THE INVESTMENT FUNDS INSTITUTE OF CANADA | L'INSTITUT DES FONDS D'INVESTISSEMENT DU CANADA

IFIC Submission

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

March 1, 2024

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Financial and Consumer Services Commission (New Brunswick)
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Office of the Superintendent of Securities, Newfoundland and Labrador
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Dear Sirs and Mesdames:

RE: CSA Consultation - Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service

The Investment Funds Institute of Canada (**IFIC**) appreciates the opportunity to comment on Canadian Securities Administrators (**CSA**) Notice and Request for Comment - *Proposed Amendments and Proposed Changes to Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service* (**Consultation**).

IFIC is the voice of Canada's investment funds industry. IFIC brings together approximately 150 organizations, including fund managers, distributors and industry service organizations to foster a strong, stable investment sector where investors can realize their financial goals. IFIC operates on a governance framework that gathers member input through working committees. The recommendations of the working

committees are submitted to the IFIC Board or board-level committees for direction and approval. This process results in a submission that reflects the input and direction of a broad range of IFIC members.

Summary

The Consultation is proposing amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) to create a new regulatory framework that would give an independent dispute resolution service (expected to be the existing *Ombudsman for Banking Services and Investments* (**OBSI**)) authority to make binding decisions (**Proposed Framework**).

IFIC supports the regulatory goals noted in the Proposed Framework of providing investors a system of redress that is efficient, fair and accessible. In order to realize these goals, we believe it necessary to revise the proposal to ensure that it includes the elements described below, each of which is explained in detail in this submission. Without these revisions, we do not believe the proposal is poised to achieve its intended effect.

1. It is a harmonized regime across all provinces and territories in Canada, including Quebec.
2. The legislative amendments and designation/recognition orders required for each CSA jurisdiction to enable the Proposed Framework are effective in each jurisdiction at the same time or the effective date for industry compliance is at the same time across all CSA jurisdictions.
3. It is simplified by removing the proposed new stage two [*review and decision stage*] and instead, enhances OBSI's existing [investigation and recommendation stage] to add procedural fairness processes.
4. At the completion of the enhanced investigation and recommendation stage, OBSI's recommendation would become a binding decision[1] on both parties, subject to the parties' right to judicial review only for compensation amounts below a threshold of $35,000. For decisions with compensation amounts that are $35,000 or above and either party does not agree with OBSI's decision, the parties have a statutory right of appeal to another alternative independent third-party procedure (i.e. not the courts, but to a division within the CSA (such as the OSC Capital Markets Tribunal) or a division within CIRO), unless the complainant abandons the process or commences litigation before OBSI issues its decision.
5. The complainant and firm should be treated the same in terms of the treatment of OBSI's recommendation/final decision and post-final decision mechanisms.
6. If the Proposed Framework proceeds with the new stage two [review and decision stage] included, the CSA should provide more transparency about the procedural processes the "senior decision-maker" at this level of review will need to meet (e.g. what applying the "fairness standard" and the "essential process test" is), and the rules should require the "senior decision-maker" to have the necessary training, experience, and knowledge that is similar to an administrative tribunal-like adjudicator.

In addition, IFIC strongly recommends that the CSA makes it a priority in the immediate near future to continue to reshape the complaint handling and dispute resolution services regime in Canada for complaints in the investment sector by reducing/streamlining the overlapping and parallel pathways for complainants to seek redress. IFIC's position is that doing so will drive improved efficiencies, remove investor confusion, provide greater certainty for both parties to a dispute, and reduce regulatory burden which leads to overall increased costs for all stakeholders. We provide details and rationale regarding this recommendation on page twelve of this submission under the heading "*Recommendation for Greater Reforms to the Dispute Resolution Regime for the Investment Sector*".

[1] A binding decision is final and binds both parties, unless a party exercises a right to judicial review or statutory right of appeal.

We also provide answers to the CSA's specific questions for comment in **Appendix A** of this submission.

Guiding Principles

The following guiding principles inform the analysis and discussion of our members concerning the Consultation.

A. Only a fully harmonized complaint handling and dispute-resolution regime across all jurisdictions of the CSA, including the Canadian Investment Regulatory Organization (**CIRO**), would be the most efficient and effective framework for aggrieved investors. A fully harmonized landscape would serve to remove investor confusion about the regime, reduce overall costs to all stakeholders, and improve investor confidence in our markets. The co-existence of the Proposed Framework with the (formerly called) IIROC Arbitration Program[2] which would have overlapping compensation limits/caps[3] only serves to continue the existence of a multi-dispute resolution service provider model for Canadian investors. This will continue to perpetuate investor confusion, add more complexity to an already complex and fractured complaint handling and dispute resolution landscape in Canada, and undermine investor confidence in the regime.

B. The power to have binding-decision authority for decisions in a dispute resolution is a quasi-judicial decision-making authority which must be accompanied with legislated requirements that provide for legal due process, including procedural fairness to support fair decision-making and a statutory right to appeal to an independent third party for parties to contest the binding decision.

C. The only circumstances in which it is reasonable to limit rights to contest a binding decision by a judicial review only process is for relatively smaller, less significant compensation amounts (i.e. more in line with the monetary thresholds for some provincial small claims courts, which are typically up to $35,000 (e.g. in Ontario and British Columbia)).

Key Aspects of the Proposed Framework that Should be Revised

The Consultation states (under *Substance and Purpose*) "Implementing the 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" [bolding added]. IFIC acknowledges the importance in having accessibility and efficiency for dispute resolution services and enhancing investor protection and confidence in the investment services sector. IFIC also agrees with the need for the Proposed Framework to provide fairness for both firms and complainants.

