VIA E-MAIL

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

Attention:

Ms. Meg Tassie Senior Advisor,Legal Services, Capital Markets Regulation British Columbia Securities Commission	Me Phillippe Lebel Corporate Secretary and Executive Director, Legal Affairs Autorité des marchés financiers	The Secretary Ontario Securities Commission
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Re: Canadian Securities Administrators Notice and Request for Comment – Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service – Proposed Amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* and Proposed Changes to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*

OVERVIEW

The Portfolio Management Association of Canada (**PMAC**) is pleased to have the opportunity to submit the following comments on the Canadian Securities Administrators' (**CSA**) Notice and Request for Comment – Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service – Proposed Amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) and Proposed Changes to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**31-103CP**); collectively, the **Consultation**.

PMAC represents over 320 investment management firms registered to do business in Canada as portfolio managers (**PMs**) with the members of the CSA. PMAC's members encompass both large and small firms managing total assets in excess of $3 trillion as fiduciaries for institutional and private client portfolios. PMAC's mission statement is "advancing standards". We are consistently supportive of measures that elevate standards in the industry, enhance transparency, improve investor protection, and benefit the capital markets as a whole.

GENERAL COMMENTS

PMAC is supportive of fair dispute resolution mechanisms and effective and trusted avenues for the redress of investor losses. As such, PMAC generally agrees with the CSA's goal of strengthening the dispute resolution framework for the Ombudsman for Banking Services and Investments (**OBSI**) or other identified ombudservice(s).

As is discussed further below, we believe that due to the unique nature of PM clients and the fiduciary relationship between PMs and their clients, the services offered through OBSI are not as essential for these clients as they are for retail investors. Sophisticated individual and institutional clients may prefer to use a different provider to resolve disputes, and PM firms should not be required to use OBSI for dispute resolution.

We understand that the Consultation is focused on concerns with respect to registrants paying less than the OBSI recommended settlement amount. The proposed solution to this issue is to make these recommendations binding. We agree that a framework to make binding decisions is one possible solution to this issue. However, we have serious substantive and procedural concerns with the framework set out in the Consultation. These concerns are described in our response below, along with our accompanying recommendations. Specifically, a system that produces binding decisions requires: (i) a clear process for the determination of settlement amounts; (ii) extensive expertise of decision makers to ensure that loss calculations and recommendations are fair and consistent; and (iii) additional procedural and administrative fairness measures.

Our recommendations are submitted with a view to aligning the proposals in the Consultation with the goals of achieving investor protection and fairness to all stakeholders.

KEY RECOMMENDATIONS

1. **Amend NI 31-103 to clarify that OBSI's mandate does not extend to non-individual clients.**

2. **Permit PMs and their clients to use dispute resolution services other than OBSI.**

3. **Conduct additional research to determine the reasons why parties settle for less than the recommended amount and consider appropriate enhancements to the existing OBSI service offering, which could include voluntary mediation and voluntary binding arbitration.**

4. **If a binding process is implemented, it must be governed by principles of administrative and procedural fairness, limited to a low monetary threshold ($35,000), and must be harmonized across Canada.**

BACKGROUND

Registered PMs have discretionary authority over the investments they manage for their clients and act as fiduciaries. PMAC strongly believes that this fiduciary duty is of utmost importance to investors, that it informs the way that PM firms operate their businesses and service their clients, and that its existence increases confidence in the capital markets.

The number of open complaint cases by the PM sector has consistently represented only 2-5% of total investment-related complaints received by OBSI. Only approximately 2% or less of PM firms have had any interaction with OBSI, other than with respect to billing.[1]

We appreciate OBSI senior staff's demonstrated receptiveness to stakeholder feedback on issues such as the representation and reporting of complaints in Annual Reports, and their commitment to enhancing OBSI staff's knowledge and understanding of discretionary asset management.

[1] According to the OBSI's 2022 Annual Report, only 1% of cases opened and 4% of cases closed involved Portfolio Managers. Of the 18 cases closed, 3 were resolved in favour of the complainant. This is similar to the number of cases opened (1%), closed (2%) and resolved in favour of the complainant (4) involving restricted Portfolio Managers.

