



Canadian Foundation *for*
Advancement *of* Investor Rights

January 25, 2013

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, ON M5H 3S8
Sent via e-mail to: comments@osc.gov.on.ca

Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, QB H4Z 1G3
Sent via e-mail to: consultation-en-cours@lautorite.qc.ca

RE: Proposed Amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations and to Companion Policy 31-103CP dated November 15, 2012 regarding Dispute Resolution Service

FAIR Canada is pleased to offer comments on the Proposed Amendments to National Instruction 31-103 (“**NI 31-103**”) by the Canadian Securities Administrators (“**CSA**”) regarding amendments proposing that all registered dealers and registered advisers outside of Quebec be required to utilize the Ombudsman for Banking Services and Investments (“**OBSI**”) as the service provider in respect of their dispute resolution obligations under section 13.16 of NI 31-103 and other related amendments.

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

FAIR Canada Comments and Recommendations – Executive Summary:

1. FAIR Canada wishes to commend the CSA for prioritizing the improvement of the dispute resolution system for consumers who may have a complaint regarding their registered dealer and/or adviser. This is in the interests of both consumers and registrants.
2. **FAIR Canada believes that a single, national ombudservice for investment complaints is vital to the integrity of the Canadian financial services market. FAIR Canada supports the Proposed**

1 Yonge Street, Suite 1801 | Toronto, ON | M5E 1W7 | 416-214-3440 | www.faircanada.ca

Amendments which would require all registered dealers and registered advisers outside of Quebec to utilize OBSI as their external dispute resolution provider.

3. FAIR Canada supports the CSA's anticipated benefits of the Proposed Amendments. We agree that having a single, national ombudservice will increase consistency in decision-making, reduce client confusion as to where to go if they have a complaint and promote the fairness and independence of the consumer redress system. We also believe that having a single ombudservice will allow for the identification and investigation of widespread issues that may arise (also known as "systemic" issues) by OBSI and that this is a responsibility that a single ombudservice is uniquely placed to undertake.
- 4. FAIR Canada strongly recommends that OBSI be given the ability to make binding decisions over all firms who participate in OBSI. In the UK, Australia and New Zealand, decisions are binding if the consumer accepts the recommendation. We see no reason for a less consumer-friendly system in Canada.**
5. The recent "stuck" cases in which certain investment firms have refused to accept OBSI's recommendations and who have been "named and shamed" as a result, demonstrate that reputational risk is an insufficient deterrent for many registrants and that OBSI needs to be placed on a stronger footing by having binding decision-making powers.
6. The recent publications of investigation reports and case summaries involving several firms who refused to accept OBSI's recommendations demonstrate that OBSI's processes and loss calculation methodology have NOT been the real reason that the cases were stuck. There is a lack of any credible factual basis upon which firms have refused to accept OBSI's recommendations. The consumer redress system will not work effectively and trust in the integrity of our system of securities regulation will be undermined if registrants are permitted to refuse OBSI's recommendations and consumers are left without any compensation.
7. FAIR Canada recommends that OBSI's accountability to regulators, the guidelines for which are currently contained in the Joint Forum of Financial Market Regulators' "A Framework for Ongoing Collaboration", be strengthened in the public interest. We recommend a more formal recognition of OBSI, through recognition orders issued by CSA members, which would improve oversight and accountability.
8. Steps to make OBSI into a statutory ombudservice could meet the industry's desire for greater transparency, bringing with it additional procedural safeguards to address issues of natural justice, while also improving investor protection. FAIR Canada supports converting OBSI into a statutory national ombudservice for investment and banking services
9. FAIR Canada answers the specific consultation questions at section 6 below.

1. Improving the Dispute Resolution System for Consumers

- 1.1. **FAIR Canada wishes to commend the CSA for prioritizing the improvement of the dispute resolution system for consumers who may have a complaint regarding their registered dealer and/or adviser. FAIR Canada is relieved that the CSA has seen through attempts by certain financial firms to undercut OBSI and render it ineffective. Instead the CSA is moving to strengthen the consumer dispute resolution system for investment-related complaints.**
- 1.2. Industry external dispute resolution organizations are both a tool of customer service (and therefore serve industry's interests) and a tool of consumer protection (and therefore serve consumers' interests).¹ Improvements to OBSI will benefit both industry and consumers.

