of complaints may overwhelm registrants and OBSI since investors have nothing to lose in trying to characterize any failed investment as a suitability failure reviewable by OBSI. This will also exponentially drive up the costs on registrants for dealing with complaints and OBSI participation fees charged to registrants for its services in order to pay for the proposed framework. The PMCA does not believe the initial and ongoing cost estimates prepared by the Ontario Securities Commission (the **OSC**) fairly reflect the true total cost of the Proposed Amendments.

6. The CSA has not provided any additional procedural protections one would expect to be afforded under administrative law to registrants who could be subject to adverse awards of up to $350,000 per complaint. The CSA's proposed "essential process test" appears to be a label created by the CSA, giving OBSI discretion to determine its complaint review process in the absence of any published procedures. The PCMA submits this creates a potential risk of bias, potential interpretational error and a lack of precedent among complaint reviews undertaken by

OBSI investigation staff. The essential process test assumes OBSI's processes are fair and correct which the CSA suggests is important to resolving complaints quickly. The PCMA notes that speed does not necessarily equate with fairness.

7. The PCMA does not believe the OSC has adequately reviewed alternatives to OBSI including those considered in IIROC's[1] review of its Arbitration Program in 2022 titled "*IIROC Arbitration Program Working Group Recommendations*"[2] (the **IIROC Report**). There was no review included in the Proposed Amendments of the mediation and conciliation services offered by the Autorité des Marchés Financiers (**AMF**) or those offered by the Financial Industry Regulatory Authority in the United States which the PCMA believes are more relevant comparisons.

8. The PCMA believes the CSA needs to clarify how OBSI's review works in connection with multiple proceedings involving, for example, other CSA members involving the same subject matter. In addition, PCMA recommends that the Proposed Amendments should be amended to clarify that complainants cannot undertake further legal proceedings for amounts over the maximum award where the cause of action is the same.

9. The PCMA has engaged the services of Purves Redmond Limited (**PRL**), an insurance broker who has reviewed the Proposed Amendments. The insurance broker, in discussions with certain errors and omissions (**E&O**) underwriters, has noted potential concerns about the insurability of claims arising from complaints in connection with the Proposed Amendments. The PCMA and PRL invite the CSA, OBSI and others to participate in a Working Group to discuss E&O insurance for registrants in Canada, the challenges faced by underwriters in underwriting the proposed framework, and a discussion about possible solutions.

10. The PCMA's specific responses to the CSA's questions based on OBSI being given binding decision-making powers are set out in the body of the comment letter. Select concerns are set out below.
    a. If jurisdictions designate or recognize OBSI as the identified ombudservice at different times, then this would result in a patchwork of regulation involving dispute resolution services in Canada. This should be discouraged.
    b. If OBSI is granted binding authority in the dispute resolution process, the final decision should be binding on both parties and not just a firm. The current approach is one-sided and any decision should always be mutually binding on both complainants and firms if they seek to engage in a dispute resolution process with OBSI if given binding decision-making powers.

[1] "**IIROC**" means the Investment Industry Regulatory Organization of Canada which merged with the Mutual Fund Dealers Association of Canada into what is now called "**CIRO**" or the Canadian Investment Regulatory Organization.
[2] See https://www.iiroc.ca/media/20626/download?inline

c. The parties should have 90 days after a final recommendation to determine if they seek to object and a further 90-days after a final decision to determine whether they will seek judicial review.
d. If binding decision-making is granted to OBSI, the PCMA believes OBSI's settlement limit should be reduced to a maximum of $10,000 representing the vast majority of complaints which closed based on monetary compensation recommended by OBSI. The PCMA has no concerns with OBSI maintaining its current limit of $350,000 for non-binding recommendations.
e. The PCMA has significant concerns that the proposed framework has no appeal rights. The right to appeal serves as a critical safety net, ensuring that decisions can be reviewed and potentially overturned if found to be incorrect or unjust. The complexities and nuances of securities law, coupled with the financial and reputational stakes involved in OBSI's rulings, underscore the need for a more robust appeal process. If the CSA is contemplating an appeal right over certain amounts, then the PCMA believes a party should have a right to appeal any final decision of OBSI for amounts over $10,000. According to OBSI's data, there are relatively few cases involving amounts over $50,000 (49 out of 546 or 9%), where almost half the cases settled below OBSI's recommended amount (24 out of 49 or 49%), based on OBSI data. The majority of the cases are for amounts below $10,000 (384 out of 546 or 70%) and 99% of these cases settle at OBSI's recommended amount.
f. The PCMA believes the CSA should require OBSI to collect more data to allow evidence-based decisions to be made and as part of the CSA's oversight of OBSI. This information should be publicly available on OBSI's website. For example, the PCMA recommends a post-final decision survey be introduced and other data elements gathered such as prospectus exemption relied upon, type of investor, net assets and other data as set out in its comment letter.
g. The PCMA requests that the CSA provide guidance to registrants and OBSI on how to manage a failed offering in the face of a multitude of complaints, establish a Western presence and not prohibit registrants from referring to their internal dispute resolution service provider as an ombudsman provided that they follow the guidance provided by the CSA set out in Joint CSA Staff Notice 31-351.[3]

In sum, the PCMA does not believe the evidence supports the Proposed Amendments and that the existing dispute resolution process is working. Furthermore, the PCMA believes the Proposed Amendments are unfair by design and do not strike the right balance between investor protection and fair and efficient capital markets. Further details regarding the PCMA views are set out in the comment letter that follows.

[3] CSA Staff Notice 31-351, IIROC Notice 17-0229, MFDA Bulletin #0736-M – *Complying with requirements regarding the Ombudsman for Banking Services and Investments*

GENERAL COMMENTS

The PCMA supports fair and balanced regulation.

Over 70% of capital raised in Canada for the first nine months of 2023 was made under prospectus exemptions in the private capital markets (CPE Analytics, "Canadian Private Capital Exempt Market Overview: First Nine Months of 2023"). This is a very large marketplace which attracted almost $90 billion dollars during the time period. Investor confidence in the private markets is critical to allow companies to grow their business while providing jobs and expanding the Canadian economy.

Registrants, such as EMDs, investment dealers and portfolio managers are involved in capital raising done on a private placement basis. Sometimes investments do not work out for various reasons. Without risk, there is no reward. When investments do not work out, both investors and registrants are unhappy with the outcome. However, an unsuccessful investment should not necessarily result in a complaint since an investor lost money. Under the Proposed Amendments, the PCMA is concerned that the CSA's new definition of a "complaint" (defined as "*any expression of dissatisfaction by a client that relates to a trading or advising activity of a registered firm or a representative of the firm*") will unnecessarily trigger the dispute resolution process. See comments below under *"Change to Definition of a Complaint*".

The Proposed Amendments may have the effect of making registrants the guarantors of all investment losses. The Proposed Amendments can be seen to encourage any dissatisfied investor to make a complaint since there is the chance of receiving an award, at no cost to the investor and no repercussions for making a frivolous or vexatious claim.

The CSA is proposing to maintain OBSI's existing operations and procedures with the addition of binding decision-making powers without any additional rights given to registrants. The PCMA believes the Proposed Amendments are unfair by design and do not strike the right balance between investor protection and fair and efficient capital markets.

If the CSA proceeds with the Proposed Amendments, the PCMA believes the CSA needs to review and consider amending the Proposed Amendments based on the various issues and concerns set out below. The PCMA believes the CSA has insufficient evidence to support a power imbalance between complainants and firms the necessitates giving OBSI binding decision-making powers, as further discussed below under "*CSA Data Does Not Support a Power Imbalance".*

Change to Binding Decision-Making Powers

The CSA seeks to change OBSI's powers from making recommendations to making binding decisions. This is a fundamental shift from an informal alternative dispute resolution process subject to discussions and negotiations, to that of an administrative tribunal (adjudicative body) without any procedural rights given to all parties.

If OBSI's role transforms, it is essential to consider the broader regulatory impact of such a fundamental change. A binding authority necessitates rigorous standards of evidence, transparency, and the right to appeal, which are hallmarks of formal adjudicative bodies. By not addressing these aspects, the CSA's Proposed Amendments create an asymmetrical system where the enhanced powers of OBSI are not counterbalanced by rights for firms, potentially leading to a less equitable dispute resolution process. It is imperative that if OBSI's role is changed, the procedural fairness afforded to firms evolves as well to ensure fairness and confidence in the process.

The CSA depicts an adversarial process as an unnecessary burden but, as discussed below under "*CSA Data Does Not Support a Power Imbalance",* the CSA only emphasizes certain data on OBSI's closed cases to show a power imbalance between complainants and firms.

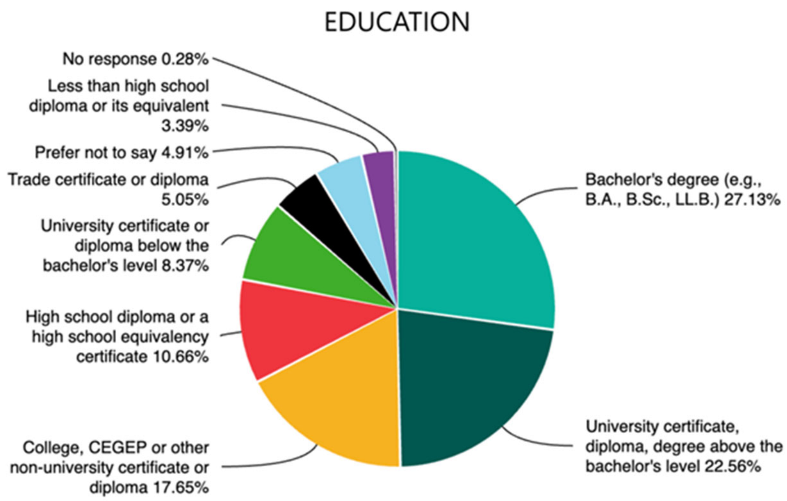
CSA Data Does Not Support a Power Imbalance
In the Proposed Amendments, the CSA criticizes the current dispute resolution process for creating a "power imbalance" between complainants and registered firms that favours registered firms. The CSA states that registered firms often have greater resources and specialized knowledge about the substance of a complaint. The PCMA disagrees with the CSA's position that a power imbalance exists, particularly with certain types of investors. Specifically, accredited investors and permitted clients do not need the protection of binding arbitration by an ombudservice due to their wealth and sophistication, the basis of the exemptions given to them under applicable securities law.

(a) No Power Imbalance Based on Education

The PCMA acknowledges that a firm may have more specialized knowledge as a registrant, however, the Proposed Amendments suggests complainants lack sophistication. A complainant may not be as unsophisticated as one would assume based on the CSA's comments of a power imbalance.

Based on a review of OBSI' Demographics website page, 50% of investment industry complainants had a Bachelor's Degree or higher (*e.g.,* university certificate, diploma or degree above a Bachelor Degree), as set out in the pie chart below.[4] This increases to 67% when including those complainants who have a college, CEGEP or other non-university certificate or diploma.