RECOMMENDATIONS

1. **Amend NI 31-103 to clarify that OBSI's mandate does not extend to non-individual clients.**

Although this is not the specific focus of the Consultation, if NI 31-103 and the OBSI framework are to be amended, we urge the CSA to use this opportunity to clarify that non-individual clients (and not just non-individual Permitted Clients), should be excluded from OBSI's mandate in NI 31-103.

We ask that the requirement in subsection 13.16(8) of NI 31-103 which currently reads "this section does not apply in respect of a complaint made by a *permitted* client that is not an individual" (emphasis added) be revised to say, "this section does not apply in respect of a complaint made by a client that is not an individual".

The Permitted Client definition in section 1.1 of NI 31-103 does not capture several non-individual clients that PMAC considers to be "institutional" clients because they meet other criteria common to institutional clients. Examples of certain clients that do not meet the Permitted Client definition and the financial thresholds in NI 31-103 are:

- Health and welfare trusts (distinct entities under the *Income Tax Act* (Canada))
- Unions and union-related benefit plans
- Multi-employer benefit plans
- Some foundations and registered charities
- Some overflow pension accounts (associated with pension plans, but not pension plans themselves)
- Supplemental employee retirement plans
- Disability plans
- First Nations trust vehicles (i.e.: for government monies), and
- Retirement Compensation Arrangements.

OBSI clearly states in its public vision and strategic plan that it "resolve[s] complaints and disputes between consumers and financial services firms", not B2B disputes or disputes between Non-Profit Organizations and financial service firms.[2] PMAC firmly believes that since the OBSI's mandate is consumer redress, and does not extend to institutions, the requirement in NI 31-103 for firms with non-individual non-Permitted Clients to offer OBSI for dispute resolution must be changed.

Including these non-Permitted Client / non-individual entities in OBSI's dispute resolution mandate is not appropriate nor in line with OBSI's purpose of serving as a dispute resolution mechanism for retail investors. Institutional investors have the means and sophistication to

[2] Please see OBSI's Vision, available on the OBSI website

achieve dispute resolution in other ways. There is no policy reason to expend firm and OBSI resources on these entities.

Notwithstanding the ability of firms with non-individual non-Permitted Clients to apply for exemptive relief from NI 31-103, this avenue is costly, burdensome and does not further investor protection. Firms should not have to incur the time, cost and effort to obtain this relief for non-individual clients. Excluding non-individual clients from the OBSI's mandate in NI 31-103 would be consistent with the CSA's 5th strategic goal as stated in its Priorities for 2022-2025, to "deliver smart and responsive regulation protecting investors while reducing regulatory burden."[3]

2. Permit PMs and their clients to use dispute resolution services other than OBSI

Sub-section 13.16(6) of NI 31-103 requires that OBSI be the dispute resolution service that is made available to clients (outside of Quebec). Our members support the availability and use of other dispute resolution mechanisms and alternatives to OBSI for both institutional and individual PM clients. PMAC members' non-institutional clients are often sophisticated and high-net-worth families and individuals with significant assets, who may prefer to use a dispute resolution service other than OBSI. Other providers may offer more efficient processes or more specialized expertise that would be better suited to these sophisticated investors. These services could include mediation and binding arbitration, if the parties agree.

The main gap in services with OBSI is the sole use of ombudsman/investigative services. This approach may be very effective and appropriate when there is a perceived imbalance of power and for simpler, more systemic issues among retail banking and investment clients, but it is not necessarily the most efficient or effective dispute resolution option for more complex and/or larger complaints involving sophisticated investors. In our view, the sole focus on investigations as a dispute resolution mechanism has its limitations, and does not meet the needs of more sophisticated investors and complex disputes.