2. A Single National Ombudservice is Essential

- 2.1. FAIR Canada believes that a single, national ombudservice for investment complaints is vital to the integrity of the Canadian financial services market and is pleased that the CSA has recognized and identified the significant benefits to the Canadian financial services market of having a single dispute resolution provider.
- 2.2. A single independent dispute resolution service provider is essential to ensure the protection of Canadian consumers. One single dispute resolution service provider is necessary in order to avoid fragmentation, inconsistencies, serious potential conflicts of interest, complainant (client) confusion and to enable the detection of systemic or widespread issues.
- 2.3. The World Bank, in its report "[Fundamentals for a Financial Ombudsman](#)" (the "**World Bank Report**"), sets out the basic principles for the creation of an independent and effective financial ombudsman. FAIR Canada agrees with the World Bank Report that allowing financial firms to choose between two or more competing ombudsmen is to present "...severe risks to independence and impartiality - because financial businesses may favour the ombudsman they consider likely to give businesses the best deal"² and that such "competition" is one-sided because consumers are not given any choice of ombudsman.³
- 2.4. The January 2009 Report of the Expert Panel on Securities Regulation noted the inadequacy of complaint handling and redress mechanisms in Canada⁴:

¹ The Navigator Company, "Ombudsman for Banking Services and Investments – Report – 2011 Independent Review" (2011) at 28 ("Khoury Report").

² World Bank, "[Fundamentals for a Financial Ombudsman](#)" (January 2012), online: <http://www.networkfso.org/Resolving-disputes-between-consumers-and-financial-businesses_Fundamentals-for-a-financial-ombudsman_The-World-Bank_January2012.pdf?utm_source=April+2012+Newsletter&utm_campaign=April+Newsletter&utm_medium=archive> at 38.

³ *Ibid.* at 39.

⁴ Expert Panel on Securities Regulation, "Final Report and Recommendations" (January 2009) at page 34.

Although many mechanisms have been put in place to provide investors with simpler, more cost-effective alternatives to the courts, the numerous organizations, the multi-step processes, and the lack of uniformity across Canada pose challenges for investors to properly understand and achieve a proper conclusion in an expeditious manner. Based on some of the personal accounts, it appears that investors are often not provided with the information required to understand the full range of options available to seek redress.

- 2.5. Given the complexity of the Canadian financial services landscape and the multi-step and multi-organizational process that exists in Canada for investors to seek redress, a single independent dispute resolution provider that meets international standards⁵ is essential in the Canadian context.

3. Extending Mandatory OBSI participation to non-SRO Registered Firms

- 3.1. FAIR Canada supports the Proposed Amendments which would require all registered firms outside of Quebec to utilize OBSI as their dispute resolution provider. In our view, requiring non-self-regulatory organization (“**non-SRO**”) member dealers and advisers in addition to Investment Industry Regulatory Organization of Canada (“**IIROC**”) and Mutual Fund Dealers Association of Canada “**MFDA**” member firms (who are currently required to participate in OBSI pursuant to IIROC and MFDA requirements) is a positive improvement for Canadian financial consumers.
- 3.2. FAIR Canada sees no reason why financial consumers of some registered firms should be able to seek redress through OBSI, whereas consumers of non-SRO registrants are currently unable to do so.
- 3.3. It should be noted that there are a number of significant compliance deficiencies that have been identified with non-SRO registrants who are directly regulated by provincial securities commissions.⁶ Improved compliance with existing regulatory requirements is necessary; failing this, OBSI will struggle to cope with the number of cases it will be potentially be required to attempt to resolve.

⁵ International standards can be found in the G20 High-Level Principles on Financial Consumer Protection, October 2011. In particular, Principle 9 requires that "Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are **accessible, affordable, independent, fair, accountable, timely and efficient**....Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers and authorised agents internal dispute resolution mechanisms." [emphasis added] Available online at <http://www.oecd.org/dataoecd/58/26/48892010.pdf>. See also the Joint Forum of Financial Market Regulators, "The Financial Services OmbudsNetwork - A Framework for Collaboration" Guidelines. Available online at http://www.obsi.ca/images/document/up-2Framework_with_the_Regulators_EN.pdf and the International Ombudsman Association Code of Ethics,. Available online at <http://www.ombudsassociation.org/about-us/code-ethics>.

