FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

May 23, 2014

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RE: CSA Staff Notice 31-338 Guidance on Dispute Resolution Services Client Disclosure for Registered Dealers and Advisers that are not members of a Self-Regulatory Organization (the "CSA Staff Notice")

FAIR Canada commends the CSA for the steps it has taken to strengthen the dispute-resolution system for investment complaints. FAIR Canada believes that a single, national program for the resolution of investment complaints is vital to the integrity of the Canadian financial services market and we are pleased that the CSA has recognized and identified the significant benefits to the Canadian financial services market of having a single dispute-resolution provider. 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 standards[1] is essential in the Canadian context.

1. Amendments to National Instrument 31-103

1.1. Amendments to National Instrument 31-103 are now in force, with a transition period ending August 1, 2014, which will require all registered dealers and advisers to join the

[1] 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.

Ombudsman for Banking Services and Investments ("OBSI"). In light of these amendments, the CSA has recently issued the CSA Staff Notice providing guidance to dealers and advisers to ensure that they properly discharge their obligations under the new requirements. The CSA Staff Notice articulates the three points in time when registrant firms must provide disclosure about the availability of OBSI and when it is required to be available to a client. This is helpful but not sufficient, given recent events in which OBSI has been forced to announce more refusals by investment firms.

1.2. FAIR Canada believes that now is the time for the CSA to take action so that OBSI has the proper footing to fulfill its mandate. In particular, two steps are vitally necessary:

1) The CSA must be clear as to what it means for a firm to participate in OBSI in a manner consistent with a firm's obligation to deal "fairly, honestly and in good faith with their clients" and must take immediate enforcement action against those who fail to do so and violate this requirement; and
2) OBSI must be redesigned so that investors have access to a system that includes binding compensation decisions.

2. Dealing "Fairly, Honestly and in Good Faith with Clients" When Participating in OBSI

2.1. The CSA Staff Notice fails to make clear what it means to participate in OBSI in a manner consistent with a firm's obligations to deal "fairly, honestly and in good faith with their clients". The third page of the CSA Staff Notice provides no clear expectations and only states: "We expect firms to maintain ongoing membership in OBSI as a 'Participating Firm' and participate in OBSI's services in a manner consistent with the firm's obligation to deal fairly, honestly and in good faith with its clients." That is the extent of the guidance on this critical point. It is inadequate given the refusals that have been made public this year by OBSI – especially those cases in which the refusals were stated at the outset of the independent dispute resolution process.

2.2. We note that the CSA, through the recent amendments, does not simply "expect firms to maintain ongoing membership" but *requires* such membership and the Guidance's wording should be appropriately amended.

2.3. In addition, the CSA needs to make clear what type of participation is commensurate with discharge of a firm's duty to deal fairly, honestly and in good faith with its clients, and what behavior is not and amounts to a violation of this duty. Recent pronouncements by certain investment firms - who have, according to OBSI's website, told OBSI in advance that their decision not to compensate was final and would not be changed no matter what OBSI concluded or recommended[2] - clearly do not amount to meaningful participation in the dispute-resolution process. Out of the four refusals OBSI has

[2] OBSI's website states that "Other times, a viable, operating firm has declared that it will simply not compensate the complainant any amount, no matter what our conclusions are." See online at http://www.obsi.ca/en/news-a-publications/e-news-archive/342.

announced so far this calendar year, two of them have told OBSI in advance that their decision not to compensate was final (Richardson GMP[3] and Armstrong & Quaile[4]) and would not be changed no matter what OBSI concluded or recommended.

2.4. Such behavior is an overt, dismissive refusal to acknowledge the validity of OBSI's process. This is not meaningful "participation" in the dispute-resolution process intended to deal with client complaints, and consequently it is not "dealing … in good faith with clients". The CSA must make this clear. Furthermore, the CSA must ensure that its member commissions and the SROs take strict enforcement action against firms who subvert OBSI in this manner. Absent such enforcement action, more and more firms likely will be emboldened to refuse to engage meaningfully in the dispute-resolution process. This will render complaints to OBSI increasingly pointless and in short order the investing public likely will stop coming to OBSI, leading to its eventual demise, and leaving many complainants with no practical means of getting a fair hearing for their complaints. As a result, consumer trust and confidence in the fairness of our financial system and the effectiveness of our regulatory system will be diminished.

2.5. **In short, the consumer redress system will not work effectively, investor protection will be harmed, and trust in the integrity of our system of securities regulation will be undermined if registrants are permitted to participate in a rote fashion while refusing to engage meaningfully in the OBSI process. A strong and immediate regulatory response is needed to prevent this, and the response should include enforcement action against investment firms who deliberately subvert OBSI's process and thereby intentionally fail to deal with client complaints in good faith.**

3. Redesign OBSI so that Decisions are Binding

3.1. In order to make the system work properly, FAIR Canada strongly recommends that OBSI be redesigned so that consumers have access to a system that results in binding compensation decisions. 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.

3.2. The steady increase in refusals to abide by OBSI's recommendations, and the corresponding tolerance dealers have developed to being "named and shamed", amply demonstrates that reputational risk is an insufficient deterrent for many registrants.

3.3. Reputational risk likely has even less deterrent effect on small and lesser-known firms operating in markets such as the exempt market that are not well-understood by many financial consumers. Many of the non-SRO registrants that now will be required to offer

[3] "Richardson GMP Refuses to Compensation Multiple Investors", April 16, 2014, available online at http://www.obsi.ca/en/news-a-publications/e-news-archive/364.

[4] "Armstrong & Quaile Refuses to Compensate Retired Complainants", April 25, 2014, available online at http://www.obsi.ca/en/news-a-publications/e-news-archive/364.

OBSI's services to their clients fit into this category. However, the significant compliance deficiencies that securities regulators have identified with non-SRO registrants leads one to question whether, in the absence of binding decisions, such firms will be willing to accept mere recommendations for the resolution of disputes with clients. Given that these firms will all soon be members of OBSI, now is the time to institute binding decision-making.

3.4. As we noted in our letter to the CSA dated June 1, 2011, certain industry participants have become threatened by the evolving role and independence of OBSI. The CSA took strong and appropriate action by entering into a Memorandum of Understanding with OBSI and requiring registered dealers and advisers to participate in OBSI (outside Quebec). **The CSA now must take additional steps to secure those measures by ensuring that participation by firms is, in fact, real and meaningful participation. This requires enforcement action against those who do violate their regulatory obligations as well as structural reform so that consumers have access to a system that includes binding compensation decisions.**

4. Consumers Deserve Reasons for the Firm's Internal Decision Not to Compensate

4.1. FAIR Canada believes that all firms, and not just the member firms of the MFDA and IIROC, should be required to provide reasons for their initial decision not to compensate a client. This should not simply be suggested as a best practice. Consumers rightfully expect to be informed of the reason(s) for the firm's decision. In addition, where the consumer wishes to pursue the matter further by means of a complaint to OBSI, having the firm's reasons on the record should help in the resolution of the matter by OBSI. The SROs' internal complaint handling rules require that reasons be provided to the client. The CSA should require the same from EMDs, Portfolio Managers and other dealers and advisers who will be required to join OBSI.

We thank you for considering our comments and views in this letter. We welcome its public posting and would be pleased to discuss this issue with you at your convenience. Feel free to contact Neil Gross at 416-214-3408 (neil.gross@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 Financial and Consumer Services 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
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