In PMAC's 2013 submission to the CSA, we noted that

> for our Members, there is less value and utility in the focus being on the "investigation" aspect of the OBSI process because… the production of documentation is straight forward… For instance the relationship disclosure information (RDI) rules along with the books and records requirement minimize any hurdles in collective information that would form part of an investigation process….[4]

[3] Please see the CSA Business Plan 2022-2025

[4] February 15, 2013, PMAC Comment Letter Re: Response to CSA Notice and Request for Comment: Proposed Amendments on NI 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* and to Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations*

As is discussed further below, we believe that in addition to permitting PMs and their clients to use the dispute resolution provider of their choice, adding voluntary mediation/arbitration services to OBSI would also be beneficial for simpler disputes involving retail clients.

3. **Conduct additional research to determine the reasons why parties settle for less than the recommended amount and consider appropriate enhancements to the existing OBSI service offering, which could include voluntary mediation and voluntary binding arbitration.**

We believe that any changes to the existing dispute resolution framework should be evidence-based and data-driven. We do not believe that the Consultation provides sufficient information to justify the significant policy change being proposed. The OBSI's high case retention rates indicate that the existing framework works well for investors and presents a sound alternative to costly litigation. The Consultation suggests that the CSA's primary concern is that firms are not paying the full recommended settlement amount ("**low payments**"), particularly when the recommended amount is over $50,000.00.

The suggested solution of making recommendations binding presumes that low payments are due to bad faith on the part of the registrant. We believe that the causes of low payments are likely more nuanced. We encourage the CSA and OBSI to conduct additional research to determine the reasons why parties settle for less than the recommended amount. For example, it may be that firms pay settlement amounts under $50,000 even when the recommendation is disputed by the firm, because the amount at issue does not warrant dedicating further resources to negotiation with the client. It is possible that there are gaps in the current framework that could be addressed to resolve the low payment issues raised in the Consultation, without resorting to a binding process.

It is important that OBSI staff have the appropriate skills and experience to make fair and accurate assessments of the circumstances leading to the dispute and the resulting losses, if any, to the investor. This includes experience with suitability assessments and loss calculations. For example, we would expect that individuals tasked with handling PM complaints have adequate training with respect to the PM business model (such as a CFA Charter holder (or at minimum Level I or II CFA)), and industry experience. The investigator should have a good understanding of portfolio construction, the documentation used throughout the lifespan of the PM/client relationship and the fiduciary relationship between the PM and the client.

Although the loss calculation skills and experience have been improved within OBSI over the past several years, we believe that confidence in the current investigation process could be improved by providing more transparency to the parties with respect to one another's position, including the ability to refute the other's assertions of fact.

Improved transparency of OBSI investigators' credentials could also improve stakeholder confidence in decision recommendations. If mediation services were added, we suggest the

addition of Chartered Mediators and Chartered Arbitrators, whether in-house or from a roster of independent outside professionals.

OBSI should also consider whether the "name and shame" system is an effective mechanism to improve dispute resolution, and whether changes to the system should be implemented. The "shame" list does not provide any context into the dispute and the reason for non-payment. Additional research could be conducted to determine whether there are more effective means that could be deployed to accomplish fair dispute resolution and avoid low payments.

In addition, given that only a small proportion of cases opened involve PMs, it would be helpful to know whether the low payments involve PM firms or registrants in other categories, and to determine whether particular registrants are more frequently the subject of complaints and low payments. This additional information would contribute to better understanding the reasons and solutions for these disputes and low payments.

We do not believe that giving OBSI the authority to make binding recommendations as described in the Consultation would lead to better outcomes for all stakeholders.

Concerns with giving OBSI the authority to make binding recommendations

Based on the information provided in the Consultation, we do not believe that the proposed review framework would satisfy the independence and fairness elements required to conform to administrative law principles and to maintain the confidence of all stakeholders. For example, there is no indication as to whether: (i) decisions would be transparent, consistent and available to the public; and (ii) whether the OBSI decision maker would be bound by case law or guided by prior decisions of the OBSI itself. Although the recommended settlement amount could reach a very high monetary threshold (currently of up to $350,000), there is no process to appeal the decision.

As noted in PMAC's response to the Capital Markets Modernization Taskforce (CMMT) consultation, we do not believe that OBSI has the independence or the structure to be a decision-making body, like a court of law or an administrative tribunal. We also believe that implementing a satisfactory process for binding decision-making would remove the ease with which investors are able to access dispute resolution, which is contrary to OBSI's mandate. As a result, we do not believe that OBSI should be empowered to render binding decisions in the manner described in the Consultation.