⁶ The Ontario Securities Commission’s Annual Summary Report for Dealers, Advisers and Investment Fund Managers provides the interim findings of a compliance sweep of 85 Exempt Market Dealers and Portfolio Managers and notes a number of significant compliance deficiencies that are of concern. Available online at http://www.osc.gov.on.ca/documents/en/Securities-Category3/sn_33-736_annual-rpt-dealers.pdf. See also OSC Staff Notice 33-735 available online at http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20110513_33-735_non-accredited-investors.htm and Alberta Securities Commission Staff Notice 33-704, entitled Review of Exempt Market Dealers, available online at http://www.albertasecurities.com/securitiesLaw/Regulatory%20Instruments/3/33-704/4078740-v2-ASC_Staff_Notice_-_Review_of_EMDs_-_final.pdf.

4. Give OBSI Binding Decision-Making Powers

- 4.1. FAIR Canada strongly recommends that OBSI be given the ability to make binding decisions over all firms who participate in OBSI. In the UK, Australia and New Zealand, decisions are binding if the consumer accepts the recommendation. We see no reason for a less consumer friendly system in Canada.**
- 4.2. The recent “stuck” cases in which certain investment firms have refused to accept OBSI’s recommendation and who have been “named and shamed” as a result, demonstrate that reputational risk is an insufficient deterrent for many registrants and that OBSI needs to be placed on a stronger footing by having binding decision-making powers.
- 4.3. Reputational risk is less likely to have deterrent effect with less well-known and smaller firms who operate in markets such as the exempt market that are not well-understood by many financial consumers. Many of the non-SRO registrants that would be required to offer OBSI’s services to their clients following the implementation of the Proposed Amendments would fit into this category. In the absence of binding decision-making authority, OBSI’s credibility may be further weakened through increased non-acceptance of its recommendations.
- 4.4. Furthermore, the significant compliance deficiencies that have been identified with non-SRO registrants leads one to question whether, absent binding decision-making authority, such firms will be as willing to accept OBSI’s recommendations.
- 4.5. The recent publications of investigation reports and case summaries involving several firms who refused to accept OBSI’s recommendations demonstrate that OBSI’s processes and loss calculation methodology have NOT been the real reason the cases were stuck. There is a lack of any credible factual basis upon which firms have refused to accept OBSI’s recommendation. The consumer redress system will not work effectively and trust in the integrity of our system of securities regulation will be undermined if registrants are permitted to refuse OBSI’s recommendations and consumers are left without any compensation.**
- 4.6. As stated in the independent review of OBSI: “Our own view is that the methodology is only a ‘lightning rod’ for industry criticism. The real issue is industry’s discomfort with the evolving role and independence of OBSI. ...We are skeptical that any technical concession on methodology would purchase any lasting ‘peace’.”⁸
- 4.7. The independent review of OBSI, conducted in 2011, concluded “...that OBSI’s approach to investment loss is based on sound logic, provides a fair and transparent platform for well-founded, consistent decision-making and is consistent with other jurisdictions.”⁹

⁸ Khoury Report, at page 18.

⁹ See The Navigator Company, “Ombudsman for Banking Services and Investments Report 2011 Independent Review” (2011), at page 17.

- 4.8. Despite this finding, OBSI conducted a further consultation on its loss calculation methodology in 2012 and has indicated it will make a number of changes, stemming from industry pressure.¹⁰ FAIR Canada recommends that the CSA pay close attention to the impact of these changes in order to ensure that recommendations continue to be “fair in all the circumstances” (in accordance with OBSI’s Terms of Reference) and that the methodology results in a reasonable estimate of the financial position the investor would be in had the unsuitable investment advice not been given and acted upon, which is the guiding principle upon which its loss methodology calculations are based.

