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Financial and Consumer Affairs Authority of Saskatchewan  
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Ontario Securities Commission  
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Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island  
Nova Scotia Securities Commission  
Securities Commission of Newfoundland and Labrador  
Registrar of Securities, Northwest Territories  
Registrar of Securities, Yukon Territory  
Superintendent of Securities, Nunavut

## **Re: CSA Notice and Request for Comment 25-314 – Proposed Approach to Oversight and Refinements to the Proposed Binding Authority Framework for an Identified Ombudservice**

The Ombudsman for Banking Services and Investments (OBSI) is pleased to provide our comments to the Canadian Securities Administrators (CSA) on *CSA Notice and Request for Comment 25-314 – Proposed Approach to Oversight and Refinements to the Proposed Binding Authority Framework for an Identified Ombudservice* (the “**Consultation Document**”), which requests public comment on a proposed approach to oversight of an independent dispute resolution service that can make binding decisions (the “**Oversight Framework**”) and refinements to the regulatory framework (the “**Proposed Framework**”) published by the CSA for comment in November 2023. It is expected that OBSI will be the identified ombudservice.

OBSI is a national, independent, and not-for-profit organization that helps resolve and reduce disputes between consumers and over 1500 financial services firms from across Canada in both official languages. We have been providing this service for over 29 years for the banking sector and over 23 years for the investment sector. As such, we are uniquely positioned to share our views and insights for this important consultation.

As noted in the Consultation Document, access to fair, efficient and effective dispute resolution processes is internationally recognized as essential to investor confidence, supportive of industry best practices, and complementary to regulatory compliance and enforcement efforts.

As long-time advocates for a fair, effective and trusted financial services sector, we agree with the overarching premise of the proposal that Canadian investor confidence, investor protection, and the integrity of Canada's capital markets will be enhanced by an ombudservice with the authority to issue binding final decisions. The CSA's 2023 binding authority consultation document provides a thorough discussion of the rationales and expected benefits of binding authority.

We acknowledge and appreciate the CSA's commitment over many years to ensuring fair redress for Canadian investors and their endorsement of OBSI as the provider of dispute resolution services for all sectors of the Canadian securities industry. The Consultation Document states that it is anticipated that OBSI would be the ombudservice designated by securities regulators and we would be honoured by this designation. We also appreciate the CSA working group's openness to consultation with OBSI in relation to the Proposed Framework.

Overall, we believe the Proposed Framework represents well-founded enhancement of the investor protection system in Canada and will result in a more fair, trusted and effective system for the resolution of investor disputes that all investors in Canada can have confidence in.

### **Overview of OBSI comments on the Proposed Framework and Oversight Framework**

We agree with and support a number of the key elements of the Proposed Framework. In particular, we strongly support the following features of the Proposed Framework:

1. The Proposed Framework appropriately maintains OBSI's current effective and efficient investigation and recommendation processes, the integrity and fairness of which have been reviewed and endorsed through multiple independent reviews.
2. The Proposed Framework recognizes and appropriately prioritizes accessibility and efficiency. Maintaining OBSI's independence and flexibility to determine the investigative approach that is appropriate and proportionate to the circumstances of each case, including with respect to questions of procedure at the binding decision stage, strikes an appropriate balance, assuring procedural fairness while preserving accessibility and efficiency.
3. The proposed requirement that higher-value stage 2 reviews should be conducted by an external OBSI decision maker is a reasonable alternative to a formal appeal to a court or regulator. Appeal to courts or securities tribunals is unnecessary and inappropriate for any recommendation under OBSI's compensation limit. Further formal rights of appeal to the courts or an administrative tribunal would undermine the key objectives of the ombudsman dispute resolution system.

We also make the following suggestions for change:

4. The proposed Oversight Framework should be refined in order to strike the appropriate balance between ensuring OBSI's accountability and maintaining OBSI's organizational and decision-making independence. As drafted, the administrative requirements of the Oversight Framework are overly broad and will be costly, time consuming and inefficient to comply with. As proposed, the Oversight Framework may infringe or be seen to be infringing on the ombudservice's independence or

credibility as an impartial decision maker. The Oversight Framework should be tailored to the accountability matters of relevance to regulators.