Alternatives to giving OBSI the authority to make binding recommendations

We believe that the existing non-binding process would be significantly improved if OBSI offered optional mediation services as part of the dispute resolution process, at the outset of the dispute. The recent decision to appoint OBSI as the only dispute resolution service for both the banking and the investment sectors may present an opportunity for OBSI to

add mediation services to consumers, which had previously been provided to banking consumers by ADR Chambers.

In contrast to a lengthy investigation process, disputes can often be resolved quickly and in a fair, transparent and cost-effective manner with the assistance of a mediator, leading to better overall satisfaction for both parties. Many disputes are due to a breakdown in the relationship between the registrant and the client, and may not involve monetary losses. Mediation offers a pathway to repairing a broken relationship, the preservation of which is often in the client's best interest.

According to the 2022 OBSI Annual Report, straightforward cases closed in an average of 30 days and more complex cases averaged 78 days. We recognize OBSI's efforts and applaud its success in drastically reducing the average case timeliness, which has dropped significantly from an average of 238 days for straightforward complaints and 290 days for more complex complaints. Although there has been marked improvement, in our view, the average time to close a complaint file could be further reduced if OBSI offered a mediation service. As we stated in our past submission,

> Mediation works well for parties who want to resolve the dispute and continue carrying on business together and resume the long standing relationship efficiently and expediently. Mediation…. is in essence tailored to provide this function with some of the key benefits being:
>
> - Preservation of business relationships;
> - Arrangement may be made quickly;
> - Process may take just a few days;
> - Simple and easy process;
> - Confidentiality;
> - Process non-binding;
> - The outcome is within the control of the parties; and,
> - High level of satisfaction.

Offering voluntary mediation and/or arbitration services within OBSI could enhance the stakeholders' experience and lead to better investor outcomes. Alternatively, there exist external providers of this service that could be leveraged. Using a dedicated team of highly qualified mediators to resolve disputes quickly in a fair and confidential manner is likely to improve outcomes for investors and industry. Mediation could be an informal process that would not require the parties to be represented by counsel. If the parties agree to a settlement through the mediation process, it could be made binding and enforceable on the parties.

Mediators should be independent, impartial and knowledgeable about industry practices and standards. The list of mediators should be public and should disclose their qualifications. In order to maintain impartiality, if the parties agree to mediation, the investor or the firm

could put forward a list of three mediators from which to choose, and the other party could choose the mediator from this list.

While we do not believe that the binding process recommended in the Consultation would be desirable, OBSI could consider allowing the parties to engage in voluntary binding arbitration, if the mediation is not successful. The parties could agree to an arbitrator in the same manner described above. The arbitration could be conducted using a simplified process, based on rules to be established by OBSI and members of the CSA.

4. If a binding process is implemented, it must be governed by principles of administrative and procedural fairness, limited to a low monetary threshold ($35,000), and must be harmonized across Canada.

In granting the ability to make binding decisions, the Consultation is proposing to effectively make the ombudservice into an administrative tribunal.[5] We do not agree that the ombudservice should be excluded from the types of procedural requirements that apply to other administrative tribunals. These procedural requirements exist in order to provide a fair and reasonable basis for administrative decision-making, thereby ensuring legitimacy and public confidence in the process.

We are concerned that the decision maker would not be independent of OBSI. Independence is a fundamental procedural fairness principle. In addition, the nature and application of the proposed "essential process test" is not clear. For example, would the parties have the opportunity to make submissions as to the process to be engaged? Would sworn affidavits be required? Would the parties have the opportunity to review one another's submissions and refute them? Would the decision maker be bound by case law? We believe that the presence of an independent tribunal member (decision maker) with appropriate training and expertise to resolve these disputes and make a binding decisions, as well as these other procedural fairness elements, are essential to ensure a fair and legitimate process. The process should be subject to the relevant Statutory Powers Procedures legislation in the various CSA jurisdictions and subject to judicial review, with appropriate routes of appeal.

