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

January 27, 2025

Delivered by email to: GCOcomments@ciro.ca

General Counsel's Office
Canadian Regulatory Organization of Canada
40 Temperance Street, Suite 2600
Toronto, Ontario, M5H 0B4

Re: Response to request for comments on the Proposal to Modernize the CIRO Arbitration Program

The Ombudsman for Banking Services and Investments (OBSI) is pleased to provide our comments to the Canadian Investment Regulatory Organization (CIRO) in response to its recent consultation, *Proposal to Modernize the CIRO Arbitration Program*.

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 provide services to federally regulated financial institutions, provincially regulated securities firms and credit unions from across the country. We have been providing these services for over 28 years. As such, we are uniquely positioned to share our views and insights for this important consultation.

As long-time advocates for accessible dispute resolution services as an essential component of 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 CIRO's commitment to ensuring fair redress for investors when errors or wrongdoing by registrants has caused investor harm, and its endorsement of the CSA proposal to provide OBSI with binding authority. OBSI agrees with CIRO that it is important for the Arbitration Program and OBSI's process to continue to be complementary.

Overview of comments

OBSI is supportive of the Arbitration Program's objective to provide a dispute resolution option for complex and large claims as an alternative to litigation that is complementary to OBSI's role. Our comments below focus on responding to the questions posed in the consultation document and are focused on the following key points:

- Mutual fund investors should have access to the Arbitration Program
- CIRO and OBSI programs should be structured to avoid overlap and minimize any potential for abuse. This is best accomplished by avoiding exceptions to the minimum claim amount eligibility criteria.

- Establishing a compensation range above OBSI's maximum limit will reduce confusion and increase clarity
- Six-year limitation periods are appropriate for alternative dispute resolution programs in Canada

Question 1: Should the program be extended to clients of mutual fund dealers?

MUTUAL FUND INVESTORS SHOULD HAVE ACCESS TO THE ARBITRATION PROGRAM

OBSI believes that access to effective dispute resolution services is an essential component of financial consumer protection for all Canadians. A key objective of both OBSI's service and CIRO's Arbitration Program is to support investor confidence by ensuring there are accessible and fair avenues for investor redress when conflicts arise.

It makes sense for investors in different investment product categories to have access to the same dispute resolution programs. Investors often diversify their portfolios across various product categories and they may work with multiple firms to meet their needs. Investors should have access to the same dispute resolution programs, regardless of investment product or firm registration category because this helps to reduce investor confusion, streamline the dispute resolution process and encourage economies of scale and scope in the provision of these services. Additionally, as CIRO works towards rule consolidation and integrated services, having uniform dispute resolution programs will help align with these efforts and avoid the potential for any gaps in the dispute resolution framework.

Question 2: Should the program remain available for 1) claims that fall outside OBSI's mandate/eligibility criteria and 2) claims where investors had attempted to resolve their dispute through OBSI and withdrew from or abandoned the process?

CIRO AND OBSI PROGRAMS SHOULD BE STRUCTURED TO AVOID OVERLAP AND MINIMIZE ANY POTENTIAL FOR ABUSE. THIS IS BEST ACCOMPLISHED BY AVOIDING EXCEPTIONS TO THE MINIMUM CLAIM AMOUNT ELIGIBILITY CRITERIA.

OBSI supports the position that the Arbitration Program should be available for claims that exceed OBSI's monetary recommendation limit and agrees with the rationale that it would ensure investors have access to a less expensive and less complex alternative to the courts for claims that exceed OBSI's recommendation limit.

We agree with the proposal to align the lower monetary eligibility level for the Arbitration Program with OBSI's current and future compensation maximum limits. As we outlined in our March 6, 2023, submission, arbitration is less suitable than ombudservices for lower-value, unrepresented complainants and expanding the Arbitration Program to these cases would complicate Canada's dispute resolution system, be confusing to investors, and increase overall costs by reducing efficiencies of scale and scope. Ensuring the Arbitration Program is complementary to OBSI's service will help to avoid these negative outcomes.