5. Explicit consumer acceptance should be required to make a recommendation or final decision binding on the firm. Binding recommendations or decisions should be based on consumers' explicit acceptance of the outcome as a full and final settlement of the dispute.

In response to the specific questions posed in the Consultation Document, we provide the following additional comments:

6. The threshold amount to require OBSI to appoint an external OBSI decision maker or a panel of external OBSI decision makers at stage 2 should be increased.
7. Setting a monetary threshold for the requirement to appoint an external OBSI decision maker at stage 2 should not impact the accessibility of the Proposed Framework for investors, if the accessibility safeguards of the OBSI process are appropriately adhered to.
8. If OBSI were to appoint senior staff not involved in the stage 1 process to a panel conducting the stage 2 process in cases that meet or exceed the proposed monetary threshold, the principal advantages would be to encourage consistency, facilitate the panel's understanding of OBSI's internal guidance and approaches, and reduce cost.
9. OBSI's current six-year limitation period is effective and appropriate.

## 1. The Proposed Framework appropriately maintains OBSI's current investigation and recommendation process

THE PROPOSED FRAMEWORK PRESERVES OBSI'S CURRENT EFFECTIVE AND EFFICIENT INVESTIGATION AND RECOMMENDATION PROCESSES, THE INTEGRITY AND FAIRNESS OF WHICH HAS BEEN REVIEWED AND ENDORSED THROUGH MULTIPLE INDEPENDENT REVIEWS

OBSI's process has been repeatedly reviewed and endorsed by independent experts over many years.

Expert independent external reviews of OSBI were conducted in 2007, 2011, 2016 and 2021. All of these reviews have concluded that OBSI is a professional and effective

ombudsman with a fair process that meets or exceeds the standards of financial ombudservices around the world. Such reviews have also canvassed and carefully examined investment industry objections without finding justification for them. All of these reviews have also made recommendations for incremental improvement of OBSI's process and OBSI has responded transparently, adopting most recommendations and reporting publicly on progress towards these improvements.

Notably, the independent reviews in 2011, 2016 and 2021 all recommended that OBSI be granted binding authority, citing international best practices, the organization's credibility, the quality of the service, and the problem of low settlements.

OBSI has also been the subject of a range of other recent examinations and endorsements of the quality of its process.

The Financial Consumer Agency of Canada (FCAC) conducted a detailed review of OBSI in 2020, which resulted in the publication of its report, *Industry Review: The Operations of External Complaints Bodies*. The report found that OBSI's had adopted international best practices for external dispute resolution services, was accessible and accountable, and demonstrated a significant commitment to transparency and a strong commitment to effective complaint resolution.

Following a public consultation process in 2021 and a thorough application and independent selection process in 2023, Canada's Minister of Finance designated OBSI to serve as Canada's sole national external complaints body for banking.

Additionally, in annual surveys, a significant majority of financial services firms who have had a complaint dealt with by OBSI in the prior year report a strongly favourable view of our process, with a significant majority agreeing with the statement "OBSI added value to our firm's complaint handling process".

By preserving OBSI's existing process as a first stage, the Proposed Framework maintains the integrity of this well-founded process while adding an additional review stage to ensure that any party who objects to the process or outcome of the recommendation stage has the opportunity to be heard and to have their objections considered by an impartial reviewer before a final binding decision is rendered.

A two-stage review resulting in a binding outcome is consistent with the process used by financial ombudsman services in comparable international jurisdictions such as the United Kingdom and Australia.

## **2. The proposed framework recognizes and appropriately prioritizes accessibility and efficiency**

MAINTAINING OBSI'S INDEPENDENCE AND FLEXIBILITY TO DETERMINE THE INVESTIGATIVE APPROACH THAT IS APPROPRIATE AND PROPORTIONATE TO THE CIRCUMSTANCES OF EACH CASE, INCLUDING WITH RESPECT TO QUESTIONS OF PROCEDURE AT THE BINDING DECISION STAGE, STRIKES AN APPROPRIATE BALANCE, ASSURING PROCEDURAL FAIRNESS WHILE PRESERVING ACCESSIBILITY AND EFFICIENCY

Among the primary advantages of an ombudservice is to ensure that financial services disputes resolution is accessible to consumers and that disputes are resolved efficiently.

