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**Delivered by email to:** [consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

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Attention: Me Philippe Lebel, Corporate Secretary and Executive Director, Legal Affairs

## **Re: Proposed regulation respecting complaint processing and dispute resolution in the financial sector**

The Ombudsman for Banking Services and Investments (OBSI) is pleased to provide our comments to the Autorité des marchés financiers (AMF or the Authority) on its proposed regulation respecting complaint processing and dispute resolution in the financial sector.

OBSI is a national, independent, and not-for-profit organization that helps resolve and reduce disputes between consumers and over 1500 banks, credit unions and financial services firms from across Canada in both official languages. We have been providing this service for over 26 years. As such, we are uniquely positioned to share our views and insights for this important consultation, particularly with respect to the deposit-taking and securities sectors.

### **Overview of comments**

Our comments respond to the Authority's recent notice of consultation dated December 8, 2022 (the Consultation Document) and accompanying updated draft regulation (the Regulation).

Overall, OBSI commends the objectives, principles and processes proposed in the Consultation Document and Regulation. We note these areas of support below, in some cases with suggestions for further enhancements. The key points we focus on below are:

- The definition of complaint should be expanded
- Complainant assistance requirements should provide more guidance
- Firm obligations to address systemic issues should be expressed with specificity
- Fair resolution includes consideration of consumers' reasonable expectations and fair redress.

We also make additional observations on several specific provisions.

## Effective complaint handling is an essential component of financial consumer protection

As long-time advocates for a fair, effective and trusted dispute resolution system, we strongly support the central objectives identified by the Authority in this consultation, namely:

- a) establishing a common set of rules and practices to be followed by financial institutions, financial intermediaries and credit assessment agents (collectively “financial firms”); and
- b) ensuring that all consumer complaints are processed fairly and diligently and, more specifically, that the analysis of such complaints enables financial firms to identify recurring issues relating to their activities and take appropriate action to address them.

Effective complaint handling is recognized as an essential component of financial consumer protection and regulatory interest worldwide. The Organization for Economic Cooperation and Development (OECD) has focused significant attention and analysis on the importance of effective complaints handling to financial systems in recent years through the work of its Committee on Financial Markets and its Task Force on Financial Consumer Protection. This global effort has resulted in the development of the OECD High Level Principles on Financial Consumer Protection in 2011<sup>1</sup> as well as a substantial body of technical and analytical reports in the years that have followed. The OECD/G20 High Level Principles, which have been endorsed by all G20 finance ministers and central bank governors, recognize ten key principles, one of which is complaints handling and redress. The key elements of this principle include that financial services consumers should have access to complaint handling and redress mechanisms that are "accessible, affordable, independent, fair, accountable, timely and efficient."

The World Bank has released a technical note intended to provide methodological guidance for regulators and financial services providers when developing and implementing internal dispute resolution frameworks to ensure they are consistent with international good practices.<sup>2</sup> This technical note calls to readers' attention the systemic importance of effective internal dispute resolution, observing that:

*Core to an effective financial consumer protection framework is an accessible and efficient recourse mechanism that allows consumers both to know and to assert their rights to have their complaints addressed and resolved in a transparent and just way within a reasonable timeframe. Complaints handling mechanisms are especially important for low-income and vulnerable financial consumers, to whom timely and effective recourse processes can have a decisive influence over their trust in their financial service provider (FSP) and in the financial sector in general. Increased trust*

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<sup>1</sup> <https://www.oecd.org/daf/fin/financial-markets/48892010.pdf>

<sup>2</sup> Complaints Handling within Financial Services Providers – Principles, Practices, and Regulatory Approaches (June 2019)

*contributes to consumers' uptake and sustained usage of financial services and, consequently, their economic livelihoods.*

The Board of the International Organization of Securities Commissions (IOSCO) recently published a report on complaint handling and redress for retail investors<sup>3</sup> in which they observed that “When an investor or financial consumer is harmed by misconduct or illegal practices, the existence of effective mechanisms for addressing the issue is important not only for the aggrieved individual, but also for producing positive externalities such as improving market discipline and promoting investor confidence in financial markets.”

### **The definition of complaint should be expanded**

THE DEFINITION OF COMPLAINT SHOULD NOT BE LIMITED TO CURRENT CLIENTS OF THE FIRM AND SHOULD INCLUDE ALL FINANCIAL SERVICES OF THE FIRM, WHETHER OFFERED OR NOT

The definition of a “complaint” under section 3 of the Consultation Document is broad and comprehensive in the sense that it includes any expression of reproach or dissatisfaction about a financial firm’s products or services.

However, two elements of the definition could inadvertently limit the scope of complaints that firms must address, and we urge the Authority to modify those elements.