Based on IFIC being aligned with these above important principles, IFIC supports the Proposed Framework if it is revised to provide the following:

1. *It is a harmonized regime across all provinces and territories in Canada, including Quebec.*

   The existing complaint handling and dispute resolution regime lacks harmonization across all CSA jurisdictions (i.e. NI 31-103, Division 5 [*Complaints*] has an existing carve out for firms registered in Quebec and Quebec's participation in the Consultation is to maintain the current exemption). The lack of a harmonized regime creates an unlevel playing field for registered firms across Canada which is unfair to firms depending on where they do business and unfair to investors depending on where they reside. The Proposed Framework only perpetuates the unlevel and complex playing field for registered firms operating both within and outside of Quebec, unlike firms that operate solely in Quebec. Also, the Consultation states that British Columbia is not participating in the proposal, though it supports the outcomes intended by this project and would consider its own

[2] A recent public consultation on this program is currently under review by CIRO Review of the IIROC Arbitration Program (opened December 6, 2022; closed March 6, 2023; CIRO's final response pending).
[3] OBSI's current compensation limit/cap is claims up to $350,000; the IIROC Arbitration Program's current limit/cap is claims up to $500,000.

legislative changes to achieve the same outcomes. As it is unclear what the legislative changes in British Columbia might look like, this potentially will lead to an even greater lack of harmonization across all CSA jurisdictions. IFIC is concerned this would increase the potential confusion for investors, regulatory burden for firms, and unfairness to both firms and investors. IFIC strongly recommends there be only one national standard/regime/framework.

Furthermore, accessibility and efficiency of the dispute resolution regime in Canada is not achieved without harmonization by all CSA jurisdictions, including Quebec. There are significant business implications and operational challenges with Quebec not being in harmony with the complaint handling and dispute resolution framework in NI 31-103, and will persist by Quebec not moving in harmony with this Proposed Framework. For example, the timeframes and processes in Quebec for reporting complaints and the escalation process for dispute resolution are not aligned, and equally of concern is the mandatory use of OBSI services is not applicable in Quebec. The lack of a harmonized regime across Canada causes fundamental business issues for firms operating across all jurisdictions, the result of which does not enhance investor protection, creates investor confusion, and is unfair to all investors.

2. *The legislative amendments and designation/recognition orders required for each CSA jurisdiction to enable the Proposed Framework are effective in each jurisdiction at the same time or the effective date for industry compliance is at the same time across all CSA jurisdictions.*

The Consultation explains that due to each CSA jurisdiction needing to follow their unique legislative rule-making requirements for the Proposed Framework to become law in their jurisdiction, it is possible that some CSA jurisdictions may not designate or recognize OBSI and the identified ombudservice at the same time, resulting in the status quo in some provinces. Resulting from this, OBSI's decisions would be binding for some jurisdictions and for others OBSI would make non-binding recommendations only.

IFIC strongly recommends that the CSA find a means to coordinate so that the final Proposed Framework has the same effective date for industry compliance across all CSA jurisdictions, whether that be by allowing a transition period before implementation or otherwise. If this possibility of non-aligned effective dates were to occur, it would be unfair to both firms and complainants:

- IFIC's primary concern with this possibly is the risk for customer confusion and mistrust should they come to know that for some jurisdictions the outcome of the services they receive from OBSI would be a binding decision as compared to a non-binding recommendation only, depending on their jurisdiction of residence. This would not provide fairness across all complainants. This also would not enhance investor confidence in the investment services sector or its regulation.
- Additionally, firms would need to operationalize the status quo in some jurisdictions while at the same time make changes to internal policies and procedures, operational processes, staff training, and customer communications to implement the Proposed Framework in other jurisdictions.

IFIC's equal concern is the regulatory inconsistencies would have significant business risk implications and impose undue regulatory burden on firms due to the time and costs involved to track when the status quo changes in each applicable jurisdiction and undertake the multiple versions of changes to internal policies and procedures, operational processes, staff training, and customer communications to be in compliance with the Proposed Framework for another jurisdiction, as required. There are a finite number of people in each dealer firm who can deal with the IT, compliance and operational implications of regulatory change projects, in addition to their other work. Their time and efforts must be deployed in the most efficient way possible; to do otherwise will increase, not decrease, regulatory burden.

3. *It is simplified by removing the proposed new stage two [review and decision stage] and instead, enhances OBSI's existing [investigation and recommendation stage] to add procedural fairness processes.*

   The design of the Proposed Framework adds a new second stage [*review and decision stage*] to what essentially is OBSI's existing process [*investigation and recommendation stage*]. The new stage two process would be triggered if either party (or both) objected to OBSI's recommended compensation amount during the stage one process. Also, during the new second stage, a "*senior decision-maker"* of OBSI who was not involved in the stage one process would review only the specific objections made by the objecting party(ies) and after completing its review, would issue a final binding decision. Overall, after either stage, OBSI's recommendation (post-stage one) or decision (post-stage two) will be a final (or deemed final) binding decision, unless the complainant abandons the process or commences litigation before the binding decision.

   Based on several concerns explained below, IFIC recommends the proposal be revised by removing the new second stage and instead, enhance OBSI's existing process that uses the "inquisitorial approach" to add procedural fairness processes to the approach. The CSA could consider doing so by adding similar elements proposed in the Consultation for the stage two review, for example, requiring OBSI to adopt a process that achieves a proportionate and fair procedural threshold to be followed by OBSI during the "investigation and recommendation" process, applying the "*fairness standard*" and the "*essential process test*" to achieve procedural fairness. Doing this would improve the fairness experienced for both firms and the complainants.