[4] See Education data from OBSI's ***Demographics*** website for the date range 11/1/2016 – 10/31/2023 for Investments only available on OBSI's website at: https://www.obsi.ca/en/case-data-insights/demographics.aspx



(b) No Power Imbalance with Accredited Investors

It is not clear why the CSA believes that accredited investors have a power imbalance relative to a registered firm. By definition, accredited investors include wealthy investors who satisfy the accredited investor exemption criteria (the **AI Exemption**), as set out in section 2.3 of National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**).

Under NI 45-106, accredited investors include individuals who meet certain income or asset thresholds, such as having:

- net financial assets of at least $1 million;
- net assets of at least $5 million; and
- net income over $200,000 ($300,000 if combined with a spouse) in each of the last 2 years. (Sections 1.1(j), (j.1), (k), and (l) of the AI Exemption)

Accredited investors also include:

- institutional investors such as banks, pension funds, government bodies and agencies and registered dealers/advisers (sections 1.1(a) to (i) of the AI Exemption); and
- other entities like corporate issuers, trusts, or investment funds (sections 1.1 (m), (p), (t), (u), and (w) of the AI Exemption).

The policy rationale for the AI Exemption is based on investor wealth and sophistication and that is why they do not require the protections of the prospectus requirement. The above individuals and entities are wealthy and/or sophisticated and have the resources to adequately represent themselves in any dispute with a registered firm. Accordingly, they do not have a power imbalance, as assumed by the CSA. The PCMA believes accredited investors should be excluded from binding arbitration as recommended by the Proposed Amendments as they can adequately negotiate their complaints with a firm, take legal action or otherwise.

(c) No Power Imbalance with Permitted Clients

The CSA has not carved out binding dispute resolution for permitted clients. As defined in s. 1.1 of NI 31-103, a permitted client is a subset of accredited investors which includes sophisticated investors such as major financial institutions, government bodies and agencies, registered advisers and dealers, pension funds, entities with substantial net assets (at least $25 million), and individuals or entities that own net financial assets exceeding $5 million. NI 31-103 waives several safeguards for permitted clients as a matter of public policy since they have sufficient wealth or knowledge that they do not require the protections available under applicable securities law.

Under section 13.3 of NI 31-103, permitted clients may waive their right to have a registrant determine that a trade is suitable. To rely on this exemption, the registrant must determine that a client is a permitted client at the time the client waives their right to suitability.

Based on the foregoing, an even stronger case can be made that permitted clients are wealthy, sophisticated investors and have the resources to adequately represent themselves in any dispute with a registered firm. Accordingly, accredited investors and permitted clients do not have a power imbalance, as stated by the CSA.

The PCMA believes accredited investors and permitted clients should be excluded from binding arbitration as recommended by the Proposed Amendments as they can adequately negotiate their complaints with a firm, take legal action or otherwise.

(d) Lower Case Settlement Amounts are Not Evidence of a Power Imbalance

As part of the evidence of a power imbalance between complainants and a registered firm, the CSA included Table 3 below in the Proposed Amendments. Table 3 examines the percentage of cases that settled below OBSI's recommended amount and the number of cases that closed with monetary compensation recommended by OBSI. The inference is that if a case settles below OBSI's recommended amount, there is a power imbalance.

Table 3: 2018 – 2022 Investment Cases Settled Below OBSI's Recommended Amount[20]

OBSI Recommended Amount	% of Cases Settled below OBSI's recommended amount	# of Cases Closed with monetary compensation recommendations
$1 to $9,999	1%	384
$10,000 to $49,999	13%	113
$50,000 to $99,999	46%	26
$100,000 to $199,999	43%	14
$200,000 to $350,000	67%	9

The CSA claims Table 3 is evidence of registered firms negotiating down the compensation paid to complainants and in part why binding decision-making powers should be granted to OBSI. Using the numbers in Table 3, the number and percentage of cases settled with the compensation recommended by OBSI can be extrapolated. The PCMA created the table below comparing settlements made at the amount recommended by OBSI and those settled at a lower amount.

OBSI Recommended Amount	Cases Settled below OBSI's recommended amount		Cases Settled at OBSI's recommended amount		Total Cases Settled
	Percent	Number	Percent	Number	Number
$1 to $9,999	1%	4	99%	380	384
$10,000 to $49,999	13%	15	87%	98	113
$50,000 to $99,000	46%	12	54%	14	26
$100,000 to $199,999	43%	6	57%	8	14
$200,000 to $350,000	67%	6	33%	3	9
$1 to 49,999	4%	19	96%	478	497
$1 to 350,000	8%	43	92%	503	546

The comparative data above does not support the CSA's view that there is a power imbalance. In total, only 8% of cases settle below OBSI's recommended amount and only 4% when looking at the majority of settlements, which have compensation amounts between $1 and $49,999.

The data suggests that the higher the settlement amount, the more registrants disagree with the proposed settlement. The PCMA would like to understand the factors that lead to this difference as this may identify that registrants have concerns with, among other things, OBSI's loss calculation methodology for private market investments, or OBSI's complaint review process. Rather than creating a new framework when 92% of the cases settle at the amount recommended by OBSI, the CSA and OBSI should determine what are the factors in these 43 or 8% of cases that led registrants to disagree with the amount recommended by OBSI.

Additionally, when a proposed settlement exceeds $50,000, it implies that the initial investment was substantially more because settlement figures typically represent the discrepancy between the actual returns received by a client and what OBSI determines they were entitled to, not the full investment amount. If the investment amounts are larger, this may suggest that in these cases the investors may be accredited investors or permitted clients and therefore do not need the same level of protection as retail investors.

The PCMA is concerned that the Proposed Amendments seeks to make a radical change without sufficient data to support the need for a change.

(e) CSA Assumes OBSI's Recommended Settlement Amounts Are Correct

The CSA reference to a power imbalance also assumes that OBSI's settlement calculations are correct. OBSI does not have any publicly disclosed loss calculation methodology for valuing private market investments other than a general statements on its website.[5] Transparency in the methodology is crucial for ensuring fairness and consistency. Without a detailed and publicly available methodology, there is a risk that OBSI's calculations may not be correct and could be seen as arbitrary.

[5] For OBSI's exempt market product loss calculation overview, see its website at: https://www.obsi.ca/en/how-we-work/emd-loss-calculation.aspx

The PCMA believes OBSI must fully disclose and provide a detailed loss calculation methodology for valuing private market investments, including all material factors and assumptions OBSI intends to rely on.

Within the private markets, EMDs may not have a current market value for securities of an issuer since it is not determinable, or the issuer will not provide such information to an EMD or other registrant. Moreover, if securities of an issuer are no longer in distribution by an EMD, obtaining such information may be challenging.

When market value is not determinable or unavailable, the PCMA is aware of instances where OBSI is requiring EMDs to buy back the entire private market investment from the complainant plus opportunity loss/cost. This approach represents a remedy of convenience when OBSI cannot determine the amount. The PCMA perceives this as a convenient solution for OBSI rather than a fair assessment of the actual value of the investment and/or the loss incurred. This could also be unfair to EMDs if the actual value is not as negative as presumed.

Requiring an EMD to buy back the entire investment from the complainant may work for larger EMDs but could render a smaller EMD insolvent. While there may be an assumption that the EMD will receive the ultimate return on the investment once realized, there is a payout required to be made to the complainant in the interim; this means a reduction in current working capital which could be beyond the minimum amount required under NI 31-103 (for EMDs this is between $50,000 to $100,000 depending on the firm's registration categories).

For clarity, some registrants believe there is an innate OBSI bias towards declaring an entire exempt market investment unsuitable since the market value cannot be readily determined by OBSI. However, OBSI could determine a reduced investment amount may be suitable if it had a loss calculation methodology for private market investments. PCMA members have experienced OBSI asserting that not $1.00 of a private market investment is suitable for a particular investor. This is a faulty approach to suitability assessments and not in alignment with the minimum amounts allowed for retail investors under the Offering Memorandum exemption in NI 45-106.[6]

(f) Confusing Evidence as CSA States OBSI's Current Approach Addresses Any Power Imbalance

The PCMA further questions the alleged power imbalance when the Proposed Amendments state, among other things, that:

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[6] Section 2.9 of NI 45-106, in certain jurisdictions, allows non-eligible investors to invest up to $10,000 every 12 months without the advice of a registrant. A non-eligible investor is the opposite of an eligible investor as defined in Section 1.1 of NI 45-106, with financial criteria lower than an accredited investor such as net income of $75,000 alone or $125,000 with a spouse and net assets of $400,000 alone or with a spouse. https://www.bcsc.bc.ca/-/media/PWS/New-Resources/Securities-Law/Instruments-and-Policies/Policy-4/45106-NI-September-13-2023.pdf?dt=20230913152514

- "*The inquisitorial approach gives OBSI procedural flexibility to address the potential power imbalance between complainants and firms when determining the issues in dispute and gathering information*."

- "*As is currently the case under OBSI's processes, the investigation and recommendation stage would be concerned with resolving a dispute fairly and addressing power imbalances which may exist between the parties because of potentially limited resources or lack of sophistication on the part of the complainant, as compared to the firm*."

The PCMA notes that the CSA on the one hand cites a power imbalance based on the number of cases closed below OBSI's recommended amount as grounds for giving OBSI binding decision-making powers, while also stating that OBSI's current procedural flexibility adequately addresses such matters. The PCMA finds such statements contradictory and does not believe they support the CSA's evidence.

(g) Conclusion

The PCMA submits that the CSA has not made a case for an alleged power imbalance between complainants and registered firms based on the evidence set out in the Proposed Amendments and discussed above. The numbers suggest that for lower settlement amounts (less than $50,000), almost all cases settle at OBSI's recommended amount. Lower settlement amounts suggest complainants may have smaller investments and may have a power imbalance. Despite this imbalance, 96% are settled at OBSI's recommended amount which leads the PCMA to question why a change to binding arbitration is required.

The PCMA believes that accredited investors and permitted clients do not need the protections of an ombudservice due to their wealth and sophistication which forms the basis of these exemptions under applicable securities law. The number of settlements below OBSI's recommended amount is significantly higher for settlements above $50,000. A higher settlement amount indicates a larger investment which may indicate the investment was made by a person with more financial means and so not in need of increased protection.

Change to Definition of a Complaint

The CSA proposes to expand the definition of a complaint to encompass any "expression of dissatisfaction" that relates to a trading or advising activity, as set out below.

> In sections 13.16 and 13.16.1, "complaint" means an ***expression of dissatisfaction*** **by a client** that (a) relates to a trading or advising activity of a registered firm or a representative of the firm, and (b) is received by the firm within 6 years of the day when the client first knew or reasonably ought to have known of an act or omission that is a cause of or contributed to the ***expression of dissatisfaction***; [emphasis added]

(a) Lack of Evidence to Substantiate Change

The PCMA believes this proposed change is arbitrary and is not aware of any published findings in OBSI evaluations, reports or reviews by the CSA that would indicate a change to the definition of a complaint is necessary.

The PCMA requests clarity as to why the CSA is changing the meaning of the word “complaint” by deleting it and, in its place, adding the phrase “expression of dissatisfaction”.