First, we suggest clarifying that the Regulation applies to complaints that may be made not only by a current “member of the clientele” of a financial firm, but by any person. We make this recommendation because in our experience, it is not uncommon for a valid complaint to be made by a person who is not a current client of a firm. Examples would include a former customer, a person claiming a beneficial interest through a customer, or a person who did not become a customer because they were denied access to a product or service.

Second, we recommend broadening the definition beyond products or services “offered” by a financial firm. We note that valid complaints may relate to actions of the firm, or products sold through the firm or provided by the firm without being offered. Such an expanded definition would capture, for example, complaints about off-book products or services – particularly in cases where misrepresentations by an employee or agent of the firm induced a customer to believe the off-book products or services were provided through the firm, or where inadequate supervision by the firm may have enabled such a misrepresentation to succeed.

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<sup>3</sup> Complaint Handling and Redress System for Retail Investors – Final Report (January 2021)

In order for the objectives of the Regulation to be fully met, it is important that it protect the reasonable expectations of all individuals dealing with financial services firms, including expectations about their relationship with the firm and the firm's responsibility for advice and products furnished by its agents.

### **Complainant assistance requirements should provide more guidance**

THE COMPLAINANT ASSISTANCE PROVISIONS SHOULD PROVIDE ADDITIONAL GUIDANCE ON THE EXTENT OF THE ASSISTANCE THAT FIRMS ARE OBLIGATED TO PROVIDE TO CONSUMERS

We strongly agree with the directives set out in sections 6 and 11 requiring firms to assist complainants through the complaints process. This is critically important because financial consumers are often unable to fully articulate their complaints on their

own or bring to light all material concerns. In our experience, consumers rarely frame their complaints in a manner that refers specifically to regulatory requirements or issues. Lacking this base of knowledge, most consumers frame their complaints in terms of the impact of the problem they have identified on them or others. Complaints often lack specificity. Some complainants, having conducted some independent research, will try to frame their complaints in oddly specific ways, relying on definitions or other information they have found, however the effect of this is often confusingly opaque. Consumer complaints are often also incomplete, omitting important facts and details while focussing on less relevant ones.

With this in mind, we recommend modifying sections 6 and 11 be expanded to clarify that a financial firm's obligation to "properly assist" complainants involves more than just a duty to help them navigate the complaint handling process. In order to develop a "comprehensive view of the complaints received" (as directed by section 9) and to fully and truly "understand the complaints filed with it" (as directed by section 11), the Regulation should specify that:

- a) whenever necessary, firms must help complainants articulate their concerns giving rise to their complaint, and must help them prepare and document the full factual circumstances relevant to those concerns,
- b) firms must assess whether the factual circumstances of the complaint indicate that additional material issues exist that need to be addressed in order to fully rectify harm done to the complainant, especially where the extent of harm may not be apparent to the complainant, and
- c) firms must include any additional issues identified in the evaluation of a complaint's merits, and resolve them as an integral part of the complaint.

## Firm obligations to identify and rectify systemic issues should be expressed more specifically

THE OBLIGATIONS OF FIRMS SHOULD BE CLARIFIED TO INCLUDE AN EXPRESS REQUIREMENT TO PROACTIVELY IDENTIFY SYSTEMIC ISSUES ARISING FROM COMPLAINTS AND FULLY RECTIFY HARM FOR ALL IMPACTED CONSUMERS

Section 9 of the proposed Regulation requires that firms develop policies to provide a comprehensive view of the common causes of complaints they receive, and to address the issues raised. Additionally, section 11 directs firms to remedy a complaint where the firm's own analysis identifies that it may have repercussions for other clients.

Read together, these provisions suggest firms must look for, and must proactively remedy, systemic issues that become apparent through the client complaint process. However, we note that sections 9 and 11 do not say this clearly. As currently drafted, these sections leave open possibilities for alternative interpretations. For example, the reference to identifying common causes in section 9 could be interpreted as actionable only in connection with section 8 (1), which directs firms to periodically apprise their officers of the number of complaints received "and the common causes thereof." Similarly, it is unclear whether section 11 imposes a positive duty on firms to determine if clients other than the complainant have been harmed, or merely a duty to address repercussions that the firm happens to notice while investigating the complainant's concerns.

The objectives of the Regulation, as outlined in the Consultation Document, provide useful guidance regarding the Authority's intentions on systemic issues – particularly the objective that "all consumer complaints are processed fairly and diligently and, more specifically, that the analysis of such complaints enables financial firms to identify recurring issues relating to their activities and take appropriate action to address them." From this, we surmise the Authority expects firms to:

- a) actively examine complaints individually and collectively for indications of systemic problems causing consumer harm,
- b) diligently identify all clients harmed as a result of a systemic issue, and
- c) fully rectify that harm for all affected clients regardless of whether any complainants themselves raise the systemic problem as an issue.