   Data provided by Table 2 in the Consultation about OBSI's case retention from its fiscal years 2018 – 2022[4] provides some support for this recommendation, in that OBSI's existing approach has been working reasonably well. Starting from 2018, the number of cases closed by OBSI were 327 and they gradually increased each year up to 567 cases closed in 2021 and 444 closed in 2022 while the percent of closed cases withdrawn or abandoned decreased each year from 6% in 2018 to 1% in 2022. Following the presentation of Table 2 in the Consultation, the CSA concludes:

   > "*The data above shows that overall, OBSI has low case withdrawal rates, and suggests that* ***the current process used by OBSI in considering a complaint is one that complainants may generally find to be helpful or accessible. It appears that complainants choose to remain engaged instead of pursuing other forms of dispute resolution or abandoning their case.*** *A complainant's willingness to have their complaint assessed by OBSI is likewise positive for firms as they will not have to delegate additional resources to defending legal proceedings.* ***Given the general indicia that complainants are content with having their complaints investigated and resolved by OBSI,*** *and the positive impact this also has for firms,* ***the CSA is of the view that the inquisitorial approach currently used by OBSI should be maintained in the proposed framework.***" [bolding added]

   IFIC has several concerns about the new stage two of the Proposed Framework. One is that adding this second stage of review makes the framework very complex and difficult to understand "*how a complaint would flow through the identified ombudservice's process*"[5], making it overly confusing for investors and firms to understand. For example, the Annex D [*Overview and Flowchart of Identified Ombudservice Processes Under Proposed Framework*] included in the Consultation is four pages long and we submit does not make it any easier to understand the new framework. Even within the four pages, several scenarios are grouped together, making the flow-chart incomprehensible to many complainants.

   Another concern, based on guiding principle "B", is that the "review and decision stage" for review of the stage one OBSI decision is also being carried out by OBSI (i.e. is not independent), even though it would be a "senior decision-maker" at OBSI who was not involved in the stage one decision. IFIC submits that this creates a real or perceived conflict of interest. If both stages

[4] Refer to Table 2 in the Consultation.
[5] Refer to Annex D in the Consultation.

(preliminary and final) of binding decision-making are within OBSI with there being no clear delineation of structurally independent divisions, that does not provide adequate checks and balances on OBSI's accountability for its binding decision-making process. We would note that as a result of recommendations by the Ontario Capital Markets Modernization Taskforce regarding the governance and accountability of the OSC, structural changes were made to separate the adjudicative functions at the OSC to an independent division, resulting in the Capital Markets Tribunal established by the *Securities Commission Act, 2021 (Ontario)*[6] .

Apprehension of bias concerns arise given OBSI's participation in each phase of the investigation, hearing, and decision-making process. Such concerns are increased given OBSI's dual role of both the advocate for the investor and the adjudicator who is to determine a fair and binding outcome. We note that the "inquisitorial approach" often leads to the OBSI acting as an advocate for the investor (as OBSI itself notes).

Regardless of whether the proposal proceeds as IFIC recommends with only an enhanced stage one process or with the proposed two stage process, IFIC's view is the best method for OBSI to have true accountability for its decision-making process is if OBSI knows that its recommendations/decisions may be appealed to another alternative independent third-party procedure. IFIC's view is that a true accountability check is critically essential for OBSI's final decisions, particularly for disputes involving compensation amounts that are high. Ensuring OBSI remains accountable requires more than CSA oversight and the proposed new stage two does not achieve that result. Rather, it requires having a statutory right of appeal of OBSI's final decisions. In section #4 below, our recommendation proposes a statutory right of appeal to another alternative independent third-party procedure (i.e. not a civil court procedure) and that the alternative independent third-party be a division within the CSA (e.g. the OSC Capital Markets Tribunal) or a division within CIRO, which would also function as an added element of CSA's oversight of OBSI under the new proposed regime.

This simplified approach IFIC is proposing would create multiple improvements to the Proposed Framework. It would make the framework process (i.e. "complaint process flowchart") much simpler and easy to understand for investors; it adds specified fairness processes in OBSI's existing approach; it places a check and balance on OBSI's accountability for its final decisions (i.e. another independent third-party could review them); and it would serve as one element of enhancing the oversight regime the CSA states it is continuing to develop for OBSI that would complement the Proposed Framework[7].

4. *At the completion of the enhanced investigation and recommendation stage, OBSI's recommendation would become a binding decision on both parties, subject to the parties' right to judicial review only for compensation amounts below a threshold of $35,000. For compensation amounts that are $35,000 or above and either party does not agree with OBSI's decision, the parties have a statutory right of appeal to another alternative independent third-party procedure (i.e. not the courts, but to a division within the CSA (such as the OSC Capital Markets Tribunal) or a division within CIRO), unless the complainant abandons the process or commences litigation before OBSI issues its decision.*

   The first two headings in this section #4 provide additional context for IFIC's proposed revisions to the Proposed Framework as suggested by IFIC's recommendations below in this section #4.

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6 https://www.capitalmarketstribunal.ca/en/news/news-releases/new-governance-structure-takes-effect-osc

7 The Consultation states the following: "At this time, the CSA continues to develop an oversight regime for the identified ombudservice that would complement the proposed framework by balancing independence of the IDRS with a need for robust monitoring and response by securities regulatory authorities." "[The CSA is] of the view that a more comprehensive oversight regime should be developed for the identified ombudservice under the proposed framework, since it would be authorized to issue binding final decisions."

Need for more detailed data underlying incidences of settling below OBSI's recommended amount

The statistics provided in Table 1 in the Consultation about the 2018-2022 investment cases that settled below OBSI's recommend amount are as follows:

Table 1:

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

During this five-year time period, only 1% of cases (3 or 4 cases) under $10,000 were settled below OBSI's recommended amount, and only 13% of 113 cases (say 16 cases) under $50,000 were settled below OBSI's recommended amount. These reflect very good success rates for OBSI. Though there was a percentage increase in cases that settled below OBSI's recommended amount when the amount was from $50,000 – $99,999 (i.e. 46% settled lower), this affected 12 cases or so. For recommended amounts between $100,000 - $199,999 and $200,00 - $350,000 (43% and 67%, respectively, settled lower), this affected another total 12 cases. In total, only 42 out of 546 cases were settled lower, meaning approximately 92% were settled at the recommended amount.

The Consultation states that the incidence of low settlements is one of the observed patterns that informed the CSA's proposal for granting OBSI binding authority. However, there is no data in the Consultation that explains the reasons underlying the few instances when firms settled lower than OBSI's recommended amount. There may be several potential factors, ranging from a firm's perception of unfairness in the process, the firm's individual representative was responsible for the wrong-doing while the firm did not have a regulatory disciplinary finding against it, the firm was already heading into financial difficulties and winding up its business, it was the same firm(s) repeating this pattern, which would skew the data, or other key factors.