(b) Proposed Definition Overly Broad

The PCMA believes expression of dissatisfaction is overly broad, lacks an objective standard and potentially captures matters that are, or should be, outside of the definition of a complaint. Not all expressions of dissatisfaction should rise up to the level of being a reportable complaint.

For example, the fact that an investment has decreased in value or that an investor may have lost money does not necessarily mean that a registrant has engaged in misconduct. Investments in most securities involve risks. There is no guarantee that investments will always be profitable, and there is no fund to compensate investors for losses they may have suffered as a result of a particular investment.

A complaint should be distinguished from a “client service or administrative concern” which would be treated in the ordinary course and not trigger a registrant’s complaint review process, as required under securities law.

It would be helpful for the CSA to provide examples of what would be included and excluded in 31-103CP to help registrants better understand regulatory expectations regarding what should be classified as a complaint. Otherwise, it risks flooding the system with trivial or vexatious claims that do not allege misconduct and may harm a registrant’s reputation and put undue burden on a firm’s resources in responding to such complaints. Treating any expression of dissatisfaction risks treating casual comments the same as serious grievances, which reduces incentives for investors to properly frame substantial issues as formal complaints deserving remediation.

The change in definition also fails to define the term “expression”. This could confuse investors who may believe words of disappointment or other informal feedback would be subject to a formal grievance process.

The lack of precision in a trigger event, of whether a client's communications rise to a reportable complaint is critical to understand since it can drive firm resources to an investigation that is inappropriate. This is magnified when there are no disincentives or costs attributed to a complainant for making a frivolous or meritless claim or merely an expression of dissatisfaction such as with a failed investment.

(c) Recommendations

If a change to the definition of complaint is to be made, then the PCMA recommends the proposed phrase “expression of dissatisfaction” be replaced with the word “grievance” for clarity.

The PCMA notes that FINRA uses grievance in its definition of a complaint[7] which the PCMA believes provides greater clarity. As applied, the term "grievance" within the definition would mean:

> *"a circumstance or condition that constitutes an injustice to the sufferer [complainant] and gives just ground for complaint"*[8]

The PCMA believes that the FINRA concept of a grievance would provide greater certainty to investors and registrants on what is a reportable complaint which provides all stakeholders with fair and balanced regulation.

31-103CP sets out the subject matter of complaints and proposed additional language by the CSA is set out below (emphasis added). The PCMA notes that this is helpful commentary for registrants.

> All complaints relating to one of the following matters should be responded to by the firm by providing an initial and substantive response, both in writing and within a reasonable time:
>
> - a trading or advising activity, ***including regarding client information, trading authority, and suitability***
> - a breach of client confidentiality
> - theft, fraud, misappropriation, or forgery
> - misrepresentation
> - an undisclosed or prohibited conflict of interest, or
> - personal financial dealings with a client
>
> Firms may determine that a complaint relating to matters other than the matters listed above is nevertheless of a sufficiently serious nature to be responded to in the manner described below. This determination should be made, in all cases, by considering if an investor, acting reasonably, would expect a written response to their complaint.

In addition to the foregoing, the PCMA submits that the CSA should also define what is not a complaint and is merely an expression of dissatisfaction that does not rise up to a formal grievance, such as:

- general lamentations on the state of the economy and capital markets;
- client service items such as the response time of a registrant to items that are not time sensitive; and
- the time and paperwork required to submit a redemption request to an issuer and time-frame for payment.

[7] https://www.finra.org/rules-guidance/rulebooks/finra-rules/4513
[8] https://www.merriam-webster.com/dictionary/grievance

Adding the above and other examples to 31-103CP of what is and what is not a "complaint" would be helpful.

OBSI Determines Whether a Matter is a Single Complaint or Multiple Complaints
It is assumed that OBSI will have the discretion to determine whether related grievances make up a single complaint or multiple complaints, which could have a significant financial impact on firms in the application of the award limit.

As discussed above, the Proposed Amendments broaden the definition of a complaint. It also does not provide the parties with clear guidance on when a matter is a single complaint or multiple complaints. For example, if a private market investor made three $350,000 investments on different dates, and raised concerns involving two investments and disappointment that they lost money in the third investment, then is this a single complaint, two complaints or three complaints? The answer would potentially impose a maximum liability limit of up to $350,000 if it was considered one complaint, up to $700,000 if it was considered two complaints and up to $1,050,000 if it was considered three complaints; assuming the entire investment is deemed unsuitable by OBSI as discussed above under "*CSA Data Does Not Support a Power Imbalance – CSA Assumes OBSI's Recommended Settlement Amounts Are Correct"*.

A $350,000 binding award limit per complaint could lead to substantial financial implications to firms. It is crucial for the CSA to refine the definition of a "complaint" to remove ambiguity and ensure fairness, particularly if binding economic outcomes are at stake for firms.

No Cost to Investors to Make a Complaint; Encouraging 'Free-Riding'
The concept of 'free-riding' refers to a situation where individuals take advantage of resources or services without bearing the proper share of the costs involved. Under the Proposed Amendments, investors can make complaints without any associated financial risk. This contrasts with the potential economic repercussions complaints have on firms, which could be subjected to significant financial and reputational damage.

The Proposed Amendments do not incorporate mechanisms to discourage or penalize complainants for making complaints that are frivolous, vexatious or without merit. Other legal systems often have checks and balances, such as 'loser pays' rules to prevent such actions.

The CSA's proposed framework lowers the threshold for what constitutes a complaint to the point where there do not appear to be any barriers. This may lead to an influx of complaints, regardless of their validity, as there is no financial deterrent for making them.

By not imposing any costs on investors for making complaints, the CSA may unintentionally encourage a situation where some investors could exploit the system, making claims without due cause, as they have nothing to lose. This may lead to an imbalance where firms are unduly burdened by having to address every complaint, significant or not, because the system allows investors to make complaints cost-free.

The CSA needs to consider the broader implications of a system that imposes asymmetric burdens on market participants. A well-balanced regulatory framework would seek to prevent the misuse of a dispute resolution process by implementing reasonable barriers to entry—such as fees or the potential for cost repercussions in the event of a groundless claim—to ensure the dispute resolution process is used judiciously and effectively.

Opening the Floodgates of Complaints

Imposing no cost on complainants for making a complaint, the Proposed Amendments may open a floodgate of complaints, with an uptick in complaints by individuals seeking restitution without regard to the underlying validity of their case. There is a risk to registrants that complaints may be inappropriately characterized as suitability issues, even when losses arise from legitimate business failures inherent to investment risks. This mischaracterization could burden the dispute resolution system with cases that are about investment risk, rather than registrant misconduct.

An increase in claims could overwhelm a registrant's and OBSI's resources, potentially leading to delays in resolution and a strain on the system's ability to effectively and efficiently adjudicate disputes. For example, in the private markets, in the face of a failed offering, there can be hundreds of complaints when millions of dollars have been raised and there are hundreds if not thousands of investors who are dissatisfied with the performance of the investment.[9] The CSA has not provided any commentary on how registrants, such as EMDs, and OBSI would handle a failed offering that resulted in multiple complaints. The PCMA is concerned that the system would become bogged down by a particular investment failure and other complaints would take significantly longer to be processed. The PCMA believes this scenario needs to be considered by the CSA.

In addition to the foregoing, the Proposed Amendments might foster a misconception among investors that all investment losses are recoverable through complaints, undermining the fundamental investment principle that returns are commensurate with risk and investments are not guaranteed. It is critical for the CSA to consider mechanisms that balance the accessibility of the complaint process with safeguards against its misuse. This could include introducing nominal filing fees, implementing initial screening procedures for merit, in addition to establishing clearer guidelines on what constitutes a complaint that can be brought to OBSI for resolution.

The CSA might also consider bolstering investor education about the nature of investment risks to prevent unwarranted complaints and ensure that investors have a clear understanding of when and how the dispute resolution process should be engaged. It is essential for the CSA to provide clarity on the nature of investment risk and the appropriate grounds for complaints to prevent the system from becoming a de facto insurance against poor investment outcomes. Investors should not expect that all losses due to market fluctuations or business failures do not warrant compensation. By doing so, the CSA can maintain the integrity of the dispute resolution process.

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[9] For example, the failed offerings of OmniArch Capital Corporation and SecureCare Capital Inc. involved hundreds of millions of dollars and thousands of investors.

OBSI Participation Fee for EMDs will Increase
The PCMA believes that the number of complaints will dramatically increase if the Proposed Amendments are enacted as proposed since investors will be encouraged to make a complaint since they have nothing to lose with the possibility of receiving a settlement. The CSA cannot view OBSI's past case volumes as indicative of future case volumes with the imposition of binding awards.

The PCMA is concerned that the CSA merely states that EMD fees will increase without providing any further details. The CSA has not published any cost/benefit analysis to review on a pro-forma basis or otherwise the impact of more complaint reviews on OBSI membership fees for participating firms. The PCMA is not aware of the CSA or the OSC undertaking any consideration or review of the cost implications to registrants, including EMDs, if OBSI's caseload and resulting costs dramatically increase which will impact fee charged by OBSI to registrants.

OBSI fees are determined by dividing a sector's budget allocation by the total number of representatives reported for the sector in the previous year. We are not aware of any cost containment or budgetary controls that will manage future OBSI fee increases. Moreover, if there are material fee increases, then it is not clear why such amounts are not paid or subsidized by each CSA member who seeks to grant OBSI decision-making powers.

The CSA states that the "*cost on firms may be mitigated by implementing more robust complaint handling processes within the firm itself that resolve complaints effectively and efficiently, as clients may only bring their complaint forward to OBSI where it remains unresolved after first being brought to the firm*." The PCMA has concerns with this statement since it does not consider that if a complainant is dissatisfied for any reason, they have nothing to lose to make a complaint with OBSI, and everything to gain, at no cost to them.

The PCMA believes OBSI fee increases are serious financial matters which have not been adequately addressed in the Proposed Amendments and which must be considered in a more detailed manner.

EMD Complaint Review Costs
The OSC states that the initial and ongoing implementation costs of the Proposed Amendments will be approximately $1,080. See Table 4 below from the Proposed Amendments.

Table 4: Estimated initial per entity compliance costs

Activity	Staff category	Hourly rate[42]	Total hours per activity	Total cost per activity
1. Learning about the regulation	Compliance Analyst	$60	2	$120
	Senior Compliance Analyst	$77	2	$150
	Chief Compliance Officer	$133	1	$130
2. Updating policies, procedures and client facing documents	Compliance Analyst	$60	3	$180
	Senior Compliance Analyst	$77	3	$230
	Chief Compliance Officer	$133	2	$270
			Total cost per firm	$1,080

The PCMA does not believe the above calculations are reflective of the true total costs to registrants.