Financial ombudservices deal with an exceptional variety of complaints and parties. Of the several hundred securities complaints investigated and resolved by OBSI each year, many involve relatively modest claims, almost all involve

unrepresented complainants and firms, and the matters to be investigated and resolved range from relatively straightforward service issues to complex transfer delay or investment suitability cases involving multiple complainants and firms.

To preserve the advantages of accessibility and efficiency in the investigation and resolution of such a broad variety of cases, an ombudservice must have the discretion to employ processes that are

proportionate to the needs of each case and include only those procedures and formalities that are necessary to ensure a fair outcome.

It is clear that some procedural tools commonplace in an adversarial dispute resolution setting, such as formal discovery and cross-examination, are poorly suited to an accessible ombudservice where one or both parties are typically unrepresented by legal counsel. The overarching policy considerations of accessibility and efficiency that underly the ombudsman decision-making framework require that the principles of natural justice and procedural fairness be respected and upheld through other procedural mechanisms, principally through an inquisitorial decision-making process.

The inquisitorial (or non-adversarial) process of investigation is used by financial ombudsmen around the world and involves an expert investigator who analyses the materials presented by the parties, usually including an initial interview with each party, and then brings their own expertise to bear in determining what additional information they believe they need to properly assess what the fair outcome of the dispute should be. The investigator will initiate the collection of any additional information they deem necessary by directly asking the parties to provide it or by conducting independent research, such as determining the regulatory requirements applicable at the time in question, assessing the risk profile of a security, or calculating financial losses.

In the inquisitorial process it is the investigator, rather than the parties, who tests the evidence in the case. The investigator will present each party with the evidence they have that could turn the decision against them and will analyze the parties' response and any contrary evidence that they present. The investigator may raise the arguments of one party against the other and may independently challenge the parties on the evidence they have provided.

Through this process, the fundamental principles of natural justice that require that each party have notice of the key issues in the matter, be able to meaningfully participate, be able to present their point of view and respond to facts presented by others, and have these arguments and evidence considered by an impartial decision-maker are preserved. Each party has the ability to challenge the other party's evidence through the independent decision maker, rather than directly, and neither party is disadvantaged by a lack of legal or industry-specific knowledge.

Inquisitorial systems are commonly used around the world in both civil and common law jurisdictions, particularly in "mass justice" settings such as administrative tribunals, where they are used primarily because they are consistent with the public interest need for accessible tribunals, and because the system could not afford the inefficiencies associated with adversarial trials.<sup>1</sup>

Similarly, in the context of independent Canadian financial services ombudsmanship, the public purpose drivers that led to the establishment of the ombudsman system and that require its continued existence are those that also necessitate a fair and efficient non-adversarial fact-finding system. The Proposed Framework's approach of using the essential process test to allow more adversarial procedural processes only when the OBSI decision maker determines that the proposed procedure is essential to a

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<sup>1</sup> See: Inquisitorial Adjudication and Mass Justice in American Administrative Law in *The Nature of Inquisitorial Processes in Administrative Regimes – Global Perspectives*, Laverne Jacobs & Sasha Baglay (eds.) (Surrey, England: Ashgate Publishing Company) 2013. pp.93-112

fair outcome in the case is appropriately supportive of the accessibility and efficiency imperatives of the ombudservice.

**3. The proposed stipulation that higher-value stage 2 reviews should be conducted by an external OBSI decision maker is a reasonable and appropriate alternative to a formal appeal to a court or regulator**

AN EXTERNAL DECISION MAKER WORKING FOR OBSI IS AN APPROPRIATE MECHANISM TO ADDRESS STAKEHOLDER CONCERNS. FURTHER FORMAL RIGHTS OF APPEAL TO THE COURTS OR AN ADMINISTRATIVE TRIBUNAL WOULD UNDERMINE THE KEY OBJECTIVES OF THE OMBUDSMAN DISPUTE RESOLUTION SYSTEM

The refinement of the Proposed Framework to stipulate that higher-value recommendations be reviewed by external decision makers who are not employees of OBSI but are retained on a part-time basis and trained by OBSI is a reasonable and appropriate approach to ensuring a fair review of decisions and assuring all stakeholders of the independence of the final decision makers in the

OBSI process. While some respondents to the 2023 consultation had called for a formal right of appeal to a court or regulator, such an outcome would undermine the key objectives of the ombudsman dispute resolution system.