Without any clear understanding of the actual underlying reasons for the relatively few lower settlement incidences (i.e. 42 out of 546 cases (8%)), IFIC respectfully suggests that the CSA consider whether the significant costs to each investors, OBSI, and registered firms[8] that will be incurred to put in place the Proposed Framework is the most efficient and effective means to resolving this concern. IFIC recommends that before finalizing the Proposed Framework, the CSA provide detailed data on the lower settlement cases and consider whether the proposed means to resolve the CSA's concerns justify the additional resources and costs to all stakeholders, especially the anticipated direct and indirect costs to investors. Further research and analysis on this issue may reveal that the CSA's regulatory goals may be achieved through a simpler, more streamlined framework that is more resource and cost efficient for both OBSI and firms, and simpler and easy to understand for investors, such as the one we are suggesting. After all, based on OBSI's case retention data and the CSA's conclusions referred to in section #3 above, complainants generally find the current process used by OBSI to helpful and accessible, and complainants choose to remain engaged instead of pursuing other forms of dispute resolution or abandoning their case.

The appropriate revisions to OBSI's dispute resolution regime should be bespoke to Canada

The Consultation states another rationale for the CSA's proposal to grant OBSI binding decision-making authority is that Canada has not kept pace with the many jurisdictions globally with financial ombudservices that have authority to issue binding decisions. In particular, the Consultation refers

[8] Refer to Annex E, section 6 (b) in the Consultation.

to the ombudservices regimes in the United Kingdom[9], Australia[10] or Ireland[11] as being jurisdictions with similar legal systems to Canada's. IFIC's concern is that Consultation does not provide a detailed comparison of the models, processes, or scope of claims within their purview for each of those jurisdictions against OBSI's model. The CSA should not propose a dispute resolution regime with binding decision-making authority for OBSI simply on the basis of adopting a regime that is in place in the United Kingdom, Australia, and/or Ireland. The regime for OBSI should be bespoke to Canada to resolve only the known and well-researched areas or significant problems where improvements may be needed. IFIC recommends that before finalizing the Proposed Framework, there should be a second-round consultation that sets out a detailed comparison of the financial ombudservices models, processes, or scope of claims within their purview for each of these jurisdictions against OBSI's model if the CSA intends to maintain the Proposed Framework as it is currently structured.

For example, OBSI's model includes claims for unsuitable investments which are very complex, contentious (i.e. a finding of wrong-doing requires significant expertise in KYC, KYP, and suitability regulatory requirements) and typically will involve larger monetary amounts which makes them more contentious, whereas the UK model does not appear to have that type of claim in scope (based on a preliminary review by IFIC). We also note the UK framework provides for judicial review only and no statutory right of appeal. Given their scope of claims does not appear to include claims for unsuitable investments, having judicial review only to challenge their final decisions is somewhat less concerning. IFIC firmly believes that granting binding decision making authority for claims involving unsuitable investments without a right to a statutory appeal to contest the decision-making process would not be a fair and legally just process.

As another example, based on IFIC's preliminary review, it appears that for the UK and Ireland regimes, both with a two-stage process, only the decision from stage two in the process would have legal binding authority. The stage one process is generally to achieve a full and final settlement by the parties agreeing to a recommendation (i.e. per the "Initial Assessment" process in the UK) or an agreed amount between the parties achieved by an informal mediation (i.e. per the "Informal Stage" in Ireland). What is most important to note is that for both regimes, if stage two is triggered (i.e. the parties do not achieve a full and final settlement from stage one), the stage two process involves all details of the complaint being looked at afresh by the ombudsman (i.e. UK) or it is transferred to a formal investigation process with exchange of evidence including adjudication by oral hearings, where all details from stage one are kept confidential from the stage two process (i.e. Ireland).

These examples of the stage two process being a fresh and full complete investigation and review of the entire complaint also provides rationale for IFIC's recommendation under section #3 to remove the proposed new stage two [review and decision stage] from the Proposed Framework. Granting OBSI with legally binding decisions after the stage two as it is proposed in the Consultation, which is limited to only review of the specific objections raised by the parties, would be too powerful an authority considering the stage two review is only a limited one before issuing a final binding decision (i.e. the entirety of the complaint is not reviewed afresh during the proposed stage two and the details from the stage one process are not kept confidential).

Further, based on a preliminary review of the Australia regime, it appears to IFIC that the CSA's proposal is to adopt the same two step process which has different treatment for firms vs. complainants in terms of escalation for further review and binding effect of the final decision. However, given that the AFCA's role is "impartial and independent" and it "does not act for either

[9] Financial Ombusdman Service (UK) https://www.financial-ombudsman.org.uk/who-we-are/make-decisions

[10] Australian Financial Complaints Authority (AFCA) https://www.afca.org.au/what-to-expect/the-process-we-follow

[11] Financial Services and Pensions Ombudsman (Ireland) https://www.fspo.ie/our-services/; https://www.fspo.ie/documents/FSPO-Dispute-Resolution-Service-Leaflet-2023.pdf; https://www.fspo.ie/our-services/Investigations-Services-Information-Leaflet.pdf

party or advocate their position", that suggests it is not most appropriate regime to replicate as is for Canada because OBSI is not impartial, and its services include being an advocate for the complainant.

Lastly, the Consultation explains that in the UK and Australia, only the firm is bound, and no appeal is permitted. In Ireland, both the firm and the complainant are bound, however, an appeal of a decision to the High Court is permitted for both parties. It is notable that although in Ireland the stage two process is a formal investigation process, revisiting all the issues raised in stage one, that regime provides a statutory right of appeal to the High Court. IFIC agrees with this post-decision appeal mechanism based on guiding principle "B" above.

