OBSI OMBUDSMAN FOR BANKING SERVICES AND INVESTMENTS
OSBI OMBUDSMAN DES SERVICES BANCAIRES ET D'INVESTISSEMENT

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Delivered by email to: GCOcomments@iiroc.ca

General Counsel's Office
Investment Industry Regulatory Organization of Canada
Suite 2000, 121 King Street West
Toronto, ON M5H 3T9

Re: Comments on Review of the IIROC Arbitration Program

The Ombudsman for Banking Services and Investments (OBSI) is pleased to provide our comments to New SRO on its Review of the IIROC Arbitration Program in response to the recent IIROC publication 22-0187, *Review of the IIROC Arbitration Program* (the "Consultation Document"), which requests public comment on the recommendations of a working group established by IIROC to review the arbitration program (the "Working Group").

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 25 years. As such, we are uniquely positioned to share our views and insights for this important consultation.

As long-time advocates for a fair, effective and trusted financial services sector, we support the overarching goal of this consultation to improve investor access to fair, expeditious and cost-effective dispute resolution processes. Access to such services is essential to investor confidence, supportive of industry best practices, and complementary to regulatory compliance and enforcement efforts.

We acknowledge and appreciate both IIROC and MFDA's commitment over many years to ensuring fair redress for investors when errors or wrongdoing by registrants has caused investor harm, and their specific endorsement of OBSI as the provider of dispute resolution services for Canadian investors.

We support New SRO's stated objective for the Arbitration Program to provide a dispute resolution option for complex and large claims as an alternative to litigation that does not draw complaints from OBSI where OBSI is the more suitable forum. The consultation document states that New SRO is considering making the Arbitration Program available only for claims that fall outside of the OBSI limit, and we are supportive of this proposal, for the reasons outlined below.

Accessible and effective dispute resolution an essential component of financial consumer protection

Effective investor dispute resolution 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 dispute resolution 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[1] 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.[2] This technical note calls to readers' attention the systemic importance of effective 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 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[3] 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."

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[1] https://www.oecd.org/daf/fin/financial-markets/48892010.pdf

[2] Complaints Handling within Financial Services Providers – Principles, Practices, and Regulatory Approaches (June 2019)

[3] Complaint Handling and Redress System for Retail Investors – Final Report (January 2021)

Overview of comments

We support the Arbitration Program as a valuable alternative to litigation for relatively large, complex investor claims, however, we note that several of the Working Group recommendations are focussed on encouraging the use of the program for lower value, unrepresented complainants. Such recommendations include:

- Recommendation 1(2) to increase public awareness through social media
- Recommendation 2 relating to providing written guidance for self-represented litigants
- Recommendation 7 to allow for self-representation or non-legal representation
- Recommendation 8 relating to partnerships to facilitate pro bono representation of unrepresented litigants
- Recommendation 9 to provide simplified procedures for lower-complexity cases with tiered procedure and fees for cases under $50k and between $50k and $250k
- Recommendation 11 to require mandatory mediation for smaller claims
- Recommendation 14 to provide funding to complainants in qualifying cases

Taken together, these recommendations contemplate a significant expansion of the arbitration program from its current focus on represented complainants with claims approaching the current limit of $500,000 who prefer arbitration processes to civil litigation.

In our view, an expansion of the Arbitration Program to lower-value claims and unrepresented claimants would be contrary to New SRO's stated goals for the Program and would diminish the overall effectiveness of the investor dispute resolution framework in Canada because:

- Arbitration is less appropriate than ombudservices for lower-value, unrepresented complainants
- The expansion of the arbitration program to lower value, unrepresented complainants would increase the complexity of Canada's existing dispute resolution system and lead increased investor confusion
- Encouraging the use of multiple dispute resolution venues for lower-value complaints would increase the overall cost of the system for investors by reducing efficiencies of scale and scope
- A system with multiple dispute resolution venues would reduce OBSI's ability to positively influence the system through the publication of aggregated data, trend analysis, systemic issue identification and the identification of best practices.

We therefore support New SRO's proposal to make the Arbitration Program available only for claims that fall outside of the OBSI limit and we do not support the Working Group recommendations outlined above. This position is based on our unique perspective on these issues and our experience resolving many thousands of investment disputes over the past 20+ years, which has given us a deep understanding of investor and firm behaviour in the dispute resolution area.