The PCMA is not aware of the OSC investigating nor publishing the existing costs (*i.e.,* the time, money and effort, both internal and external, including potential legal fees for more 'serious' complaints) that are incurred by firms, such as EMD, to investigate a complaint and issue a findings letter, let alone the additional costs, if a complaint is made to OBSI. Without such costs as a baseline, it is difficult to determine what additional costs will be incurred if the Proposed Amendments is adopted. In addition, the OSC has failed to include any legal costs when the Proposed Amendments involves material changes that will require a wholesale review of a registrant's complaint review procedures.

With the imposition of binding decisions, of up to $350,000 per complaint with no right of appeal, the financial aspect alone will cause registrants, such as EMDs, to allocate additional resources to complaints. This does not appear to have been considered or quantified by either the CSA or OSC.

The PCMA believes that firms will have to spend more resources on lawyers and compliance consultants to address a complaint due to the possible binding financial implications. As discussed further below, complaints under the Proposed Amendments may be uninsurable under errors and omissions insurance policy (**E&O Insurance**) in place by a firm or dealing representative.

These are serious financial matters which have not been addressed in the Proposed Amendments and which must be considered in addition to the resources and imposition of binding awards could have on registrants.

Concerns With the "Essential Process Test"
In granting OBSI the power to make binding decision-making of up to $350,000, the CSA does not propose to give dealers and advisors any additional procedural rights. Instead, the CSA seeks to maintain the status quo and allow OBSI to determine what rights it believes are essential to the dispute resolution process involving a particular complaint. The CSA calls this the "essential process test". For ease of reference, the essential process test in the Proposed Amendments is set out below.

> "*[OBSI] would achieve a proportionate process by following a procedural threshold test under which [OBSI] would engage only in processes essential to achieving as efficient, quick, and understandable a process as possible in resolving disputes in a fair manner (the essential process test)… During the review and decisions stage, the essential process test would enable [OBSI] to use processes ranging from inquisitorial to adversarial, if they are essential to achieving a proportionate process for both parties to resolve a dispute fairly. [OBSI] would decide which procedural tools to apply in each review. In all scenarios, the [OBSI] would apply processes that achieve procedural fairness for both the firm and complainant and that do not create disproportionate burden on the parties. The use of procedural tools that are more commonly found in the adversarial system during the review and decision stage is anticipated to be infrequent and would be limited to circumstances that meet the essential processes test*."

The PCMA has various concerns with the essential process test for the reasons discussed below.

(a) CSA Created Test

The essential process test represents an innovative approach to dispute resolution within the financial services sector. However, this approach raises concerns due to its apparent lack of precedent in Canadian administrative law, suggesting that it is not a well-established legal principle that has been tested and honed through application and judicial scrutiny.

The CSA has not provided evidence or comparative analysis to affirm the validity of this test within the context of legal or regulatory frameworks, nor has it demonstrated that a similar test has been effectively employed in other jurisdictions with comparable legal or regulatory systems. This absence of supporting information is problematic because it does not allow stakeholders to evaluate the test's effectiveness or fairness based on historical application or empirical data.

Legal tests typically gain acceptance and legitimacy through a process of development that includes academic debate, practical application, and often judicial review, which helps to refine the principles and ensure that they are applied consistently and fairly. By contrast, the essential process test appears to be an *ad hoc* creation without the benefit of this rigorous process. The lack of a clear definition or articulated standard for what constitutes an "essential process" leaves room for interpretation and potentially introduces a level of uncertainty and arbitrariness into the dispute resolution process.

In addition, the CSA has not provided concrete examples or detailed guidance on the implementation of this test which adds to the ambiguity, making it challenging for advisors, dealers, and other stakeholders to anticipate how the test would be applied in practice. This is particularly concerning because decisions made under this test could involve substantial sums of up to $350,000, and the outcomes could have significant financial and reputational impacts on dealers and advisors involved.

Given the potential consequences of the application of the essential process test, the PCMA requests that the CSA provide more guidance on its purpose and intended operation. There should be a thorough and transparent discussion about the test, including a clear rationale for its introduction, an explanation of its objectives, and a demonstration of how it aligns with the principles of fairness and natural justice that are fundamental to Canadian law. Without such information, stakeholders are left with an undefined process that may not meet the rigorous standards typically expected in the Canadian legal and regulatory landscape. The PCMA believes it is problematic to allow OBSI to continue with its undefined complaint review process when regimes that impose binding decisions for much smaller amounts have detailed procedures that are fair to all parties (*e.g.,* small claims court has small claims court procedures, which in Ontario a limit of $35,000).

(b) Discretion

The use of discretion with the essential processes test poses concerns involving impartiality and predictability of OBSI's decision-making authority. When an organization such as OBSI is given the ability to interpret and apply a test without clear, predetermined criteria, there is a risk that decisions may be made arbitrarily and inconsistently. This concern is magnified since OBSI decisions can have material financial impacts, up to $350,000 per complaint, on the dealers or advisors involved.

Without transparent guidelines, firms cannot adequately prepare and represent themselves. This unpredictability can undermine confidence in the dispute resolution process. Transparency allows all parties to understand the rules and how they are applied. It enables stakeholders to navigate the system with an informed awareness of their rights and obligations.

The lack of clear criteria can also raise questions about accountability. If OBSI's decisions are not based on a clear set of standards, it can become challenging to scrutinize these decisions or hold OBSI accountable for any perceived inconsistencies or biases. This is a fundamental concept in administrative law, where decisions must not only be fair to all parties but must also be seen to be fair.

Furthermore, when discretion is not bounded by objective criteria, there is a risk that similar cases will not be treated similarly, which is not in alignment with the principle of equality before the law. This inconsistency can lead to a perception that decisions are influenced by factors other than the merits of the case, which can erode trust in the integrity of the dispute resolution system.

Therefore, the PCMA believes it is crucial for the CSA to consider implementing a framework that defines the boundaries of discretion and ensures that any exercise of this discretion is based on consistent, objective, and transparent criteria. Such a framework should ideally be subject to oversight and review to maintain the integrity of the process and to ensure that decisions are made fairly and with due regard to the rights of all parties involved. This would not only protect the interests of the dealers and advisors but would also serve the public interest by promoting a fair, efficient, and transparent dispute resolution system.

(c) Risk of Bias and Error

The essential process test in dispute resolution also creates the potential risk of bias and interpretational error. This risk is amplified in the absence of clearly defined rules and oversight mechanisms.

Bias, whether conscious or unconscious, can manifest in decision-making, particularly when a single entity is vested with broad discretion. The subjectivity involved in determining what is "essential" can lead to inconsistencies, where similar disputes may receive different treatment not because of the merits, but because of varying interpretations of what processes are deemed necessary. This necessitates the need for a framework of robust rules.

OBSI's decision-making process is also susceptible to errors in judgment. These errors may not be the result of any intentional bias, but can occur simply because of the complex nature of a complaint and the nuances involved in interpreting securities law, especially by non-lawyer decision-makers. When errors occur in the absence of a clear set of rules, they become harder to identify, address, and rectify.

The PCMA's concerns involve the concept of fairness, which is a fundamental principle of administrative justice. Fairness is not just about the end result but also about the procedures used to reach that result. When procedures are determined on a case-by-case basis without clear guidelines, the fairness of the process can be called into question. Stakeholders may perceive that the process is not even-handed or that their case was not given the same consideration as others. This is concerning to EMDs and their dealing representatives since firms have no right of appeal as currently contemplated in the Proposed Amendments.

Oversight is a critical component of mitigating bias and errors. It helps to ensure that decisions are made with consistency and are also subject to review and correction, if necessary. Oversight mechanisms, such as the ability to appeal decisions help to provide checks and balances that are essential for maintaining fairness and accuracy in administrative processes. However, the Proposed Amendments do not provide registrants with a right of appeal, only limited judicial review, which is discussed below.

(d) Need for Procedural Certainty

Procedural certainty is an important component of a trustworthy and effective dispute resolution system.

The Proposed Amendments introduce a level of uncertainty that is detrimental to the confidence that dealers and advisors need to have in any mandatory dispute resolution system. Such uncertainty can hinder their ability to prepare for and respond to complaints effectively.

While the CSA contemplates incorporating the essential process test into legislative amendments and harmonized orders within local jurisdictions, the lack of detailed articulation in the Proposed Amendments about these essential processes is concerning. The CSA's decision to defer the specification of these processes to the discretion of individual CSA members and provincial/territorial governments further exacerbates this uncertainty and creates the increased risk of jurisdictional disharmony. This approach does not afford industry participants the opportunity to fully understand, prepare for, or comment on the proposed processes that will significantly impact their business. Stakeholder engagement is a critical aspect of the regulatory process, providing valuable insights and helping to ensure that the regulations are fair, understandable and proportional, and consider the perspectives of those who will be affected by them.

The PCMA believes it is incumbent upon the CSA to provide a comprehensive description of the procedural rights and processes that will apply. This transparency is particularly crucial given the proposed binding nature of OBSI's decisions, which may have substantial financial implications for registrants.

(e) Ambiguity in Proportionality

The principle of proportionality is intended to ensure that the means employed to resolve a dispute are appropriate to the scale and complexity of a complaint. However, without concrete criteria to define proportionality, there is ambiguity. This ambiguity can lead to disputes about the very process used to resolve the complaint.

The term "proportional" is inherently subjective without a frame of reference or a set of parameters to provide meaning and context. This subjectivity can lead to inconsistency, with different decision-makers arriving at different conclusions about what is proportional in similar cases.

In practical terms, proportionality should balance the need for a thorough investigation against the burden of the investigatory process on the parties. The processes should not be so onerous as to be punitive or so lax as to be ineffective. They must be sufficient to uncover the facts and allow for a fair judgment without causing unnecessary delay or expense.

To mitigate the ambiguity surrounding proportionality, the CSA and OBSI should establish detailed guidelines outlining what may be considered proportional in various contexts and publish the guidelines so that all interested parties can be informed. These guidelines could include factors such as the complexity of the case, the amount of money at stake, the potential impact on the parties, and the precedence of similar cases. Additionally, there should be a mechanism in place, such as a procedural appeals process, through which decisions about proportionality (and other elements of the essential process test) can be reviewed and, if necessary, adjusted while a complaint is being reviewed. This would help ensure that all parties have a clear understanding of the rules and can trust that the processes will be applied fairly and consistently.

Establishing these guidelines and mechanisms would not only clarify what is meant by a "proportional" process but would also provide a benchmark against which OBSI's decisions can be measured and reviewed. It would help prevent disputes about the process itself and ensure that all parties can focus on resolving the substantive issues at the heart of the complaint.

(f) Assumption of Correctness

There also appears to be an assumption that OBSI will determine the essential processes accurately without a set of predefined rules. There is an inherent human and institutional propensity for error and bias, which can significantly affect decision-making processes.

In any dispute resolution system, it is critical that the processes used to determine outcomes are grounded in a well-defined set of rules and procedures that are universally understood and applied. This standardization helps to eliminate ambiguity and ensures that all parties have a clear understanding of what to expect from the process.