The 2023 consultation document outlined the principal justifications for implementing a binding investment ombudservice regime in Canada, one of which is to provide retail investors and firms with “a fully effective system of redress that is final, fair and accessible.” Each of these principal aims would be undermined if a formal right of appeal of the ombudservice’s decisions to a court, securities tribunal or other body were added to the process.

As discussed above at point 2, accessibility of the ombudservice, particularly to consumers and firms without legal representation, is an essential feature of an effective ombudservice and a principal reason for financial ombudservices’ ubiquity in investor protection systems worldwide. Clearly, no appeal beyond the ombudservice could be meaningfully accessed by an investor or firm without legal representation.

If binding decisions of OBSI were subject to appeal to a court or administrative tribunal, this avenue would principally be used by firms subject to OBSI decisions requiring them to pay fair redress. The harmed investor would be obliged to defend the merits of the decision in a legal forum in order to receive compensation for their losses. To meet this obligation would require the investor to retain legal representation and would entail a lengthy, expensive process that would entirely negate the purposes of the ombudservice system.

Finality is a feature of the system that gives both consumers and firms confidence to bring their disputes to the ombudservice and invest their time and effort in the dispute resolution process, on the understanding that the outcome will be a fair resolution of their dispute, completed efficiently, that will allow them to put the dispute behind them. Appeals beyond the OBSI final review would open the door

to lengthy procedural processes, motions and further appeals that would severely diminish any promise of finality of the ombudsman dispute resolution process.

Harmed investors already have the option to take their complaints against financial services firms to court, and complainants and firms can jointly decide to work with an arbitrator or mediator to resolve their dispute if they wish to do so in a more procedurally formal manner. The advantage of an ombudservice is that it avoids the formality, time and expense of these alternatives. If all or most substantial decisions of OBSI were to be appealed to the courts or a tribunal, then this advantage would be severely diminished and eliminated in many cases.

Appeal mechanisms are generally provided in order to provide an assurance of fairness in a dispute resolution process. The fundamental principle being that an independent, senior decision maker will be able to impartially hear the concerns of the appellant and judge the fairness of the process or outcome of the original decision maker. The appeal judge will render a decision that reaffirms or corrects the original decision, ensuring that the party with the objection is provided with an additional layer of protection from an unfair original decision.

Such an assurance of fairness is the purpose of the second level review stage described in the Proposed Framework, and it is appropriately provided through the mechanism of the external OBSI decision maker. When considering the appropriateness of any appeal mechanism, regulators should consider the stages of a complaint review in the Proposed Framework:

1. The investor who believes they have incurred harm as a result of a firm or representative's error or wrongdoing will have complained to their primary service provider or representative about the subject matter of the complaint and received a response.
2. Dissatisfied with the response of their primary service provider, the investor will have escalated their complaint, usually in writing, to the senior complaint officer of their firm, participated in the firm's internal investigation of the matter, and received a substantive response from the firm.
3. Dissatisfied with the response from the firm, the investor will have escalated their complaint to OBSI in writing, provided their evidence, participated in our investigation process.
4. The OBSI investigator, after determining that the investor is entitled to compensation for the error or wrongdoing that caused them harm, will have worked with the investor and firm to facilitate a settlement.
5. Following an unsuccessful facilitated settlement process, the consumer will have received a recommendation that they are entitled to compensation for the error or wrongdoing that caused them harm.
6. The firm will have objected to the recommendation for compensation and will have escalated the matter for review. The OBSI decision maker (internal or external, depending on the amount of the recommendation) will have conducted their review, considered the objections of the firm and likely engaged both the firm and investor in their further review and determination of a fair outcome in the case before rendering a final binding decision for an amount of compensation deemed fair in all the circumstances of the case of less than \$350,000.



Firms will have the opportunity to further contest the fairness of this decision through the judicial review process. Providing further rights of appeal beyond this would be counter-productive and would not substantially enhance the fairness or effectiveness of the dispute resolution process. Rather, further rights of appeal would be more likely to result in investor abandonment of the process or avoidance in the first instance.