5. OBSI’s Accountability to Regulators Should be Strengthened in the Public Interest

- 5.1. FAIR Canada recommends that OBSI’s accountability to regulators, the guidelines for which are currently contained in the Joint Forum of Financial Market Regulators’ “A Framework for Ongoing Collaboration”, be strengthened in the public interest. We recommend a more formal recognition of OBSI, through recognition orders issued by CSA members, which would improve oversight and accountability.
- 5.2. We support steps that would improve the transparency and accountability of OBSI. The CSA should have oversight with the OSC being the lead regulator given its office’s proximity to OBSI’s head office.
- 5.3. Transitioning OBSI into a statutory ombudservice could meet the industry’s desire for greater transparency, bringing with it additional procedural safeguards to address issues of natural justice, while also improving investor protection. FAIR Canada supports converting OBSI into a statutory national ombudservice for investment and banking services.

6. Response to Specific Consultation Questions

Limitation Period Issue

- 6.1. FAIR Canada agrees that a limitation period of six years from the time when the consumer knew or ought to have known there was a problem with their investments is fair, provided that a subjective standard is used.
- 6.2. The wording of the Proposed Amendments should be modified to make clear that the limitation period begins running when the client knew or reasonably ought to have known of the problem or mistake with the trading or advising activity and not simply the fact of the trading or advising activity.
- 6.3. A subjective standard should be used, based on the particular client, with an appreciation of all the facts, including the consumer’s age, degree of reliance on the advisor, knowledge,

¹⁰ See FAIR Canada’s comment letter dated July 9, 2012, available online: <http://faircanada.ca/wp-content/uploads/2011/01/120709-FAIR-Canada-comments-re-OBSI-suitability-and-loss-assessment-consultation.pdf>.

language skills, experience, understanding of account statements provided, vulnerability, and ability to identify a problem with the unsuitability of the investment. It is our understanding that the majority of the complainants to OBSI are seniors and vulnerable consumers.

- 6.4. It is unfair to vulnerable consumers, including persons with limited language skills, low financial literacy and seniors who may have reduced cognitive abilities, to apply a limitation period without a full appreciation of these characteristics.
- 6.5. The limitation period should not be calculated based on the time of the trading or advising activity to which it relates. The discoverability principle (knew or ought to have known) is incorporated into many limitation acts throughout the various provinces of Canada and should be also be applied here, whilst taking into account the particular consumer's characteristics in light of the overarching principle of fairness which guides an ombudservice.
- 6.6. **We recommend that it be required that registrants agree to toll the limitation period for a complaint while it is at OBSI.**

Time Period to Complain to OBSI

- 6.7. We believe that the current requirement to bring a complaint to OBSI within 180 days of the client's receipt of notice of the firm's rejection of their complaint or recommended resolution of the complaint, subject to OBSI's authority to receive and investigate a complaint in other circumstances if the ombudsman considers it fair to do so, is reasonable and appropriate. We support this requirement so long as the registered firm has taken adequate steps to fulfill its requirement to "ensure that the complainant is aware of the dispute resolution or mediation service that the firm makes available to them and that the firm will pay for that service."¹²
- 6.8. The ability to make exceptions, should it be fair and reasonable to do so in the particular circumstances, is vital given that fairness is a fundamental principle and the goal should be to reach decisions that are fair (as opposed to procedurally fair).
- 6.9. It is important that consumers are made aware of the process for complaint handling including the length of time that firms are permitted to take before providing their response (the 90 day time limit) and the length of time that complainants have to take their complaint to OBSI (the 180 days), along with the limitation period for commencing a civil action and when and how such limitation periods are tolled.
- 6.10. Such information should be provided to consumers when they become a client of a registrant, again when they make a complaint to a registrant, and at the time they receive

¹² See Proposed Section 13.16(3) and Proposed Companion Policy 31-103CP, Section 13.16. at (2012) 35 OSCB 10356 and 10357.

the firm's response to their complaint. The wording of Section 13.16(3) should be modified accordingly.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Feel free to contact Ermanno Pascutto at 416-214-3443 (ermanno.pascutto@faircanada.ca) or Marian Passmore (marian.passmore@faircanada.ca) at 416-214-3441.

Sincerely,



Canadian Foundation for Advancement of Investor Rights

cc: British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Prince Edward Island Securities Office
Office of the Superintendent of Securities, Government of Newfoundland and Labrador
Department of Community Services, Government of Yukon
Office of the Superintendent of Securities, Government of the Northwest Territories
Legal Registries Division, Department of Justice, Government of Nunavut