Without such a framework, there is a risk that OBSI's discretion in identifying essential processes could lead to inconsistent or biased interpretations, which would ultimately affect the fairness and equity of the resolutions provided. As stated above, bias can stem from various sources, including but not limited to, individual perspectives, past experiences, or institutional culture. Moreover, interpretive errors can occur due to misapprehensions of law or regulations, misunderstandings of the facts, or the complex nature of the complaint at hand. It is for this reason that a mechanism of checks and balances, including oversight by an external body and a clear set of procedural guidelines, is important. These safeguards would serve to provide accountability, allowing for decisions to be challenged and reviewed, thereby helping to ensure that fairness is achieved.

To foster trust by all stakeholders and to uphold principles of justice, there must be an acknowledgment of the possibility of error and bias within the assumption of OBSI’s correct application of the essential process test, along with procedural checks and balances, to mitigate these risks.

(g) Equating Speed with Fairness

The CSA's statement that OBSI will engage only in processes deemed essential to resolving disputes efficiently and quickly raises concerns about the underlying assumption that speed equates to fairness. While an efficient and understandable process is desirable, it should not come at the expense of a thorough and equitable resolution. In complex financial disputes, particularly within the private markets, the complexities of various transactions often require a careful examination of extensive information, including due diligence on products, client (know-your-client) information, and suitability assessments.

The volume and complexity of information in such disputes cannot be understated, and the pressure to resolve cases swiftly could lead to oversights. Securities law and financial practices are complex and nuanced fields where the details matter. A decision-making process overly focused on efficiency could potentially overlook the subtleties and depth required for a fair assessment of each case, particularly for cases involving the private capital markets.

The pursuit of expedience must not overshadow the importance of reaching a resolution that is grounded in the facts and the law and regulations. The right decision should be one that is fair and based on a thorough evaluation of all relevant information. The potential for OBSI to prioritize the rapid closure of cases to appear efficient could compromise the quality and fairness of the outcomes. The PCMA is not aware of statistical information in the Proposed Amendments about investor concerns over the length of the process, and there appears to be few abandoned or withdrawn cases.

Additionally, without an appeal mechanism, there would be no opportunity for firms to challenge decisions that they believe have been made in haste or without adequate consideration of all the relevant facts. This could leave firms without recourse and undermine the perceived integrity of the dispute resolution process. It is essential for the CSA to consider these concerns and ensure that the dispute resolution procedures adopted by OBSI strike the right balance between efficiency and justice. This could include implementing safeguards against rushed judgments and providing a means for the review of decisions to confirm their fairness and adherence to relevant laws and practices.

(h) Proposed Change is Not Fair and Balanced Regulation

The PCMA supports fair and balanced regulation and believes that it is in the public interest for the CSA to find the right balance between investor protection and fair and efficient capital markets. The PCMA does not believe the right balance has been struck between these objectives**.** The PCMA's criticism of the "essential process test" focuses on the lack of transparent and articulated processes or determinations of what are "essential" and/or "proportional" processes as applied to different types of complaints which also vary depending on the amount claimed.

The concentration of procedural discretion within OBSI, without the establishment of transparent, predefined rules or an external appeal mechanism, creates a scenario where the processes and outcomes may not be perceived as fair or balanced. When significant dollar amounts are at stake, discretion, bias, ambiguity, lack of an appeal mechanism and other factors become significant to outcomes/decisions which collectively may jeopardize the perceived fairness and reliability of the dispute resolution process. For the financial services industry to maintain confidence in the regulatory framework, it is important that the rules governing OBSI's procedures be explicitly articulated and readily accessible.

Furthermore, the PCMA believes it is important that OBSI's determinations are anchored in the established tenets of securities law, regulatory policies, and accepted industry practices. The absence of such grounding may lead to decisions that, while expedient, do not necessarily reflect the complex realities of securities transactions.

The PCMA believes that firms should have a right to have clear written procedures and a procedural appeal option if they believe that their rights are not fully addressed to allow them to present their case.

No Consideration of Alternatives to OBSI

If the Proposed Amendments are implemented, the CSA anticipates that OBSI would be the independent dispute resolution service considered for designation or recognition by securities regulatory authorities. For any publication of proposed rules, section 143.2(2)(5) of the Ontario *Securities Act* requires "*a discussion of all alternatives to the proposed rule that were considered by the Commission and the reasons for not proposing the adoption of the alternatives considered*".

The PCMA does not believe that the OSC has considered whether other entities or frameworks would be better suited than OBSI in providing binding dispute resolution services. The OSC only considered the alleged negative consequences of maintaining the status quo with OBSI, as set out in Annex C of the Proposed Amendments, and no other alternatives.

The PCMA notes that the CSA has identified three jurisdictions to support what appears to be a foregone conclusion that OBSI should be the identified ombudservice and be granted decision-making authority. There is no comparison of each ombudservice using various criteria by which one would compare and contrast their respective features. For example, the Investment Industry Association of Canada provided a detailed report where it provided a lengthy list of ombudservices in Canada and other jurisdictions that have non-binding authority, in both financial and non-financial sectors.[10] The PCMA is not aware of such a review or comparison undertaken or mentioned by the CSA or OSC.

In addition, it does not appear that the OSC considered and discussed the following alternatives:

- IIROC[11] published a review of its Arbitration Program in 2022 titled "*IIROC Arbitration Program Working Group Recommendations*"[12] (the "**IIROC Report**"). There was no mention, discussion or consideration given to the IIROC Arbitration Program as a viable option relative to OBSI;

[10] https://iiac-accvm.ca/iiac-research-of-ombudsperson-non-binding-authority/

[11] "**IIROC**" means the Investment Industry Regulatory Organization of Canada which merged with the Mutual Fund Dealers Association of Canada into what is now called "**CIRO**" or the Canadian Investment Regulatory Organization.

[12] See https://www.iiroc.ca/media/20626/download?inline

- the médiation and conciliation services offered by the Autorité des Marchés Financiers (“**AMF**”). A description of such services is provided in the IIROC Report, however, no data or discussion was provided by the OSC of this alternative. The PCMA also notes that the AMF has elected not to change its current dispute resolution services.; and
- the mediation and arbitration services offered by the Financial Industry Regulatory Authority (“**FINRA**”) to investors. A description of such services is provided in the IIROC Report, however, no data or discussion was provided by the OSC on this alternative.

The PCMA urges the OSC to fulfill its statutory mandate by conducting a comprehensive review of all available dispute resolution mechanisms, including those highlighted in the IIROC Report. Given the significant implications of giving OBSI binding decision-making powers, it is imperative for the OSC to reassess alternatives such as the AMF's mediation services and FINRA's arbitration and mediation offerings. The PCMA believes these are more relevant than those of the United Kingdom or Australia. A detailed analysis and comparison are necessary to ensure a fair, balanced, and effective dispute resolution framework. The OSC should update its <u>Annex E</u> in an amended and restated Proposed Amendments and seek further comments from stakeholders to ensure an inclusive, transparent regulatory process that upholds the principles of fair and efficient capital markets.

EMDs Cannot Force Dealing Representatives to Cooperate

EMDs are required to be participating members of a dispute resolution system, such as OBSI, and not dealing representatives. There are challenges with an EMD receiving the full cooperation of a dealing representative who has left a firm or joined a competing firm to assist the EMD against whom a complaint has been made. This means that an EMD may not be able to fully defend itself in the face of unchallenged accusations made by a complainant involving alleged statements or actions taken by a former dealing representative. The CSA has not addressed such accountability matters which it must now consider if it grants binding decision-making to OBSI as contemplated under the Proposed Amendments.

Issue Involving Multiple/Concurrent Proceedings

The PCMA requests that the CSA provide explicit guidance regarding the interplay between a complaint review by OBSI and simultaneous reviews conducted by CSA members or judicial bodies. The PCMA believes that the lack of clarity on how concurrent proceedings should be navigated may result in an unnecessary burden on firms. Such simultaneous processes, with their distinct and often divergent procedural protocols, can impose significant operational and legal challenges for firms.

The issue is compounded since OBSI operates lacks published procedural guidelines which may lead to inconsistencies and uncertainties when compared to the well-established procedural rights available in civil litigation or reviews conducted by CSA members. These discrepancies can create an uneven playing field, placing registrants at a disadvantage and potentially compromising their ability to effectively manage and respond to multiple reviews.

To rectify this, the PCMA suggests that the CSA take definitive steps to harmonize the review process. This could involve establishing a hierarchy of proceedings or creating a framework that allows for the deferment of one process in favor of another.

Settlements Cannot Be Used to Fund Litigation; Res Judicata Concerns
The PCMA submits that the Proposed Amendments should be amended to clarify that complainants cannot undertake further legal proceedings for amounts over the maximum award where the cause of action is the same.

The PCMA is concerned that complainants could use an OBSI award as a means of establishing their case and utilize the proceeds of that award to fund the court proceedings for an additional settlement. The PCMA submits that such a situation would be *res judicata*[13] but believe such matters require clarification.

The PCMA refers the CSA to the case *Clark v In Focus Asset Management & Tax Solutions Limited* [2014] EWCA Civ 118.[14] This is a Court of Appeal decision of the United Kingdom that discussed this very matter. The Court of Appeal found that a final decision operated as an absolute bar to further proceedings on the same facts if the complainant had accepted the award. It further held that it was always open to the complainant to commence proceedings in the courts in the first instance, particularly if their claim exceeded the maximum amount permitted to be awarded by the Ombudsman, or alternatively to reject the award offered and issue proceedings.

The PCMA requests that the CSA address such matters in enabling legislation or otherwise, if the Proposed Amendments are enacted.

IMPACT OF PROPOSED AMENDMENTS ON E&O INSURANCE

Insurance Broker Response Letter

In Annex E of the Proposed Amendments, the OSC has failed to consider how the proposed framework could influence E&O insurance for registrants, including EMDs. It does not appear that the OSC assessed or provided any insight into how E&O Insurance premiums and/or coverage could change as a result of the Proposed Amendments. Discussions by the OSC on "fidelity" coverage and "forgery or alteration clauses" fail to address the direct impact of E&O Insurance, which is more pertinent to the liability exposure firms would face under the Proposed Amendments.

The PCMA has had discussions with an insurance broker and various underwriters which suggest that the Proposed Amendments could result in a situation where EMDs may not receive any coverage under E&O Insurance, thus exposing them to potentially significant uninsured losses. Such awards could drive EMDs and other registrants out of business.

The OSC's analysis did not account for the 'deep pockets' necessary to satisfy potential binding OBSI settlements, a significant cost of the Proposed Amendments. Such a review should consider the insurance market's capacity to absorb new risks introduced by the Proposed Amendments, potential changes in premiums, and the extent of coverage offered, if any. Failing to do so not only leaves EMDs

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[13] A matter that has been adjudicated by a competent court and may not be pursued further by the same parties.
[14] See law firm case commentary at: https://www.hfw.com/Financial-Ombudsman-Service-February-2014

exposed to financial risks that could threaten their operational viability but also undermines the confidence in the ability of a dispute resolution process to protect the interests of both firms and investors.

The PCMA refers the CSA to a letter from an insurance broker who considered the insurability of OBSI complaints and potential settlements adverse to dealers, which is attached at Schedule "A".