The subject of appeal beyond a potentially binding OBSI decision making framework was considered in the 2021 independent review of OBSI's securities mandate. In the context of their recommendation that OBSI be given the power to make binding decisions, the reviewers stated, "We believe that a system with a full right of substantive appeal would effectively negate OBSI's purpose and undermine its authority and would add complexity and significantly increase cycle time to the detriment of Main Street complainants".

The promise and actuality of fairness an essential defining feature of all ombudservices and is considered in every facet of OBSI's process. When considering the degree of procedural reaffirmation of this fairness that is appropriate for the Proposed Framework, regulators should consider how OBSI's final binding decisions will be situated in the overall context of the resolution of investor disputes and recognize that further process and rights of appeal are neither necessary nor appropriate in this context.

#### **4. The proposed Oversight Framework should be refined to increase its proportionality and respect for OBSI's independence**

THE OVERSIGHT FRAMEWORK SHOULD STRIKE THE APPROPRIATE BALANCE BETWEEN ENSURING OBSI'S ACCOUNTABILITY AND MAINTAINING OBSI'S ORGANIZATIONAL AND DECISION-MAKING INDEPENDENCE. AS DRAFTED, THE ADMINISTRATIVE REQUIREMENTS OF THE OVERSIGHT FRAMEWORK ARE OVERLY BROAD AND WILL CREATE UNDUE COSTS AND INEFFICIENCIES

OBSI is fully committed to accountability and transparency. A key objective outlined in our strategic plan is to foster public, industry, and regulator confidence by demonstrating accountability for our organizational practices in everything we do. We achieve this through transparent operational reporting, substantial regular reporting to regulators, and responding openly to

feedback and recommendations from regular external reviews. We recognize that the increased responsibility of binding authority will necessitate increased oversight and accountability to regulators and the public, who are rightly concerned with ensuring that the binding authority power is exercised appropriately. However, the Oversight Framework as proposed goes beyond what is necessary for effective oversight and will create costly inefficiencies as well as actual or perceived infringement of OBSI's independence.

##### **Undue administrative burden and cost**

The Oversight Framework is nearly identical to the CIRO oversight regime, despite the significant differences in the size, mandate, and market impact of OBSI as compared to CIRO. CIRO is a far larger organization, with a much more diverse mandate and substantially more market impact and risk than



OBSI. The potential for harm to the capital markets from a failure of CIRO oversight is not comparable to any potential harm that might occur from a failure of OBSI oversight.

The proposed Oversight Framework would be costly for OBSI to comply with and the resources necessary for compliance will be disproportionate to the policy objectives of the oversight regime. Such costs would necessarily be passed on to OBSI's registered firm members.

We suggest the following changes, which would substantially reduce the burden of the Oversight Framework, while allowing its important objectives to be met:

1. *Limit application and oversight activities to OBSI's securities mandate:* One of OBSI's key strengths as a provider of ombudservices to the Canadian financial services sector is that we provide these services across a wide range of sectors and jurisdictions, engaging both provincial and federal regulators and governments as we provide services to the banking, securities and provincial credit union sectors. Combining these services is beneficial for many reasons, including reduced consumer confusion and alignment with industry representations, reduction in gaps between ombudservices, enhanced information value of aggregated data, and significant efficiencies of scale and scope. All the regulators and governments that OBSI works with in the context of providing these services have an interest in our accountability and independence. In practical terms, the oversight frameworks implemented by the different regulators and governments to whom we are accountable cannot be structured in a manner that could interfere with one another.

At present, investment cases account for approximately 10% of OBSI's case volumes and consume approximately 30% of OBSI's resources. As proposed, the Oversight Framework contemplates oversight of matters that extend well beyond our securities mandate, which is impractical and unnecessary to achieve the desired oversight outcomes.

2. *Reduce and simplify reporting and approval requirements:* As proposed, the volume of reporting and public consultation contemplated in the Oversight Framework is exceptionally high. This will place a significant administrative burden on both OBSI and the CSA that will be time consuming and costly, lead to delays in change implementation and is not necessary to achieve the desired oversight outcomes. By reducing the quantity of regular reporting, items requiring pre-approval and non-objection and limiting remaining items with materiality thresholds, this burden can be substantially reduced. The potential for underreporting should not be a concern because the Oversight Regime gives the CSA the power to conduct targeted reviews or demand production of reports and information from OBSI for any matters that may require additional regulatory scrutiny in the future.