IFIC's recommendations

Based on the data in Table 1 referred to above, the context provided under the above two headings, and the guiding principles "B" and "C" above, IFIC makes the following recommendations:

- At the completion of the enhanced investigation and recommendation stage, OBSI's recommendation would become a binding decision on both parties subject to the parties' right to judicial review only for compensation amounts below a threshold of $35,000.
- For compensation amounts that are $35,000 or above and either party does not agree with OBSI's decision, the parties have a statutory right of appeal to another alternative independent third-party procedure (i.e. not the courts), which is division within the CSA (i.e. the OSC Capital Markets Tribunal) or a division within CIRO, unless the complainant abandons the process or commences litigation before OBSI issues its decision

IFIC's recommendations in this regard are whether the proposal is finalized as only an enhanced stage one process as IFIC recommends in section #3 above or the two-stage process as proposed in the Consultation.

IFIC supports OBSI being granted authority for its decisions being legally binding on both parties for compensation amounts up to $35,000, and that the post-decision mechanism for the parties should be judicial review only (where the complainant does not abandon/withdraw from the process or commence litigation).

IFIC's view is that for disputes concerning more significant amounts, both parties should have the right to legal due process, including procedural fairness supporting decision-making and a statutory right to appeal. IFIC suggests that $35,000 and above is a reasonable monetary threshold for the parties to contest OBSI's decision by a statutory right of appeal because that is the same limit for small claims court jurisdiction in some Canadian provinces (e.g. Ontario and BC). Small claims court monetary thresholds take into consideration that the full legal due process and formal rules of evidence and court procedures (oral cross examinations) are dispensed with because the amount of the dispute is low. It is also reasonable based on the data from Table 1 above, which indicates that the lowest percentage of cases that settled below OBSI's recommended amount was when the amount ranged from $0 to $50,000 (i.e. which also comprised the largest number of OBSI closed cases with OBSI's monetary compensation recommendations). In other words, it is likely that the parties will generally not contest a recommendation/decision by OBSI if it is below $35,000.

IFIC strongly recommends that the Proposed Framework be revised to provide that where OBSI's decision is for compensation amounts that are $35,000 and above, OBSI continues to facilitate the parties' acceptance of OBSI's decision by an agreed settlement. If either (or both) parties formally object to OBSI's decision where the compensation amount is $35,000 and above, the objecting party(ies) should have a statutory right of appeal to another alternative independent third-party procedure (i.e. that is not a civil court procedure), unless the complainant either abandons the process or commences litigation before OBSI issues its decision. A civil court procedure is not recommended because IFIC recognizes that it would not be fair to a complainant who does not have the resources to contest an appeal of OBSI's decision through a civil court procedure (i.e. with rules of evidence and cross-examinations they would likely be required to retain counsel to assist them).

Instead, IFIC recommends that where OBSI's decision is a compensation amount that is $35,000 or above, the statutory right of appeal mechanism available for both parties should be to another alternative independent third-party procedure, which is a division within the CSA (such as the OSC Capital Markets Tribunal) or a division within CIRO, unless the complainant abandons the process or commences litigation before OBSI issues its decision. Having a division of either the CSA or CIRO be the independent body reviewing one or both parties' objections to OBSI's decision would also be a way for the CSA to develop a more comprehensive oversight regime over OBSI to complement the Proposed Framework.

IFIC's recommendation in this regard intends that both parties should have the same OBSI post-decision mechanisms (i.e. judicial review only for compensation amounts below $35,000 and statutory right of appeal to another alternative independent third-party procedure for compensation amounts of $35,000 or above). [Note: See section #5 below for IFIC's recommendations and reasons for proposing equal treatment for both parties.]

Adopting this recommended approach would be consistent with the CSA's substance and purpose of the Proposed Framework[12], while ensuring the important principle of providing fairness to both firms and complainants is met (i.e. to uphold the important right of full legal due process for both the firm and complainant where disputes involve larger amounts of money where the dispute resolution is with a quasi-judicial decision-making authority).

Moreover, the right to a fair process is critical when binding decision authority is exercised for decisions in dispute resolution. We recommend the below elements to ensure an appropriate level of procedural fairness:

a) Right to Know: To ensure procedural fairness, parties must be given notice of the complainant's allegations, and the dispute should be confined to the issues raised by the plaintiff (or which the parties have reasonable notice of through the complaint.)

b) Right to Disclosure: Firms should have the opportunity to examine evidence considered and relied upon by OBSI at the investigation and recommendation stage as well as at review and decision stage.

c) Written Reasons: Firms should have the right to receive written reasons for the decision. Such reasons must be detailed and adequate to know the evidence relied upon and the reasoning behind the decision.

d) Legal Defences: Parties should be able to use all legal defences as they may in a court of law or administrative tribunal.

Other suggestions for robust processes to handle and address investment complaints include due regard to relevant statutes (e.g., Statutory Powers Procedures Act and Limitations Act and regulations (e.g., NI 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations and Companion Policy NI 31-103).

5. *The complainant and firm should be treated the same in terms of the treatment of OBSI's recommendation/final decision and post-final decision mechanisms.*

The Proposed Framework contemplates that if a complainant does not withdraw from or object to OBSI's recommendation at either the completion of stage one [*investigation and recommendation stage*] or stage two [*review and decision stage*], OBSI's final decision will not be binding on the complainant and the complainant may consider litigation as an alternative redress pathway. It also contemplates a firm is always bound by a decision (either at stage one or two) unless the complainant abandons the process or commences litigation. In all scenarios, a firm is always bound

[12] That OBSI's final (or deemed final decisions) are binding thereby enhancing investor protection and confidence in the investments sector and providing aggrieved retail investors with a fully effective system of redress that final, fair, and accessible.

by the OBSI decision at either stage and only a judicial review of OBSI's decision is available for firms.

IFIC's concern with this proposed approach is that it does not achieve the principle of providing fairness to both parties. If the Proposed Framework proceeds with the new stage two [review and decision stage] included, IFIC recommends that regardless of whether the complainant is the party that triggered the stage two review and decision (i.e. even if it did not object to the stage one recommendation), OBSI's decision should also be binding on the complainant following the stage two review and decision process.