The PCMA welcomes the opportunity to create a working group to discuss the availability of E&O insurance in connection with the Proposed Amendments. Suggested participants would include the PCMA, other industry associations, the PCMA's insurance broker, various E&O insurance underwriters and members of the CSA and OBSI staff. The PCMA believes the working group will assist all stakeholders in fully understanding the challenges faced by underwriters in underwriting the proposed framework, with a discussion about possible solutions.

<u>SPECIFIC COMMENTS TO CSA QUESTIONS</u>

Below are the PCMA's specific responses to questions posed by the CSA in the Proposed Amendment.

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?***

<u>PCMA Response</u>

If jurisdictions designate or recognize OBSI as the identified ombudservice at different times, then this would result in a patchwork of regulation involving dispute resolution services in Canada. This should be discouraged.

In jurisdictions where decisions are binding, registrants will likely prioritize resources to those complaints, since this reflects the commercial realities of the situation; there is greater risk of loss for binding versus non-binding decisions for firms in the face of an adverse decision by OBSI.

This situation could also lead to potential confusion among investors regarding their rights and the dispute resolution process depending on their location. This would also require additional changes to each registrant's Relationship Disclosure Information form, website and other disclosures, that discuss the dispute resolution process. This was not examined by the OSC in Annex E of the Proposed Amendments in connection with its review of the costs/benefits of the proposed framework.

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.***

PCMA Response
If the OBSI is granted binding authority in the dispute resolution process, the final decision should be binding on both parties and not just a firm.

Notwithstanding the foregoing, under the Investigation and Recommendation Stage**,** parties should have sufficient time to determine whether they seek to object to a final recommendation. There are material financial consequences to firms who are facing an adverse decision, and they need sufficient time to consult with third parties and others to determine if they wish to object. The PCMA believes 90 days from the date of receipt of the final recommendation (the **Objection Period**) is sufficient time for the parties to object.

If there is no objection, then the final recommendation should become a final decision 90 days after the Objection Period for a total of 180 days. If a firm has to pay a settlement to a complainant, then this time allows a firm to gather the necessary resources to make such a payment. As stated above, it is unlikely these complaints will be insurable under a registrant's E&O policy. See the section titled "*Impact of Proposed Amendments On E&O Insurance*".

The PCMA believes that if a firm has insufficient resources to pay a settlement, then a firm should be allowed to negotiate with OBSI reasonable terms and conditions for the payment in such circumstances. The PCMA believes this is in the best interest of all parties rather than an EMD or other registrant surrendering its registration in such circumstances, due to its inability to pay a settlement.

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.***

PCMA Response

If OBSI is granted binding decision-making authority, the parties should have a 90-day post-decision period. The parties need sufficient time to consult with legal counsel and other professionals to determine whether they should seek a judicial review of a final decision. If an application for judicial review is made, then the final decision by OBSI should only be enforceable upon the conclusion of the judicial review process.

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?***

PCMA Response

The PCMA believes the approach is unfair and one-sided in favour of complainants for the reasons set out below.

As currently stated, the Proposed Amendments contemplate four possible outcomes to a final recommendation made by OBSI at the Investigation and Recommendation Stage as follows:

1. *No Objection by Either Party* - If no party objects to the final recommendation at the Investigation and Recommendation Stage, then the decision is final and binding.

2. *Both Parties Object* - If both parties object to the final recommendation at the Investigation and Recommendation Stage, then it would trigger the Review and Decision Stage and that the decision will be final and binding.

3. *Complainant Only Objects* - If only the complainant objects to the final recommendation at the Investigation and Recommendation Stage, then it would trigger the Review and Decision Stage and that decision will be final and binding.

4. *Firm Only Objects* - If only the firm objects to the final recommendation at the Investigation and Recommendation Stage, then it would trigger the Review and Decision Stage and that decision will be final and binding, unless the complainant withdraws from the dispute resolution process, as prescribed, and instead pursues a civil proceeding against the firm.

The PCMA notes the unfairness of the Proposed Amendments since a complainant is not bound by a final decision if a firm (and not the complainant) only objects to a final recommendation made by OBSI. The PCMA believes this approach is unfair to firms for the following reasons:

(a) Lack of Mutual Binding Outcome

The Proposed Amendments create a system where, if a firm objects to OBSI's final recommendation, the complainant can still opt out and pursue civil proceedings. This asymmetry means that the firm is bound by the decision if the complainant accepts it but not vice versa, creating a one-sided environment.

(b) Resource Expenditure without Reciprocity

Firms are required to invest considerable resources in the dispute resolution process without the guarantee that the complainant will be bound by the process's outcome. This potentially leaves the firm at a financial and strategic disadvantage, as they may end up defending the same case again in civil court.

(c) Contrasts with International Standards
The CSA notes that in Ireland, both a firm and a complainant are bound by the ombudservice's final decision, which can be appealed to the High Court. The CSA states that this is not the case for ombudservices in the United Kingdom and Australia. The CSA's departure from the approach in Ireland in favour of the United Kingdom and Australia, without a detailed analysis, raises questions about the fairness and consistency of the proposed framework among these jurisdictions and other jurisdictions. Furthermore, the PCMA advocates for a solution tailored to Canada's unique regulatory and legal environment, acknowledging while it is beneficial to consider the dispute resolution mechanisms of other jurisdictions, there is a noticeable gap in the CSA's research. Specifically, there is an absence of comparative analysis with the FINRA in the United States or commentary on the dispute resolution processes of the Canadian Investment Regulatory Organization (CIRO).

(d) Investor Protection and Market Confidence
The PCMA has concerns with the CSA's statement that its proposed framework would "*enhance the accessibility and efficiency of dispute resolution through the identified ombudservice, provide fairness for both firms and complainants and enhance investor protection and confidence in the investment services sector*". The PCMA argues that this statement is misleading as the proposed framework does not provide mutual fairness, particularly when a complainant can avoid being bound by the final decision if a firm raises objections. This perceived imbalance could lead to diminished confidence among firms in the dispute resolution process, prompting them to adopt a more defensive and confrontational stance in the dispute resolution process, contrary to the CSA's stated intentions.

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

PCMA Response
The PCMA does not agree with OBSI having binding decision-making powers of up to $350,000. This represents a significant amount money for EMDs whose regulatory capital requirements, if solely registered as an EMD, are $50,000. The PCMA suggests a more rigorous examination of the justifications for the binding settlement limit is necessary.

Based on OBSI's data, as set out in the Table 3 below, the vast majority (70%)[15] of final decisions are under $10,000. The PCMA does not believe the CSA has not made the case that the current $350,000 limit should be maintained for binding decisions. As discussed under the Section "*CSA Data Does Not Support a Power Imbalance - Lower Case Settlement Amounts are Not Evidence of a Power Imbalance*", 92% of all the cases settled at the recommended compensation amounts.

[15] 384 cases out of 546 = 70%

Table 3: 2018 – 2022 Investment Cases Settled Below OBSI's Recommended Amount[20]

OBSI Recommended Amount	% of Cases Settled below OBSI's recommended amount	# of Cases Closed with monetary compensation recommendations
$1 to $9,999	1%	384
$10,000 to $49,999	13%	113
$50,000 to $99,999	46%	26
$100,000 to $199,999	43%	14
$200,000 to $350,000	67%	9

Any decision to set a binding settlement limit should be informed by empirical data and a clear understanding of the financial realities observed in current dispute resolutions. The PCMA does not believe the data on the current settlements suggests a need to grant OBSI binding decision-making powers. The PCMA does not object to OBSI having a settlement limit of $350,000 if it doesn't have binding decision-making powers.

If binding decision-making is granted to OBSI, the PCMA believes OBSI's settlement limit should be reduced to a maximum of $10,000 representing the vast majority of complaints which closed based on monetary compensation recommended by OBSI as set out in the table above. The PCMA has no concerns with OBSI maintaining its current limit of $350,000 for non-binding recommendations.

The PCMA notes that parties have more procedural protections for amounts much less than $350,000 under other dispute resolution processes. For example, the maximum civil claim limit for those matters under small claims court in all jurisdictions in Canada (e.g., $35,000 in Ontario and British Columbia and $100,000 in Alberta). In addition, there are detailed procedural rights afforded to parties involved in the simplified procedures process available for certain civil cases in the Ontario Superior Court of Justice for money or property valued up to $200,000. These are examples of where parties have more rights for disputes involving lesser amounts of money than those being proposed to be adjudicated by OBSI. With binding decision-making powers, the amount should reflect the procedural rights of the parties, which it does not appear that the CSA has not considered when seeking to give OBSI binding decision-making powers.

In addition, the CSA states that the current award limit of $350,000 could be subject to future increases. This is a concern on the lack of clarity on the conditions or criteria that would trigger such an increase. The Proposed Amendments do not establish clear benchmarks or indicators that would justify an escalation of the award limit or who would make such a decision.

The PCMA recommends that the CSA provide a framework that outlines specific economic, market, or regulatory conditions that would necessitate a review of the settlement limit. Such a framework would provide a structured and transparent approach and outline a process for periodic review, ensuring that any adjustments are made with consideration of the broader market environment and the health of the financial sector.

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?***

PCMA Response

The Proposed Amendments state that parties will not have any right to appeal final decisions made by OBSI. This is concerning given that OBSI operates independently of securities regulatory authorities and may have differing interpretations and applications of securities law compared to CSA members.

The internal review by one or more senior decision-makers within OBSI does not suffice as a check on the decision of the initial decision-maker because it remains within the same organization. This internal review creates the potential for conflicts of interest or confirmation bias, which could lead to a perpetuation of the initial error or bias.

The concentration of power within OBSI, without the possibility of appeal to an external body, could also lead to an erosion of trust in the impartiality and fairness of the dispute resolution process. The situation is further compounded since the CSA does not require OBSI to follow the procedural requirements that typically apply to tribunals under arbitration acts or other relevant legislation. Such requirements generally exist to ensure that tribunals operate within a framework that promotes fairness and accountability.

The lack of appeal rights effectively seals OBSI's decisions as final, removing the opportunity for parties to seek redress or correction of what they may perceive as errors or misapplications of securities law or lack of procedural protections under OBSI’s essential process test.

In most legal systems, the right to appeal serves as a critical safety net, ensuring that decisions can be reviewed and potentially overturned if found to be incorrect or unjust. The potential divergences between OBSI's interpretations of cases and those of CSA members could result in decisions that may not align with established securities law and precedent. This would become a serious concern if OBSI is given binding decision-making powers.

The PCMA recognizes that the Proposed Amendments provide the opportunity for judicial review. However, the PCMA submits that judicial review is insufficient to address the potential disparities between OBSI's application of securities law and that of the various CSA members.

Judicial review typically focuses on the legality of the decision-making process rather than the merits of the decision itself, which may not address substantive errors or misinterpretations of securities law by OBSI. As stated, the distinct operational mandate of OBSI compared to securities regulators can lead to divergent interpretations of securities law, and the limited scope of judicial review may not rectify such fundamental differences. The right to appeal is a cornerstone of fair adjudicative processes, ensuring that decisions can be scrutinized and corrected if necessary, upholding the principles of justice and due process. This becomes more important when parties have no written procedural rights and are subject to OBSI’s discretionary essential process test.