Presently, OBSI provides services to the investment industry pursuant to a memorandum of understanding with Canadian Securities Regulators (MOU), who oversee OBSI operations through a committee known as the Joint Regulators' Committee (JRC). The MOU provides an oversight framework that includes standards of governance, independence, fairness, timeliness, setting of fees and costs, appropriate resources, accessibility, systems and controls, core methodologies, information sharing and transparency. The MOU also sets out the framework of meetings and consultations, the reporting of systemic issues and independent evaluations through which the JRC conducts its oversight of OBSI operations. Overall, this framework has proven robust and effective.

OBSI's process has been repeatedly reviewed and endorsed by the CSA jurisdictions and others over many years. In these many years of highly detailed reporting, the JRC has never indicated any dissatisfaction or concern with OBSI processes or accountability. Independent reviews of both securities and banking mandates have consistently found OBSI's processes to be fair, consistent and professional, and have carefully examined industry objections to OBSI's processes without finding justification for them. After a careful and independent review, the Government of Canada has designated OBSI as Canada's exclusive national ECB for banking. Such substantial, independent validation should give the CSA confidence in OBSI's complaint handling competency, professionalism and accountability and mitigate against the need for additional substantive oversight.

In considering amendments to the proposed Oversight Framework, the CSA jurisdictions should consider the success of the current OBSI oversight framework in achieving regulatory oversight objectives, as well as the potential risks that they seek to mitigate through the Oversight Framework. Regulators' focus should be on narrowing the requirements of the Oversight Framework to these risks.

### **Infringement of independence**

Independence is a foundational principle of financial ombudsmanship. The governance and operational structure of any public interest ombudservice should be fully independent and transparent. This is necessary to provide assurance to all stakeholders of the organization's ability to act impartially and to systematically adopt processes that are reflective of its guiding principles.

The International Network of Financial Services Ombudsman Schemes and the Organization for Economic Cooperation and Development (OECD) High Level Principles on Financial Consumer Protection both stress the importance of independence as a foundational element of any financial ombudsmanship system.

As described above, accountability is important for any public service entity, especially one exercising the power of the state. Accountability and independence are not incompatible, however, and they do not necessarily pull in different directions. Rather, both must be respected in any oversight framework that is implemented.

The Consultation Document outlines the key provisions of the Oversight Framework, which include: prior CSA approval of a range of procedures and documents and changes, including various governance matters, organizational policies and procedural guidelines, membership access criteria, loss calculation methodologies and fee models. As described above, the Oversight Framework also requires extensive reporting about a wide range of matters, including many matters of internal management and administration. The degree of oversight contemplated has the potential to severely infringe on OBSI's independence.

The impact of the Oversight Framework on OBSI's independence will be reduced through:

- The implementation of the reporting and approval reductions we have suggested above
- Significant narrowing of the definition of "Rule"
- Elimination or narrowing of the various provisions in the Oversight Framework that relate to internal administration, such as performance benchmarking, IT service procurement, privacy law compliance, financial reporting, risk management, internal audit, skills matrices, etc.

- Elimination or narrowing of provisions for CSA oversight of matters that directly impact case outcomes, such as training materials and loss calculation methodology
- Elimination or narrowing of provisions for CSA oversight of matters related to membership procedures, forms and fees

As discussed above, OBSI is committed to transparency and accountability, however, the Oversight Framework should be proportionate to the market impact of the organization and the necessary goals of the oversight program. For example, the approval and reporting matters we have suggested should be eliminated or narrowed above could be addressed in the framework through requirements to comply with enumerated principles-based requirements, such as to maintain robust IT security programs, to ensure sufficient funding and prudent financial management, to immediately report any incidents of financial distress, to ensure that the board is appropriately representative of the stakeholder groups served by the organization, etc. and OBSI could be asked to demonstrate compliance with such principles on an annual basis or as part of the process of independent external review.

## 5. **Explicit consumer acceptance should be required to make a recommendation or final decision binding on the firm**

BINDING RECOMMENDATIONS OR DECISIONS SHOULD BE BASED ON CONSUMERS' EXPLICIT ACCEPTANCE OF THE OUTCOME AS A FULL AND FINAL SETTLEMENT OF THE DISPUTE

The Proposed Framework's approach to defining when a recommendation or final decision becomes binding on the firm relies on the passage of time, consumer acceptance, or the absence of specified conduct on the part of the complainant (withdrawal or commencement of legal proceedings within specified time periods).