The Consultation notes that additional details regarding the ombudservice's processes, including when a decision will be considered final, would be set out in governance documents or within harmonized orders. We believe that these details must be provided to stakeholders for consultation before we can opine as to whether they are appropriate and fair.

If binding authority is extended to OBSI, there should be a monetary limit to the authority. We suggest that the current Ontario Small Claims Court threshold of $35,000 would be an

[5] We note that the IMF report cited in the Consultation references binding authority in a single sentence: "Stronger investor protection can be achieved through giving the Ombudsman for Banking Services and Investments binding jurisdiction on firms." There is no elaboration on how this is to be achieved. (*Canada: Financial System Stability Assessment IMF Country Report No. 19/177*, June 2019 by the International Monetary Fund, at p 30.)

appropriate limit, given the lack of independence, administrative fairness and transparency being proposed. The current minimum capital requirements for registrants range from $25,000 to $100,000. An award over this amount could effectively cause a firm to go out of business, which is not in its clients' best interests. Given the proposed amended definition of "complaint", concerns have been raised as to whether E&O insurance would be available to cover such claims. We object to the proposed changes being made until these issues can be further studied and resolved.

If the process described in the Consultation is adopted, the absence of the right to appeal exacerbates our concerns. We recommend that any decision over a very low threshold amount ($35,000) should be subject to appeal to the provincial securities regulatory tribunal of each jurisdiction, or to the superior courts of the provinces.

The securities regulatory authorities should also have oversight of the process and decision-making of the identified ombudservice. This includes supervisory and veto rights over the ombudservice's procedures. The OBSI's terms of reference and decision-making procedures should be subject to the same rule-making requirements as the SROs and the securities regulatory authorities (e.g., publication for comment and approval by the CSA).

Finally, we suggest that any such process be subject to an effectiveness review one year after implementation to determine whether the desired objectives are being met.

Harmonize requirements

We strongly urge the CSA and governments to harmonize the requirements nationally. Registrants are already subject to different complaint handling processes in Quebec. If different requirements are adopted at different times in various jurisdictions, registrants could be subject to distinct processes in 13 jurisdictions. We are concerned that British Columbia is not participating in the Consultation and that Saskatchewan is moving forward with proposed legislative changes ahead of other jurisdictions. This fragmentation will be operationally complex and will represent a significant additional burden and cost for firms. For example, if binding authority is adopted, firm policies, procedures, and staff training for handling complaints may change (including whether complaints are referred to external counsel, for example). Different requirements in different jurisdictions will require a separate process. A lack of harmonization would also result in inconsistent treatment of complaints depending on where the client resides, including with respect to the amount of compensation that may be awarded. This will lead to investor confusion and will not improve confidence in the dispute resolution process or the capital markets generally.

If the CSA proposal is accepted, the legislation effecting the changes to OBSI should be consistent. OBSI should be subject to the same procedural fairness requirements and compensation limits across jurisdictions.

CONCLUSION

We believe that OBSI provides an essential service to consumers in the industry. It is clear that its dispute resolution service is valued, respected, and is an effective and affordable means for consumers to obtain redress when they have a complaint against a registrant.

We urge the CSA to amend NI 31-103 to clarify that firms are not required to make OBSI available to institutional clients, and we ask that PM clients have the ability to avail themselves of alternative dispute resolution services, including mediation and binding arbitration, should the parties agree.

We believe that OBSI's existing dispute resolution mechanisms should be reviewed and that changes should be made where appropriate, which would improve outcomes and be beneficial for the industry as a whole. In our view, adding voluntary mediation and arbitration services could be a significant improvement to the OBSI service offering.

We disagree with the proposed framework to give OBSI or another ombudservice binding authority, without appropriate procedural safeguards to ensure independence, transparency and fairness to all parties.

We would be pleased to discuss our recommendations further with you. If you have any questions please contact Katie Walmsley (kwalmsley@pmac.org) or Victoria Paris (vparis@pmac.org).

Sincerely,

PORTFOLIO MANAGEMENT ASSOCIATION OF CANADA

"*Katie Walmsley*"	"*Warren M. Rudick*"
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