The complexities and nuances of securities law, coupled with the financial and reputational stakes involved in OBSI's rulings, underscore the need for a more robust appeal process. Such a process would allow for a deeper evaluation of the decisions, ensuring they align with both the letter and spirit of securities law and precedents established by the CSA. Without the safeguard of a proper appellate review, there remains a significant gap in the procedural defenses available to parties dissatisfied with OBSI's decisions, potentially leaving them without an adequate remedy.

The PCMA recommends that the CSA establish a clear appeals process that allows firms to challenge OBSI decisions before an independent body. The PCMA believes appeals should be heard by the tribunal of the applicable CSA member, similar to how decisions by CIRO can be appealed to a CSA member. This would help to ensure that OBSI's decision-making is both fair and perceived as fair by all parties and follows applicable securities law in rule and principle.

Implementing such checks and balances would provide greater assurance to market participants that their rights are protected and that the dispute resolution process is capable of correcting its own errors. The PCMA believes this, in turn, would contribute to the overall integrity and credibility of the dispute resolution system.

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.***

PCMA Response

The PCMA believes that there should be a statutory right of appeal to the courts or the tribunal of the applicable CSA member in all instances from a final decision of OBSI since the CSA seeks to give OBSI binding decision-making powers. Please see our PCMA Response in #5 above regarding the need for a right of appeal for all parties.

If the CSA is contemplating an appeal right over certain amounts, then the PCMA believes a party should have a right to appeal any final decision of OBSI for amounts over $10,000. According to OBSI's data, there are relatively few cases involving amounts over $50,000 (49 out of 546 or 9%), where almost half the cases settled below OBSI's recommended amount (24 out of 49 or 49%), based on the information in Table 3 above. The majority of the cases are for amounts below $10,000 (384 out of 546 or 70%) and 99% of these cases settle at OBSI's recommended amount.

Accordingly, the PCMA believes $10,000 would be a fair amount for a right of appeal, in addition to that of judicial review, if sought by either or one of the parties.

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.***

PCMA Response

(a) Need for Additional Data

The PCMA believes the CSA needs to require OBSI to collect additional data before granted binding decision-making powers. The current demographics data on OBSI's website is helpful, but additional data points are required, especially if binding decision-making powers are granted to OBSI. Information be collected and made publicly available include, but are not limited to, the following:

- *prospectus exemptions relied upon by the complainant*
- *type of investor*
    - permitted client
    - accredited investor
    - eligible investor
    - other
    - natural person
    - non-individual
- *financial information of complainant[s]*
    - financial assets
    - net assets
    - net income
    - other
- *nature of complaint*
    - redemption matters
    - high-risk nature of investment
    - suitability
        - if so, what suitability criteria were examined
            - concentration amounts
            - investor profile
            - time-horizon
            - other

(b) Oversight Over Determination of Single versus Multiple Complaints

The CSA needs to provide oversight on what OBSI is determining as a single complaint versus multiple complaints. See comments above under "*OBSI Determines Whether a Matter is a Single Complaint or Multiple Complaints*". Each complaint is subject to a $350,000 settlement limit so splitting a single complaint into multiple complaints, in the absence of any guidance on such matters, requires increased vigilance by the CSA of such matters due to the financial impact on firms.

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?

PCMA Response

The PCMA believes the proposed framework is unfair by design. Additional procedural protections should be provided to firms if binding decision-making powers are granted to OBSI since adverse decisions will have a material financial impact on firms.

(a) No CSA Explanation of "Enhanced Oversight" Over OBSI

The CSA states that it will provide ***enhanced oversight*** over OBSI but provides no details. It merely states the following:

> "*The identified ombudservice would 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*."

> "*For example, similar to SROs, statutory authority in some jurisdictions could authorize the securities regulatory authority to 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*."

The absence of any discussion or description of what the CSA contemplates as its enhanced oversight is concerning to the PCMA as this should have been developed since there are no appeal rights to a final decision made by OBSI in the Proposed Amendments.

(b) Need for Post Final Decision Review Survey

The absence of these procedural protections makes oversight challenging since it is unclear how the CSA will receive information from registrants on what they perceive as an unfair process. To address such concerns, the PCMA believes firms and complainants should be given the opportunity to complete a detailed survey after a final decision has been rendered. The PCMA suggests the CSA consider this regardless of whether binding decision-making powers are granted to OBSI. Both parties should be given the opportunity to voice their concerns regarding OBSI's complaint review process. The PCMA believes this is fundamental to what is a non-transparent complaint review process. Such surveys should be delivered only to a designated CSA member so parties, especially firms, can be candid and not fear retribution in the event of further OBSI complaint reviews.

(c) Need for CSA Oversight & Guidance on Failed Offerings and Complaint Overload

The CSA also needs to have continuous oversight over failed offerings if they result in a substantial number of claims. If there is a failed offering, under the Proposed Amendments, investors are encouraged to make a complaint to see if they can get their money back since there are no financial repercussions for making a complaint. In such circumstances, registrants, such as EMDs, need the CSA to provide oversight and guidance on how to manage a firm's limited resources in responding to such complaints.

A registrant will be at the first stage of a complaint review, so guidance needs to be provided on how a registrant can manage multiple complaints within a 90-day review period. If they cannot, then registrants may be forced to provide what resources they can to respond to a multitude of complaints given the 90-day response time constraint. This may result in less-than-optimal findings letters from firms, which is not helpful but a result of the proposed framework.

The PCMA acknowledges that there exists a *Protocol for Handling Systemic Issues Ombudsman for Banking Services and Investment and OBSI Joint Regulators Committee (**JRC**)*[16]. Systemic issues include *"the same complaint against [one or] multiple registered firms in a registration category and/or about similar products or services provided to investors which appear likely to have significant regulatory implications or to raise concerns about the registrant's fitness for registration."*

One of the remedies in such circumstances includes "*initiating a compliance review or an enforcement investigation of the registered individual and/or registered firm relating to the systemic issue*". The PCMA's concern is not with the investigation of a systemic issue, rather the complaint overload for a failed offering where multiple complaints are made by many investors against one or more registrants who participated in a failed offering. The response clock for an EMD and OBSI to respond to a claim is ticking yet there is no oversight or guidance on what registrants can do in such circumstances. The PCMA requests that the CSA be proactive and provide guidance on such matters as part of its real-time oversight function of OBSI.

The PCMA notes that OBSI will have the same issues and concerns if investors are not satisfied with the findings of a registrant's investigation of their complaint; this will likely result in the investor making a complaint with OBSI since they believe it is their only recourse to get their money back, notwithstanding the bona fides of any registrant malfeasance.

(d) Need for Western Presence

OBSI has no Western office location and is viewed by many as an Ontario ombudservice. The PCMA believes the absence of a Western physical presence encourages Western alienation and inculcates OBSI with an Ontario-centric focus to dispute resolution. Matters may be resolved by Western (and Eastern) CSA members differently than in Ontario, where OBSI is currently based.

(e) Need for Oversight of OBSI's Loss Calculation Methodology for Private Market Investments

The PCMA is concerned that it has provided inadequate oversight over OBSI's loss calculation methodology for private market investments.

OBSI's lack of a transparent and detailed loss calculation methodology for private market investments is a significant concern to PCMA members, especially given the complexity inherent in valuing private investments. OBSI has only provided general statements on its website about such matters. OBSI's approach, as it stands, lacks the specificity that firms require to anticipate and understand the potential financial outcomes of a dispute.

[16] https://www.obsi.ca/en/about-us/protocol-for-handling-systemic-issues.aspx

OBSI's communication on how losses are calculated remains overly general, lacking the necessary detail to provide clarity to firms and investors alike. In the private markets, loss calculation is challenging since the market price can be undeterminable. The clarity of OBSI's approach is critical for ensuring fair, transparent and objectively determinable loss calculations.

The PCMA is aware and very concerned of instances where OBSI has determined that an entire investment is deemed unsuitable and requires that an EMD buy-back a complainant's entire investment. That means that not $1.00 is suitable for any investment, which the PCMA believes would be a rare occurrence. The PCMA believes the lack of a transparent and reasonable loss calculation methodology makes it easier for OBSI to declare that the entire investment is unsuitable. This practice should be monitored by the CSA.

Since 2014, OBSI has promised to provide such a detailed loss calculation methodology and has failed to publish any proposal that seeks industry input in an open and transparent manner. The implementation of a well-structured private investment loss calculation methodology is not just a matter of procedural importance; it is central to maintaining fairness, fostering trust in the dispute resolution process, and ensuring that OBSI's decisions are grounded in a consistent and rational approach to loss valuation.
The PCMA recommends that the CSA should require OBSI to publish a loss calculation methodology for private market investments regardless of whether the Proposed Amendments are approved. The PCMA further requests that the CSA should be directly involved in the review of such loss calculation methodology to ensure it is fair to all parties.

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.***

PCMA Response
The CSA is proposing a ban on registered firms using the term "*ombudsman*", "*internal ombudservice*" or a "*substantially similar term*" when referring to a department or service of a registered firm or an affiliate that engages in complaint handling. For ease of reference, the proposed new section 13.15.1 is set out below.

13.15.1 Prohibited terminology *(1) A registered firm must not describe the complaint handling procedures, officers or employees of the registered firm or an affiliate of the registered firm, in a manner that could lead a reasonable client to conclude that the procedures, officers or employees are independent of the registered firm.* (2) *For greater certainty, and without limiting subsection (1), a registered firm must not refer to a department or service of the registered firm or an affiliate that engages in complaint handling with respect to complaints of the registered firm as independent, or as an ombudsman, internal ombudservice, or a term that is substantially similar.*

The CSA states that using such terminology could be misleading or confusing to a retail investor who may conflate a registrant's internal complaints handling process with those provided by OBSI under NI 31-103. The CSA provided a detailed explanation of its concerns involving internal "ombudsman" in Joint

CSA Staff Notice 31-351, IIROC Notice 17-0229, MFDA Bulletin #0736-M – *Complying with requirements regarding the Ombudsman for Banking Services and Investments* (**Joint CSA Staff Notice 31-351**).[17]

Many EMDs are small, therefore, having an internal ombudsman dedicated to this function is not feasible. Typically, the Compliance Department of an EMD manage client complaints. However, the PCMA believes that all registrants, including EMDs, should **NOT** be prohibited from referring to their internal dispute resolution service provider as an ombudsman provided that they follow the guidance provided by the CSA set out in Joint CSA Staff Notice 31-351, which is set out below for ease of reference.