IFIC submits this proposed approach is reasonable because if the Proposed Framework is implemented as is, complainants may choose to use OBSI's services knowing/realizing that the firm will be bound to OBSI's decision with no appeal mechanism to challenge OBSI's decision on the merits, so long as the complainant never withdraws from/abandons the process before the final decision. Complainants should not be able to participate in the entire OBSI process and at the end of it, determine not to be bound by it if they do not approve of the outcome. This will place a resources and cost burden on OBSI's services, and it provides firms with no final certainty whether the dispute has ultimately ended even though they are bound to the final decision. However, IFIC agrees that complainants should be able to abandon the process or commences litigation at any time during the process before OBSI's final decision is made.

IFIC recommends that both the firm and complainant should be treated the same in terms of the treatment of OBSI's final decision, whether the framework proceeds as a one stage process (as IFIC recommends above) or two stages, unless the complainant abandons the process or commences litigation before the process completes (i.e. before OBSI's final decision). Therefore, IFIC proposes revising the Proposed Framework to provide the same treatment of OBSI's final decisions and post-decision mechanisms for both the complainant and the firm as we explained in more detail in our recommendations under section #4 above (i.e. for both stages or if there is only one enhanced stage).

By the above proposed revision, IFIC is suggesting a framework that is a bespoke regime for Canada, being a hybrid of the frameworks in Ireland vs. the United Kingdom and Australia. As mentioned in section #4 above, the Consultation explains that in the UK and Australia, only the firm is bound, and no appeal is permitted. In Ireland, both the firm and the complainant are bound, however, an appeal of a decision to the High Court is permitted by both parties. As a hybrid suggestion, IFIC's proposed revisions above incorporate Ireland's framework of treating both parties the same in terms of being bound by the decision and having the same rights post-decision to having a statutory right of appeal as the post-decision mechanism (i.e. not judicial review only for the firm). Yet, it also incorporates IFIC's recommendations from section #4 above regarding the monetary threshold at which OBSI's recommendation/decision is legally binding and for when both parties have a statutory right of appeal to another alternative independent third-party procedure if either party objects to OBSI's recommendation/decision, unless the complainant abandons the process or commences litigation before OBSI issues its final decision.

Furthermore, revising the Proposed Framework in this manner as well would make the "Overview and Flowchart" provided in Annex D of the Consultation simpler and easier to follow, improving comprehension by both complainants and firms. IFIC's concern is that, as it is currently written, it is very complex and confusing to comprehend, and therefore may make complainants frustrated that they may need to retain third party legal or other assistance to assist them with understanding it. The current Overview and Flowchart creates a discouraging and potentially expensive barrier for complainants.

6. *If the Proposed Framework proceeds with the new stage two [review and decision stage] included, the CSA should provide more transparency about the procedural processes the "senior decision-maker" at this level of review will need to meet (e.g. what applying the "fairness standard" and the "essential process test" is) and the rules should require the "senior decision-maker" to have the*

necessary training, experience, and knowledge that is similar to an administrative tribunal-like adjudicator.

As previously mentioned, the Consultation states that during the new stage two [*review and decision*], a "*senior decision-maker"* of OBSI who was not involved in the investigation and recommendation stage (i.e. stage one) would review only the specific objections made by the objecting party(ies) and after completing its review, would issue a decision.

The power to make binding decisions in a dispute resolution would result in OBSI becoming a quasi-judicial decision-making authority. It should act in a way commensurate with a higher standard of qualifications to exercise that authority. IFIC's concern is that the Consultation does not provide sufficient information about the required qualifications of a "senior decision-maker" at OBSI.

IFIC's view is the individual exercising this type of significant power should have the necessary education, training, skills, knowledge and experience that is similar to an administrative tribunal-like adjudicator (i.e. not only on the basis of being senior at OBSI by years of service or position title only). IFIC recommends that the CSA prescribe this level, or a similar standard, of qualification requirements that OBSI is required to meet for this senior decision-maker role.

As noted in section #3 above, the Consultation explains that in conducting the stage two review, OBSI would adopt a process that achieves a proportionate and fair procedural threshold to be followed by the senior decision maker applying the "*fairness standard*" and the "*essential process test*" to achieve procedural fairness. The Consultation states the CSA contemplates that the "*essential process test*" would be set out in legislative amendments in the local jurisdictions.

IFIC's concern is that the Consultation provides very little details about what these procedural processes are and that it is currently not known what the legislative amendments will set out. Without these specific details, it is not possible to know whether the final Proposed Framework will provide fairness for both firms and complainants in regard to this new stage two [review and decision stage]. Therefore, IFIC recommends that before finalizing the Proposed Framework, and if the second stage is retained, there should be a second-round consultation that includes these details for public comment.

In addition, if the Proposed Framework proceeds with the new review and decision-making stage included, IFIC recommends that the proposed enhanced CSA oversight regime for OBSI ensures these proposed legislated procedural fairness processes and essential process test standards are met by OBSI.

Recommendation for Greater Overall Reforms to the Dispute Resolution Regime for the Investment Sector

IFIC believes that greater overall reforms to the complaint handling and dispute resolution services regime in Canada are needed in the investment sector. The CSA should undertake reforms to resolve the complexity and fractured structure of the existing regime, and to make the regime harmonized across all jurisdictions in Canada. IFIC's concern with the Proposed Framework is it does not offer improvements to the existing regime in this regard and therefore, investor confusion trying to navigate the existing non-harmonized and multi-channel/fractured regime will continue. The CSA's aim to improve investor confidence in the investment services sector and its regulation may not succeed by implementing the Proposed Framework.

IFIC's view is that the most optimal approach to making reforms to the existing regime would be to undertake a complete redesign and restructure of the existing complaint handling and dispute-resolution landscape across all jurisdictions of the CSA, including Quebec and CIRO. The focus of such redesign should be to make the process fully harmonized and do away with the multi-dispute resolution service provider model for Canadian investors (i.e. by using OBSI services, the (formerly called) IIROC Arbitration

Program[13], the regime in Quebec for Quebec residents, and/or reporting a complaint directly to a provincial securities regulator or CIRO).