However, this should not be left to interpretation. Therefore, we urge the Authority to clarify sections 9 and 11 in order to make the Authority's intentions clear regarding the positive obligation of firms to identify and rectify systemic issues for all impacted consumers.

**The obligation to process complaints fairly should specifically include consideration of consumers' reasonable expectations and fair redress**

FAIR RESOLUTION OF FINANCIAL SERVICES COMPLAINTS INCLUDES CONSIDERATION OF CONSUMERS' REASONABLE EXPECTATIONS AND REDRESS THAT PLACES THE CONSUMER IN THE PLACE THEY WOULD HAVE BEEN HAD NO ERROR OR WRONGDOING OCCURRED

The Consultation Document specifies that a principal objective of the Regulation is to ensure that all consumer complaints are processed fairly and diligently, but does not offer further guidance as to what constitutes fair processing of complaints. We suggest that the Regulation should specify that fair resolution of financial

services complaints includes two key considerations: the protection of the reasonable expectations of the consumer and the offering of fair redress when appropriate.

*Consideration of reasonable expectations supports fair outcomes and consumer confidence*

As discussed above, fair resolution of financial complaints includes consideration of the consumer's reasonable expectations in the circumstances, in addition to the legal rights and obligations of the consumer and the financial firm. This is the fairness standard applied by financial ombudsman services worldwide because:

- a) it reflects the standard typically applied by courts of law and therefore reflects the rights consumers would have if they pursued their claim through the courts, and
- b) it is the standard expected by financial services consumers and is therefore most likely to support the overarching objective of financial services regulation to promote consumer confidence in financial markets.

Including an explicit requirement in the Regulation that Québec financial services firms must consider consumers' reasonable expectations in their complaint handling process would support the Consultation Document's central objective of establishing a uniform practice among financial firms for fairly resolving complaints. Moreover, it would integrate each firm's complaint handling practices with the standard commonly employed at the next level of dispute resolution for matters that escalate beyond the firm's process, such as the AMF, a financial services ombudsman, or the civil courts.

The consideration of consumers' reasonable expectations is also consistent with art. 1437 of the Québec Civil Code, which protects consumers from contractual provisions that depart from the fundamental obligations arising from the rules normally governing the contract and imposes a duty of clarity on one

who seeks to enforce unusual or harsh contractual terms,<sup>4</sup> as well as the concept of good faith, which is central to the interpretation of contracts in Québec.<sup>5</sup>

*Fair redress places the consumer in the position they would have been had the wrongdoing not occurred*

The fair resolution of complaints also requires that, where a consumer has incurred losses as a result of an error or wrongdoing, fair redress should be paid to the consumer.

As currently drafted, the Regulation does not provide any guidance to firms relating to compensation and redress, beyond the general objective that consumer complaints should be processed fairly, and the provision at section 13 that, where offers are made to a consumer, the consumer should have adequate time to seek advice and the compensation should be paid within 30 days.

Québec consumers and firms would benefit from additional guidance in the Regulation to require firms to offer fair compensation if compensation is warranted, and to stipulate that fair compensation should be an amount sufficient to place the harmed consumer in a position they would have been had the error or wrongful conduct not taken place. Such a requirement would be consistent with civil justice norms in courts across Canada and international best practices among ombudsman and other dispute resolution services. It is the methodology that OBSI uses, and one that we have found appropriate to the fair resolution of cases across a wide range of circumstances.

We urge the Authority to expressly mandate consideration of reasonable expectations and fair redress in complaint handling by financial firms. These measures constitute the most effective and appropriate ways to achieve the Consultation Document's central objectives; and, as noted earlier, successful attainment of those objectives will benefit financial firms, enhance protection for Québec consumers, and foster greater public confidence in the province's financial markets.

### **Additional Comments**

OBSI strongly supports many of the amendments that the AMF has included in the proposed Regulation. We note these areas of support below, in some cases with suggestions for further enhancement.

#### *Section 7 – Personnel handling complaints*

At section 7, the Regulation provides specific guidance to firms on the provisions of their complaints policy that relate to the personnel who will be responsible for handling complaints. We agree with the proposed provisions, and suggest adding further guidance to specify that, wherever possible, complaints

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<sup>4</sup> Sébastien Grammond, "Reasonable Expectations and the Interpretation of Contracts Across Legal Traditions" (2010), 48 Can. Bus. L.J. 345, footnote 49, at p. 361.

<sup>5</sup> *Domtar Inc. v. ABB Inc.*, [2007] 3 S.C.R. 461, at para. 1.

should not be investigated by persons involved in the factual circumstances of the complaint (i.e., where they personally are alleged to have engaged in the wrongdoing or supervisory failure at issue).