> *In communications with clients, we emphasize the importance for firms that use an internal ombudsman to clearly indicate that:*
>
> - *the internal ombudsman is employed by the firm or is an affiliate of the firm and, unlike OBSI, is not an independent dispute resolution service;*
> - *the client may submit a complaint to OBSI without going to the internal ombudsman if the firm has not provided the client with a written notice of its decision within 90 days of the client complaining to the firm;*
> - *if a client is not satisfied with the firm's decision, the client may immediately submit a complaint to OBSI without going to the internal ombudsman and that the client has 180 days after receipt of the firm's decision to submit their complaint to OBSI;*
> - *the services of OBSI are free;*
> - *the use of the firm's internal ombudsman process is voluntary, specifying the estimated length of time the internal ombudsman process is expected to take, based on historical data;*
> - *statutory limitation periods continue to run while an internal ombudsman reviews a complaint, which may impact a client's ability to commence a civil action.*
>
> The disclosure of the services of OBSI should be given at least equal prominence to those of the internal ombudsman and should provide clear, transparent and easy to understand information, including full OBSI contact information, necessary for clients to make an informed decision on their complaint escalation options.

The above guidance was provided by the CSA in December 2017. The PCMA is not aware of any updates by the Joint Regulators Committee of the Ombudsman for Banking Services and Investments[18] that this

[17] https://www.osc.ca/sites/default/files/pdfs/irps/csa_20171207_31-351_ombudsman-banking-services-investments.pdf

[18] The Joint Regulators Committee (**JRC**) is composed of designated representatives of the CSA and the two self-regulatory organization (SRO)s that amalgamated on January 1, 2023, and are predecessors to the Canadian

stated confusion has continued or any related data. The absence of any updates to the guidance or data suggests that further regulatory intervention is unnecessary and contrary to evidenced-based regulation.

The PCMA notes that the term “ombudsman” has been used globally for centuries and has meaning for retail investors and should be permitted to be used by registrants provided it is not misleading. The CSA guidance above is helpful in achieving this requirement.

Traditionally, an ombudsman is an impartial officer who investigates complaints but only makes non-binding recommendations. The role is to inquire into decisions and act as a mediator/facilitator, not make final rulings. If an ombudsman is given the power to make binding decisions, their role changes fundamentally from being an impartial complaint handler to more of an adjudicator/arbitrator. This could cause confusion for the public if OBSI retains its name that includes the term "ombudsman" but no longer follows the traditional ombudsman model of making non-binding suggestions to resolve issues. Those using the services of OBSI may incorrectly assume recommendations are non-binding if it maintains the same name if it is granted adjudicative authority. Using a new title, such as “Compliant Adjudicator” would help distinguish OBSI’s changed role with a changed name, if enacted, and make it clear that binding decisions, not just recommendations, would be issued by OBSI.

CONCLUSION

The PCMA supports investor protection and fair and balanced regulations. Both are needed for a viable Canadian capital markets ecosystem. We respectfully submit that the Proposed Amendments have not struck the right balance between investor protection and fair and efficient capital markets.

The PCMA has discussed its various issues and concerns regarding the Proposed Amendments and fundamentally believes the evidence does not support giving OBSI binding decision-making powers. The PCMA respectfully requests that the CSA complete a review of all settlements below OBSI’s recommendation to determine if any trends indicate there is a systemic concern that necessitates the need for the changes as outlined in the Proposed Amendments.

The PCMA believes the Proposed Amendments raise significant concerns including, but not limited to, the following:

- an overly broad definition of a “complaint” and a lack of clarity of when a matter is a single complaint or one or more complaints. The imposition of an award limit of up to $350,000 makes this imprecise definition concerning since it may have material financial implications for registrants;

Investment Regulatory Organization (**CIRO**), the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (**MFDA**). The JRC provides oversight of the Ombudsman for Banking Services and Investments (OBSI). (Source: https://www.osc.ca/en/investors/investor-protection/obsi-joint-regulators-committee)

- an ambiguous complaint review process that gives OBSI complete discretion to determine all such matters in what the CSA calls an "essential process test";

- the lack of any costs imposed on complainants in making a frivolous or vexatious complaint and seeking to make registrants the guarantors of investment losses characterized as a failed suitability review. Under the Proposed Amendments, complainants have nothing to lose and are encouraged to make complaints in circumstances involving any investment losses. This will likely result in a large increase in complaints and compliance burden placed on registrants to address such matters in addition to related OBSI participation fee increases arising from its increased caseload;

- the high likelihood that there will be no E&O insurance coverage for claims involving OBSI disputes since they are arguably uninsurable. In the absence of such insurance coverage, EMD viability may become a concern since $350,000 per complaint represents a significant amount of money for EMDs whose regulatory capital requirements, if solely registered as an EMD, are $50,000; and

- the lack of an appeal process and limited judicial review.

These are the main issues and concerns the PCMA has with the Proposed Amendments which the PCMA believes are unfair by design. If binding decision-making powers are granted to OBSI, the PCMA believes OBSI's settlement limit should be reduced to a maximum of $10,000 representing the vast majority of complaints which closed based on monetary compensation recommended by OBSI. The PCMA has no concerns with OBSI maintaining its current limit of $350,000 for non-binding recommendations. However, the PCMA believes that if such changes are contemplated, the CSA should republish the Proposed Amendments and seek further stakeholder feedback.

* * *

The PCMA appreciates the opportunity to provide the CSA with our comments on the Proposed Amendments and would be pleased to discuss them with you at your earliest convenience.

Yours truly,

PCMA Advocacy Committee

cc: PCMA Board of Directors

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February 28, 2024

Private Capital Markets Association of Canada
Suite 5700, First Canadian Place
100 King Street West, Toronto, ON, M5X 1C7

Attention: PCMA Executive Committee

Dear Executive Committee Members,

Re: Insurance Broker Perspectives on the Proposed Amendments

You have asked us to discuss certain insurance considerations involving the proposed amendments by the Canadian Securities Administrators (the "**CSA**") to the complaint handling provisions of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations,* as well as proposed changes to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (the "**Proposed Amendments**").

We consent to the Private Capital Markets Association of Canada including this letter as an attachment to its response letter to the Proposed Amendments.

Purves Redmond

Purves Redmond Limited ("**PRL**") is a leading independent insurance advisory and brokerage firm, established in 1959 and headquartered in Toronto, Canada, with offices in Vancouver, Calgary, Toronto, and Montreal. PRL's national presence and global reach allow us to provide clients with exceptional service, connecting them with industry experts, insurers, and solutions while maintaining a genuine, honest, and transparent approach. PRL has extensive experience in servicing licensed professional service providers including, financial advisors, exempt market dealers, life agents, insurance brokers, lawyers, accountants and architects & engineers.

Though we have had discussions with underwriters of major insurance companies in Canada regarding the Proposed Amendments, our comments are those of our firm only.

OSC Insurance Cost Analysis

We have reviewed Annex E of the Proposed Amendments. We reproduce the relevant section, '*Potential Higher Insurance Costs'*, below for ease of reference (the **OSC Insurance Cost Analysis**).

> *"Potential Higher Insurance Costs*
>
> *Sections 12.3 to 12.5 of NI 31-103 require all firms to maintain bonding or insurance that contains certain specific clauses and coverage as outlined in Appendix A – Bonding and Insurance Clauses of NI 31-103 (Appendix A). Under Appendix A, firms must obtain insurance that contains a "fidelity clause" that insures against any loss through dishonest or fraudulent act of employees and a "forgery or*

> *alterations clause" that insures against any loss through forgery or alteration of any cheques, drafts, promissory notes or other written orders or directions to pay sums in money, excluding securities.*
>
> *Generally, the firms more likely to be impacted by an increase to their insurance costs would be firms that have refused to follow OBSI's recommendation or have settled complaints at an amount lower than what OBSI recommended. Between 2018 and 2022, out of 844 cases that ended with monetary compensation, 42 cases (approximately 5%) involving 24 firms settled below OBSI recommendations. We do not have the required data to estimate the potential impact on those firms' insurance costs because of variables specific to each firm. We note, however, that large and medium sized firms accounted for approximately 86% of low settlement cases*."

Although the OSC Insurance Cost Analysis references fidelity coverage, there is no mention of errors and omission ("**E&O**") insurance. Generally, E&O insurance provides defence and indemnification for 'wrongful acts' in providing, or failing to provide, professional services, all as defined by the policy, where the claim falls within the insuring agreement and all terms and conditions of the policy. E&O insurance would ordinarily be the applicable type of insurance that could respond to a potential claim in connection with a complaint, assuming it was covered, and not fidelity coverage.

Broad Definition of a Complaint

The Proposed Amendments define a "**complaint**" as an "*expression of dissatisfaction by a client that (a) relates to a trading or advising activity of a registered firm or a representative of the firm*…". This broad definition of a complaint, coupled with binding decision-making powers, pose challenges to properly underwriting as an insurance risk. Insurance does not provide coverage for all expressions of dissatisfaction by a complainant. An expression of dissatisfaction by a client may not be sufficient to trigger coverage under an E&O insurance policy. Moreover, the broad definition of a complaint and the uncertainty of whether a matter is a single complaint or two or more complaints, each subject to a maximum limit of $350,000, raises additional concerns about the ability of insurers to provide coverage, if at all. Without clarity on the insurability of matters referred to in this new binding dispute resolution process, significant uncertainty exists regarding the ability of financial advisors and dealers to secure appropriate insurance coverage.

Insurer Control Over Defence & Settlement Process

Generally, a condition of defence and/or indemnification under an E&O policy is that insurers have control of the defence and settlement process. Under the Proposed Amendments, the identified ombudservice would have the authority to issue a final and binding award to a complainant of up to $350,000, with no right of appeal. It is unclear what, if any, role insurers could have in this new independent dispute resolution service. The shift to a binding investment ombudservice regime may remove or impede insurer management of claims. That would change the underwriting risk profile, and potentially impact not just the pricing but also the availability and/or scope of E&O coverage.

Claims Volumes

The Proposed Amendments note that this, "*will likely increase the monetary compensation paid to complainants*". It further notes that, "*providing an identified ombudservice with the authority to make binding decisions would foreseeably improve access to fair and final monetary redress to investors at no cost to them*."

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This increased access to monetary redress, without any cost to complainants, may result in more complaints, especially when the threshold of what constitutes a complaint is low. Higher claims volumes, defence costs and quantum of awards may impact the availability, scope and pricing of insurance coverage for registrants. Higher claims volume can result in higher insurance premiums, changes in policy coverage and the possibility of no coverage for certain insureds.

Loss Calculation Methodology for Private Market Investments

We have not seen a detailed loss calculation methodology for private market investments. We understand the Ombudsman for Banking Services and Investments has such a methodology for public market investments. Transparency about how losses would be calculated would be important underwriting information for determining insurance coverage availability and pricing.

Suggestion for a Working Group

The PCMA has asked if we would be willing to be part of an industry working group to discuss the E&O insurance implications if the Proposed Amendments are enacted. We would be pleased to assist in such matters and note that certain E&0 underwriters have also expressed an interest to assist in this endeavour.

We trust these considerations regarding the potential impact on the availability, scope, and pricing of insurance assist with the assessment of, and potential feedback on the Proposed Amendments. We would be pleased to participate in a call with the PCMA and members of the CSA who wish to discuss such matters further.

Best Regards,

[redacted]

Rob Hanson, CFA
Eastern Region FINEX Leader