Need for a fully harmonized regime: See section #1 above under the heading "*Key Aspects of the Proposed Framework that Should be Revised" for* our comments regarding the importance and necessity in also having all future overall reforms to the complaint handling and dispute resolution regime fully harmonized across all CSA jurisdictions.

Need for a non-fractured, streamlined, simplified regime: For firms outside of Quebec, the existing regime is fractured and complicated which not only is confusing for investors, but also places registered firms in the circumstance that for a complaint with a single complainant they may be responding to a number of overlapping and somewhat duplicative channels/pathways in responding to the complaint. For example, an investor may seek redress by registering a complaint with the dealer firm (ie. branch manager) and/or with the dealer firm's complaint handling department, and/or report it to a provincial securities commission and/or CIRO, and/or escalate it with OBSI, and/or file a civil court action. Also, for CIRO member firms either outside or in Quebec, an investor may avail themselves of the (formerly called) IIROC Arbitration Program[14]. If a complainant should resort to accessing each pathway that is available to them, each involves time and cost to the individual dealer/advisor and the firm for each complaint review process. Each of these avenues of investigation, review, and decision process has a different mandate to investigate and different remedies available, meaning the firm must prepare a variety of responses for the different complaint review/resolution channels. In addition, the elements of the same complaint may continually change across each of the complaint review/resolution channels. This current environment can be very confusing to investors, which in turn can lead to mistrust with the industry. (Note: The existing regime is even confusing for seasoned professional litigation counsel in the securities sector.) It also adds significant time and cost for firms in the investment sector in each case where a complainant resorts to each overlapping means to make a complaint, which costs may indirectly get passed on to investors participating in the marketplace.

Recommendation for immediate near future: Should the Proposed Framework proceed in the short term, IFIC strongly recommends that the CSA make it a top priority to continue to reshape the complaint handling and dispute resolution services regime in Canada for complaints in the investment sector by considering ways that the newly formed CIRO, together with the delegation of certain powers from the AMF to CIRO, may provide an opportunity to make greater overall reforms to create a fully harmonized, non-fractured, streamlined, and simplified investor complaint handling and dispute-resolution services regime in Canada. Also, British Columbia should participate in it, not have their own legislative system. The Consultation states that "[t]he CSA recognizes the importance of having an efficient system that resolves complaints fairly and effectively without creating undue burden for either party to a dispute". IFIC's concern is that much more than this Proposed Framework should be done to achieve an efficient and effective dispute resolution system for Canadian investors.

Other Concerns with OBSI Processes

IFIC is also concerned with certain existing OBSI processes which already have significant impacts for firms going through OBSI's current dispute resolution services, and will have even greater impacts since OBSI would be authorized to issue binding decisions. Therefore, IFIC strongly recommends the following revisions are made to OBSI's process:

- The OBSI compensation limit/cap (i.e .currently up to $350,000) should only apply to a single complaint/dispute matter for a complainant regardless of the number of their affected accounts (e.g. RRSP account and savings account both with the same issue in dispute) or accountholders (e.g. joint account holders with the same dispute for the same account). In other words, there should not be an up to $350,000 claim/binding decision for each account separately nor for each

[13] See footnote #2.
[14] Ibid

accountholder in a single account, nor for each of multiple accounts that are, in effect, part of a class action.

This should also be the case if a certain monetary threshold (i.e. $35,000 as IFIC proposes in the submission) is included in the framework as a decision binding on the parties without a right to appeal. For clarity, the $35,000 monetary threshold should apply to a complainant's single complaint/dispute matter, regardless of the number of the complainant's affected accounts. In other words, several OBSI binding decisions that may be less than $35,000 per relevant account, might well exceed $35,000 in total, in which case a statutory right of appeal should be available. Joint accounts should be jointly subject to the $35,000 threshold regardless of the number of joint accountholders.

- OBSI bylaws should be revised to have OBSI's binding decisions ordered against the individual dealer representative from the firm responsible for the claimant's loss, not only the firm. Under the existing process, only the firm is responsible to pay compensation even if the wrong-doing was caused solely or partially by the individual dealer representative. IFIC questions whether circumstances like that may have led to some firms settling for lower amounts than OBSI's recommended amount. In the case of small independent firms, an individual dealer representative should not be able to leave the firm immediately following a large compensation claim thereby leaving the firm on the hook to cover the loss. If OBSI's decisions have binding authority, OBSI's processes should be revised to have OBSI's decisions name both the firm and the individual dealer representative and provide some apportionment to each to compensate the complainant.
- OBSI's compensation limit/cap of $350,000 should not be increased without further prior public consultation, particularly under the circumstances of OBSI being authorized to issue binding decisions involving amounts up to $350,000. See IFIC's responses to Question #4 in Appendix A below. Also, if a future proposal to increase OBSI's limit/cap is simply on the basis to have OBSI's limit match those of similar international financial ombudservices with binding decision-making authority, detailed research and comparisons should first be carried out on those foreign securities regulatory regimes and published before proposing an increase. Increasing OBSI's limit would not be warranted if those foreign jurisdictions have regulatory regimes that differ greatly from the Canadian investment sector (i.e. they do not have as robust investor protection principles already embedded in the rules of the regulatory regime) and if the foreign financial ombudservices' model, processes, and scope of claims within their purview is not the same as OBSI.

* * * * *

CONCLUSION

IFIC is pleased to have had this opportunity to provide our comments on the Consultation. Please feel free to contact me by email at amitchell@ific.ca. I would be pleased to provide further information or answer any questions you may have.

Yours sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA

By: Andy Mitchell
President & CEO

APPENDIX A

Question #1

The CSA contemplates that under the proposed framework, an IDRS would be authorized to issue binding decisions in circumstances where it is designated or recognized in a jurisdiction as the identified ombudservice. It is possible that some CSA jurisdictions may not designate or recognize OBSI as the identified ombudservice at the same time, resulting in the status quo (e.g., OBSI making non-binding recommendations only) applying in those jurisdictions until OBSI were designated or recognized as the identified ombudservice. If jurisdictions designate or recognize OBSI as the identified ombudservice at different times, what operational impacts, if any, would you anticipate from an IDRS being designated or recognized in some but not all jurisdictions? How can these impacts best be managed?