To facilitate an objective review of the complaint and minimize conflict, wherever possible complaint handling should be carried out by personnel removed from the events who are nevertheless knowledgeable about the products or services in question. Additionally, the remuneration and career advancement of those individuals must not be tied in any way to the outcome of complaints that they work to resolve. These principles should be embedded in the Regulation.

#### *Section 8 – Complaints as a vital source of continuous improvement information*

We applaud the measures contained in section 8, which recognize the crucial information about firm processes and areas for improvement that can be brought to light through the complaint process and the analysis of complaints information in aggregate. These provisions should serve to foster continuous improvement of each firm's process for complaint handling, as well as the identification of potential systemic issues that come to light through an analysis of any common causes of complaints.

#### *Section 10 – Plain language and clear communication*

We strongly endorse the Authority's directive for use of clear, readable, specific and not misleading communication in all complaint handling documentation. Such clear communications are essential to client accessibility and can serve to enhance consumer trust and reduce misunderstandings and tensions.

#### *Section 12 – Timeframe for firm's final response*

The Regulation establishes a 60-day response period for complaints, which may be extended to 90 days "where warranted by circumstances that are exceptional or beyond its control". The 60-day response requirement is consistent with international standards and corresponds closely to the response time mandated by FCAC for federally-regulated banks; however, we note investment dealers (including bank-owned dealers) are permitted 90 days under the dispute resolution framework endorsed by the Canadian Securities Administrators. In our experience, these existing timeframes are appropriate and sufficient for the fair resolution of complaints at the firm level.

Accordingly, while we acknowledge that a timeframe contemplated in the Regulation for all financial firms would provide a clear but flexible standard, we suggest that it might be more practical, less burdensome and less confusing, particularly for firms that also operate outside of Québec, to maintain the status quo. This could be accomplished by allowing financial intermediaries 90 days for response to complaints while adopting the 60-day limit for financial institutions.

#### *Section 13 – Acceptance of offers and completion of settlements*

We support the directive that complainants must be given a reasonable amount of time to assess a settlement offer, including sufficient time to obtain advice for the purpose of making an informed and enlightened decision on whether to accept the offer. We suggest adding that the time provided must



correlate to the offer's complexity and the potential need for advice from investment, tax or financial planning experts in addition to legal advice.

Also, we note that the Regulation does not address liability releases or non-disclosure agreements and their content. We urge the Authority to provide guidance on this subject – and in particular to include a directive requiring that any release of liability or non-disclosure agreement to be:

- a) reasonable,
- b) not overly broad,
- c) limited to the specific subject-matter of the complaint being settled, and
- d) binding only on the complainant.

#### *Section 16 – Complaint record*

Section 16 provides useful guidance on the documents and information that must be maintained as part of the complaint record, but the notices and information described in section 14 and 15 are not explicitly included. We suggest they should form part of the preserved complaint record.

#### *Section 22 – Content of firm's final response letter*

In addition to the matters specified, section 22 should direct that a firm's final response letter must inform the complainant of their right to access OBSI, where applicable.

#### *Section 27 – Description of complaint resolution process*

Similarly, section 27 should mandate reference to the availability of OBSI, where applicable, in firms' descriptions of their complaint handling process.

#### *Section 28 – Website access to information about lodging a complaint*

Section 28 of the Regulation reflects the importance of ensuring that all potential complainants can easily access information about a firm's complaint process. As mentioned above, however, the class of potential complainants should not be limited to members of the firm's clientele. Rather, section 28 should state that website access to a firm's summary of its complaint handling process and dispute resolution policy must be readily available to anyone who might rightfully be able to make a complaint.

#### *Section 30 – Preventing communication with regulators*

Section 30(1)(c) appropriately prohibits firms from trying to prevent complainants communicating with the Authority or the SROs. We suggest this prohibition should extend to communications with all regulators and law enforcement agencies.

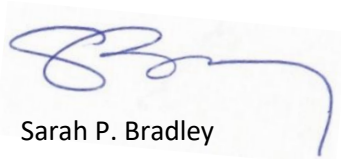
#### *Sections 31, 32 and 33 – Monetary administrative penalties*

While access to administrative penalties is important to encourage compliance and support practical enforcement of the Regulation, we observe that fines or penalties in the range of \$1000 to \$5000 are unlikely to have much, if any, deterrent effect on financial services firms. Therefore, if possible, the

amounts stipulated for monetary administrative penalties should be increased substantially, and provision also should be made for those fines to increase further for repeated violations.

In closing, we wish to thank you for providing us with the opportunity to participate in this important consultation. We would be pleased to provide further feedback to the Authority at any time.

Sincerely,

A handwritten signature in blue ink, appearing to read 'S. Bradley', is written over a light blue rectangular background.

Sarah P. Bradley  
Ombudsman & CEO