However, we do not think it is appropriate for the Arbitration Program to allow claims under $350,000 on the basis that they fall outside OBSI's mandate/eligibility criteria. In accordance with Part 6 of OBSI's Terms of Reference, complaints that are excluded from OBSI's mandate are cases that relate solely to:

- the general interest rate and risk management policies and practices of a firm
- the pricing of financial services by a firm
- the scale of fees or charges generally applicable to financial services offered to customers of the firm in similar circumstances or
- the commercial judgment of a firm

Though OBSI may investigate whether the process by which a firm implemented its policies and practices or made or maintained a commercial judgment was biased, incomplete, not in accordance with the firm's policies and procedures or otherwise was unfair.

OBSI will not investigate a complaint where the same subject matter, raised by the same complainant, has been considered in proceedings in or before any court, tribunal, arbitrator, or any other independent dispute resolution body, and those proceedings have concluded with a binding or final decision on the merits of the complaint.

In addition to the exclusions outlined above, OBSI will only consider a complaint that:

- is made by the appropriate complainant
- is not vexatious
- the firm has had the opportunity to investigate
- has been made to OBSI within 180 days of the firm's final response
- is within OBSI's six-year limitation period
- is not currently before an arbitration tribunal or court
- has not been previously investigated by OBSI

Given the limited nature of OBSI's mandate limits, it is difficult to imagine circumstances where a claim that is outside OBSI's mandate or eligibility criteria would be appropriate for the CIRO Arbitration Program. It would therefore be more straightforward to simply describe the Arbitration Program eligibility criteria by reference to the monetary claim amount only.

We also do not believe that that the Arbitration Program should be available to investors who abandon or withdraw from OBSI's process. While consumer withdrawal from OBSI's process is rare, in most cases when it occurs it is because the consumer anticipates an unfavourable outcome. To avoid receiving a final rejection of their complaint, consumers sometimes withdraw in protest. Making the arbitration program available to consumers who have withdrawn from OBSI could potentially lead to abuse of the system if complainants who have been unsuccessful at OBSI or who sense that a negative outcome may be forthcoming seek a potentially more favourable outcome through the Arbitration Program. This could lead to a misuse of both OBSI and CIRO resources and unfairly oblige firms to respond to unmeritorious complaints through both processes.

The negative outcomes outlined above can be avoided by simply establishing the $350,000 (potentially $500,000 in the future) lower claim limit for the Arbitration Program as outlined in the proposal.

Question 3: Is the proposed range, between $350,000 (and potentially $500,000) to $1,000,000, appropriate for arbitration claims involving investor disputes in Canada?

ESTABLISHING A RANGE ABOVE OBSI'S MAXIMUM LIMIT WILL REDUCE CONFUSION AND INCREASE CLARITY

OBSI is supportive of the proposed range and would also be supportive of a limit higher than $1 million, perhaps on a voluntary basis at higher claim levels. As discussed in our submission to the first consultation on the Arbitration Program, such an increase in the upper award limit would improve access to the program for a broader range of investors with disputes that are suitable for arbitration.

The Arbitration Program as outlined in the proposal offers significant advantages relative to civil litigation, which support its goal of improving investor access to fair, expeditious and cost-effective dispute resolution processes. Many of these advantages also accrue to firms involved in investor disputes.

The costs of civil litigation have increased significantly since the current Arbitration Program award limit was established, and this has created a potential gap in access to efficient dispute resolution for claims exceeding $500,000. Any such a gap could 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.

OBSI does not have a fixed position on the specific amount of the upper award limit, but would observe that given the ever increasing cost of formal litigation it may make sense for the upper award limit of the Arbitration Program to be higher than $1 million or to increase over time, perhaps relative to inflation.

Question 4: Should the limitation period for claims under the program be extended and what would be the appropriate limitation period for arbitration claims in the program?

SIX-YEAR LIMITATION PERIODS ARE APPROPRIATE FOR ALTERNATIVE DISPUTE RESOLUTION PROGRAMS IN CANADA

As noted in the consultation document, OBSI's limitation period is 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.

We believe that most or all of these reasons would apply equally to the Arbitration Program. It would make sense for the Arbitration Program's limitation period to align with OBSI's and it may be seen as incongruous to have more restrictive limitations.

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

Sincerely,

Sarah P. Bradley
Ombudsman & CEO