As noted in our response to the 2023 consultation, we suggest that the overall framework would be more straightforward and administratively sound if the trigger for binding decisions was based on a requirement of explicit consumer acceptance of the recommendation or decision.

In such a process, the firm would only be obliged to pay the amount of the recommendation or decision if the consumer accepted it in full and final settlement of the dispute. With such a requirement in place:

- Recommendations from the first stage of the investigative process would become binding on the firm if a) neither party had requested a review within the specified time period, and b) the consumer had accepted the recommendation. If the complainant had not explicitly accepted the recommendation and had not requested a review, they would be free to pursue other avenues of redress.
- Final decisions following a second-stage review would become binding on the firm upon acceptance by the complainant. If the complainant had requested the review, their acceptance of the outcome would have been agreed at the outset, and both parties would be bound by the outcome. If the complainant had not requested the review, and had not explicitly accepted the recommendation, the complainant would be free to pursue other avenues of redress and the firm would not be bound.

It is reasonable that consumers be required to explicitly accept a recommendation or decision before it becomes binding on the firm, and this system would offer several benefits:

- Requiring active acceptance of a recommendation or decision ensures that the complainant remains engaged in the process and in the outcome
- An explicit acceptance would clearly indicate that the amount of the recommendation or decision is acceptable to the complainant in final settlement of the claim, foreclosing the possibility of further action
- The acceptance form could include a standard form of release of liability, limited to the subject matter of the complaint. This would have the ancillary benefit of reducing the risk that consumers may be asked by firms to execute over-broad releases and ensures that a standard balanced release is used in all cases, benefiting both parties
- The time between a recommendation or decision and the obligation to pay would be faster
- The process would be simplified and easier for all parties to understand

**6. The threshold amount to require OBSI to appoint an external OBSI decision maker or a panel of external OBSI decision makers at stage 2 should be increased**

THE THRESHOLD AMOUNT TO REQUIRE OBSI TO APPOINT AN EXTERNAL OBSI DECISION MAKER OR A PANEL OF EXTERNAL OBSI DECISION MAKERS AT STAGE 2 SHOULD BE INCREASED TO \$175,000, OR HALF OF OBSI'S MAXIMUM RECOMMENDATION AMOUNT

The Proposed Frameworks contemplates that the requirement to appoint an external OBSI decision maker to conduct a second-stage review of an OBSI recommendation would be triggered when an objection is received from a firm or consumer of a recommendation for compensation of \$75,000 or more. While the vast majority of OBSI recommendations are below this amount, we recommend increasing the threshold to \$175,000, or half of OBSI's

maximum recommendation amount (currently \$350,000). We make this recommendation for reasons of administrative efficiency and proportionality of expense. Accessibility considerations are addressed below in section 7.

While the details of the internal administrative framework for support of the external OBSI decision maker system have not been finalized, it is likely that this system will require administrative and secretariat support and will require ongoing training for decision makers. Additionally, there is likely to be considerable expense associated with the decision makers themselves, who will undoubtedly be highly skilled professionals. Unlike internal senior OBSI decision makers whose time and salary can be defrayed among many cases and files, external OBSI decision makers will be focussed on the specific subset of cases requiring their attention. The scheduling and administration of the external OBSI decision maker process is also likely to be more time consuming than internal processes would be. All told, the costs of the external OBSI decision makers' time, as well as the administrative and secretariat support necessary to support their work, in our view is likely to be disproportionate to the amount at stake in recommendations of \$75,000.

**7. A monetary threshold for the requirement to appoint an external OBSI decision maker at stage 2 should not impact the accessibility of the Proposed Framework for investors**

SETTING A MONETARY THRESHOLD FOR THE REQUIREMENT TO APPOINT AN EXTERNAL OBSI DECISION MAKER AT STAGE 2 SHOULD NOT IMPACT THE ACCESSIBILITY OF THE PROPOSED FRAMEWORK FOR INVESTORS, IF THE ACCESSIBILITY SAFEGUARDS OF THE OBSI PROCESS ARE APPROPRIATELY ADHERED TO

With appropriate safeguards in place, the Proposed Framework's requirement of appointing an external OBSI decision maker at stage 2 of the process in cases above the stipulated monetary framework should not impact consumer accessibility. As discussed above in section 2, accessibility is a crucial element of any ombudsman dispute resolution system and must be safeguarded.