IFIC Response: See IFIC's response in section #2 of the submission.

Question #2

The proposed rule amendments include a new provision requiring compliance with a final decision of the identified ombudservice. Under the proposed framework, we contemplate that both a recommendation or decision of the identified ombudservice could become a final decision that will be binding on the firm under certain circumstances. Specifically:

a. With respect to a recommendation made by the identified ombudservice following the investigation and the recommendation stage, we contemplate the recommendation becoming a final decision where (i) a specified period of time has passed since the date of the recommendation, (ii) neither the firm nor the complainant has objected to the recommendation, and (iii) the complainant has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice (the deeming provision). What are your general thoughts about the deeming provisions and the circumstances that trigger it? Please also comment on whether 30, 60, 90 days would be an appropriate length of time to be specified for a recommendation to be deemed a final decision under the deeming provision.

b. With respect to the decision made by the identified ombudservice following the review and decision stage, we contemplate the decision becoming final where (i) a specified period of time has passed since the date of the decision (the post-decision period), and if the complainant did not trigger the review and decision stage, (ii) the complainant has not rejected the decision and has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice. Please comment on the provision of this post-decision period and whether 30, 60 or 90 days would be the appropriate length for the post-decision period.

IFIC Response: At a minimum, 90 days should be granted for stages 1 and 2.

Question #3

The proposed framework contemplates that complainants could not reject a decision of the identified ombudservice if they initiated the second-stage review of the recommendation by objecting to it. What are your views on this approach?

IFIC Response: IFIC agrees with this element in that it contemplates the complainant should also be bound by OBSI's final decision. However, we don't agree with it being the only trigger for when OBSI's decision is also binding on the complainant. See IFIC's response in section #5 of the submission. The complainant and firm should be treated the same in terms of the treatment OBSI's recommendation/final decision and post-final decision mechanisms for both stages or if there is only one enhanced stage (as IFIC recommends in section #3 of the submission).

Question #4

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

IFIC Response: IFIC's view is that $350,000 already is a substantial amount for binding decision-making authority. IFIC does not support an increase in this maximum limit if the Proposed Framework does not include a statutory right of appeal to another alternative independent third-party procedure as IFIC recommends in section #4 of the submission.

Further, increasing this compensation limit will only cause more overlap between OBSI's services and the (formerly called) IIROC Arbitration Program[15] and create more confusion for investors in terms of too many multiple and overlapping pathways to choose for dispute resolution services. See IFIC's response in the submission under the heading and subheading "*Recommendation for Greater Reforms to the Dispute Resolution Regime for the Investment Sector - Need for a non-fractured, streamlined, simplified regime*" on page 12 of the submission.

Also, see IFIC's response in the submission under the heading "Other Concerns with OBSI's Processes", the third bulleted paragraph.

Question #5

The proposed framework does not contemplate an appeal of a final decision to either a securities tribunal, or a statutory right of appeal to the courts (although parties could still seek judicial review of a final decision). What impact, if any, do you think the absence of an appeal mechanism will have on the fairness and effectiveness of the framework for parties to a dispute?

IFIC Response: See IFIC's responses in section #4 and #5 of the submission.

[15] See footnote #2.

Question #6

Should the proposed framework include a statutory right of appeal to the courts or another alternative independent third-party procedure for disputes involving amounts above a certain monetary threshold (for example, above $100,000)? If so, please explain why.

IFIC Response: IFIC recommends a $35,000 monetary threshold for both parties to have a statutory right of appeal to another alternative independent third-party procedure (i.e. not the courts). See IFIC's response in section #4 of the submission for our proposal and rationale.

Question #7

Are there elements of oversight, whether mentioned in this Notice or not, that you consider to be of particular importance in ensuring the objectives of the proposed framework are met? If so, please explain your rationale.

IFIC Response: See sections #3 and #4 of the submission for recommendations on ways to revise the Proposed Framework, which would also provide a way for the CSA to develop a more comprehensive oversight regime to complement the Proposed Framework. Also, see the last paragraph of section #6 in the submission for another suggestion on improving oversight.

Also, as mentioned in the Consultation, IFIC agrees that a more comprehensive oversight regime needs to be developed for OBSI that complements the Proposed Framework, since OBSI would be authorized to issue binding decisions. We especially agree that it is important the level of oversight should broadly follow the approach for oversight of SROs, clearing agencies, and exchanges, including all the elements mentioned in the "CSA Oversight" part of the Consultation. IFIC believes this standard of oversight is commensurate with being granted the power to have binding-authority for decisions in a dispute resolution, which is a quasi-judicial decision-making authority. This is especially of importance if the CSA is contemplating excluding OBSI from legislation that sets out procedural requirements for tribunals, such as the Statutory Powers Procedures Act (SPPA), which sets out basic minimum procedural rules that must be met supporting decision-making.

Question #8

Do you consider oversight, together with the other aspects of the proposed framework discussed in this Notice, to be sufficient to ensure that the identified ombudservice remains accountable?

IFIC Response: No, IFIC does not consider these alone to be sufficient. See section #3 of the submission regarding IFIC's concerns with the second stage "senior decision-maker" also being OBSI, which creates a real or perceived conflict of interest. Because there is no clear delineation of structurally independent divisions, it does not provide adequate checks and balances on OBSI's accountability for its binding decision-making process. IFIC's recommendations in sections #3 and #4 of the submission proposes a method to ensure OBSI remains accountable.

Question #9
Please provide your views on the anticipated effectiveness of prohibiting the use of certain terminology for internal or affiliated complaint-handling services that implies independence, such as “ombudsman” or “ombudservice”, to mitigate investor confusion. **IFIC Response:** No comment.