We also support the proposed increase in the maximum award limit, as this will improve the utility of the program for a broader range of investors and firms with unresolved disputes that are suitable for arbitration.

We are not supportive of the proposed reduction in the timeframe for dealers to provide complainants with a substantive response letter, and suggest that if New SRO chooses to implement a reduction, it consider a flexible approach to the time limitation.

Ombudservices are more appropriate than arbitration for lower-value, unrepresented complainants

OMBUDSMAN DISPUTE RESOLUTION OFFERS IMPORTANT ADVANTAGES OVER ARBITRATION FOR THE MOST COMMON SECURITIES DISPUTES

Arbitration offers signficiant speed, cost and complexity advantages over litigation through the courts for many securities disputes. Equally, however, ombudsman dispute resolution offers important advantages over arbitration for the most common secutiries disputes – those invovling relatively modest monetary claims and where one or both parties is not represented by legal counsel.

In addition to being faster, less costly and less procedurally complex than arbitration, the inqisitorial nature of ombuds dispute resolution offers investors and firms the assurance of a fair outcome, without the need for either party to fully articulate or appreciate the legal or regulatory issues relevant to their position, or to perform complex risk analyses or loss calculations. This significantly increases the accessiblity of the dispute resolution system by reducing cost and complexity. It also ensures that a greater proportion of investor complaints are considered and resolved fairly, rather than abandoned.

OBSI's process provides investors and firms with an impartial, expert assessment of their claim or defence, conducts specialized expert risk rating and loss calculations, and works to facilitate a fair resolution where appropirate, all with a clear view to providing a cost-effective, efficient process.

Conversely, investors seeking redress through arbitration are at a signficant disadvantage if not represented by legal counsel,[4] and typically face substantial information and resource disadvantages relative to the investment firms involved which would not be fully remedied by the recommendations of the Working Group.

In its recommendation report, the Working Group stated that it took inspiration from the FINRA model of arbitration, which investors in the United States are generally compelled to use to resolve complaints. A key distinction, however, between the US and Canadian contexts is that the United States does not have an ombudservice availble to investors with lower value complaints. In the US, all investors are required to use the arbitration system and it therefore makes sense for that system to include procedural accommodations aimed at minimizing the inherent disadvantages of arbitration for lower-

[4] Choi, Stephen; Fisch, Jill E.; and Pritchard, Adam C., "The Influence of Arbitrator Background and Representation on Arbitration Outcomes" (2014). Faculty Scholarship at Penn Law. 1546.
https://scholarship.law.upenn.edu/faculty_scholarship/1546

value, unrepresented complainants. Such accommodations are not necessary in Canada due to the availablity of OBSI for lower-value disputes.

The expansion of the arbitration program to lower value, unrepresented complainants would increase the complexity of the dispute resolution system and increase investor confusion

THE DISPUTE RESOLUTION LANDSCAPE FOR INVESTORS IS DAUNTING, AND CONFUSION CAN LEAD TO POOR ADVICE AND INAPPROPRIATE CHOICES. DELAY IN REQUESTING OUR SERVICES CAN RESULT IN LOSS OF ACCESS.

The dispute resolution system for investors in Canada is already unduly complex, with multiple possible avenues available to investors who have not been able to resolve a complaint satisfactorily through the firm's dispute resolution process. Provincial securities regulators, New SRO, the AMF, the Arbitration Program, courts and OBSI are all available, and in some cases, other tribunals such as the provincial consumer protection bureaus, privacy commissioners or human rights tribunals may be an option, depending on the nature of the complaint. Complaints about investment professional conduct can also be made to accreditation bodies such as the CFA Institute or Advocis.

From the perspective of an aggrieved investor, this landscape is daunting and can lead to confusion, hesitation, poor advice and inappropriate choices. OBSI's services are available to investors for 180 days following a firm's final response letter, after which a complaint is considered out of mandate. Hesitation and delay in requesting our services by an investor can result in their complaint not being addressed. Presenting another option to unrepresented investors in this situation, particularly with the promotion recommended by the Working Group, risks increasing confusion and potential disadvantage for investors who are already in a challenging position.