The potential risk for unrepresented consumers and firms at the stage 2 level is that they may be less able than a party with legal

representation to fully avail themselves of the benefit of the stage 2 review or to respond to challenges posed by the other party. The appropriate application of the essential process test described in the Consultation Document and appropriate training for external OBSI decision makers will be vital to ensuring that the stage 2 review process remains fair and accessible for all parties.

**8. The inclusion of senior staff to stage 2 review panels would encourage consistency, facilitate understanding of OBSI's internal guidance and approaches and reduce cost**

IF OBSI WERE TO APPOINT SENIOR STAFF NOT INVOLVED IN THE STAGE 1 PROCESS TO A PANEL CONDUCTING THE STAGE 2 PROCESS IN CASES THAT MEET OR EXCEED THE PROPOSED MONETARY THRESHOLD, THE PRINCIPAL ADVANTAGES WOULD BE TO ENCOURAGE CONSISTENCY, FACILITATE THE PANEL'S UNDERSTANDING OF OBSI'S INTERNAL GUIDANCE AND APPROACHES, AND REDUCE COST

OBSI's current process does not involve the appointment of decision-making panels. All investigations and reconsiderations are undertaken by an individual investigator or reconsideration officer, working in a team under the supervision of an Investigation Manager.

While the Proposed Framework contemplates the potential appointment of multiple decision maker panels, such configurations are likely to be rare for administrative and cost reasons and would likely be considered appropriate only for highly complex cases near the top of OBSI's

monetary limits and for compelling reasons, such as to ensure appropriate subject matter or linguistic expertise. In such cases, it would be advantageous to permit a mixed panel of external and internal OBSI decision makers who had not been involved in the stage 1 process. The principal advantages would be to add expertise, encourage consistency, facilitate the panel's understanding of OBSI's internal guidance and approaches and limit the costs of a multi-person panel.

## 9. OBSI's current six-year limitation period is effective and appropriate

### OBSI'S CURRENT SIX-YEAR LIMITATION PERIOD IS EFFECTIVE AND APPROPRIATE AND SHOULD BE MAINTAINED

As noted in the consultation document, OBSI will only investigate complaints that are made to the firm within six years from the time the consumer knew or ought to have known about their right to bring a claim. Over the years, we have considered shortening our limitation

period and we have declined to do so. We have carefully examined the reasoning for our six-year limitation period and the potential consequences of shortening it to two years and have concluded that a six-year limitation period remains appropriate for the following reasons:

- Financial services firms have regulatory obligations to respond to consumer complaints in a fair and appropriate manner without any time-based limitation, and most securities regulatory enforcement limitation periods exceed two years.
- Most provincial statutory limitation periods are two years, however, this is not universal and some Canadian jurisdictions (e.g., Quebec, Manitoba, and the territories) have longer legal limitation periods. Since OBSI provides services across Canada, it could be seen as incongruous for our limitation period to be more restrictive for some Canadians than their own provincial or territorial time limits.
- While firms have occasionally raised the issue of OBSI's limitation period, in our experience limitation arguments raised by firms generally have not presented a significant barrier to case resolutions. Neither regulators nor consumer advocates nor our independent external reviewers have recommended reducing our limitation period.
- The discussion around the limitation period should be viewed through the lens of ensuring access to justice and the overarching purpose of the dispute resolution process. In our view, it would be inconsistent with this purpose that consumers with otherwise legitimate claims may not have their complaints reviewed and may be denied fair compensation as a result of a reduction of our limitation period.
- A six-year limitation period is consistent with traditional equitable approaches to ensuring that claims are brought within a reasonable time and that respondents are not unfairly prejudiced by delay. Many other international financial ombudsman schemes have a limitation period longer than two years.

Thank you for providing us with the opportunity to participate in this important consultation. We would be pleased to provide further feedback to the CSA jurisdictions at any time.

Sincerely,

Sarah P. Bradley  
Ombudsman & CEO