Encouraging the use of multiple dispute resolution venues for lower-value complaints increases the overall cost of the system by reducing efficiencies of scale and scope

THE COSTS OF DISPUTE RESOLUTION SERVICES, LIKE THE ENTIRE REGULATORY AND INVESTOR PROTECTION SYSTEM, ARE ULTIMATELY BORNE BY INVESTORS

There are significant economies of scale and scope in dispute resolution services, as the baseline administrative and system costs are substantial. Developing and providing multiple dispute resolution venues for the same subset of complaints multiplies these costs for all users of the system.

The costs of dispute resolution services, like the entire regulatory and investor protection system, are ultimately borne by investors. Even costs paid directly by firms are, by their nature, incorporated into the fees that the end users of the system pay. It is in everyone's interest to minimize these costs and increase efficiencies wherever possible.

A system with multiple dispute resolution venues would reduce OBSI's ability to positively influence the system through the publication of aggregated data, trend analysis, systemic issue identification and the identification of best practices

DATA AND INSIGHTS FROM THE DISPUTE RESOLUTIONS SYSTEM ARE VALUABLE SOURCES OF INFORMATION FOR ALL STAKEHOLDERS AND THEIR VALUE IS DIMINISHED WHEN IT IS INCOMPLETE

OBSI's mission is to help ensure a fair, effective, and trusted Canadian financial services sector. We do this, in part, by sharing our expertise and insights. We publish extensive case volume and trend data through our newsletters and online Data Cube, and we use our insights to promote financial literacy messages and information on emerging areas of concern to consumers through our case studies and social media feeds. We also provide detailed reports to regulators to help them understand the nature of the unresolved disputes in the sector and enhance their understanding of the marketplace. By feeding data and insights back into the system in this way, we support a virtuous cycle of continuous improvement in the Canadian financial services sector.

The value of these insights and reports is diminished in a system involving multiple dispute resolution providers, because the relevant data available is disaggregated and incomplete. This can lead to less accurate analyses, flawed conclusions and failures to observe emerging issues and trends.

The proposed increase in the maximum award limit will improve access to the program for investors and firms with disputes appropriate for arbitration

THE COSTS OF CIVIL LITIGATION HAVE INCREASED SIGNIFICANTLY SINCE THE CURRENT ARBITRATION PROGRAM AWARD LIMIT WAS ESTABLISHED, AND THIS HAS CREATED A GAP IN ACCESS TO EFFICIENT DISPUTE RESOLUTION FOR CLAIMS EXCEEDING $500,000

We are supportive of the Working Group's recommendation that the compensation limit for the Arbitration Program be raised from $500,000 to $5,000,000. Such an increase would improve access to the program for a broader range of investors and firms with disputes that are suitable for arbitration.

For the Arbitration Program to succeed in its goal of improving investor access to fair, expeditious and cost-effective dispute resolution processes, it must offer advantages relative to civil litigation. The costs of civil litigation have increased significantly since the current Arbitration Program award limit was established, and this has created a gap in access to efficient dispute resolution for claims exceeding $500,000. Such a gap can lead to investors reducing their claims to fit the available dispute resolution avenue, rather than pursuing the redress they believe to be fair in the circumstances.

The existing time limit of 90 days for dealer response to an investor complaint is reasonable in many cases

INVESTMENT DISPUTES OFTEN REQUIRE MORE THAN 45 DAYS TO REASONABLY INVESTIGATE AND PROVIDE A SUBSTANTIVE RESPONSE

We are not supportive of the Working Group recommendation that the time limit for a dealer to provide a substantive response to a client complaint be reduced from 90 days to 30-45 days.

It is universally acknowledged that timely resolution of disputes is an important component of fairness and is advantageous to investors pursuing a complaint. However, often in securities disputes, the issues to be investigated and resolved are relatively complex and the factual background may reasonably take some time to establish. Additionally, investor and firm positions often require some time to develop as information is gathered, positions are considered and consultations take place.

In our view, 30-45 days is an unreasonably short time limit to impose on all cases involving dealer firms, and imposition of such a rule will result in substantive response letters being sent prematurely, denying firms and investors the opportunity to fully investigate and reasonably resolve their complaint prior to escalation to OBSI. In many cases, 90 days is a reasonable limit, and in cases where internal processes allow for quicker conclusion, substantive response letters are often sent sooner.

We note that the regulation recently proposed by the Autorité des marchés financiers ("AMF") 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 for federally regulated banks. If New SRO considers a reduced timeframe desirable, we would suggest a flexible standard such as the one proposed by the AMF.

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

Sincerely,

Sarah P. Bradley
Ombudsman & CEO