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February 28, 2024

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
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The Secretary
Ontario Securities Commission
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Re: CSA Notice and Request for Comment – Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service – Proposed Amendments to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations and Proposed Changes to Companion Policy 31-103CP Registration Requirements, Exemptions and Ongoing Registrant Obligations

The coalition of consumer advocates listed below (the Coalition) is pleased to share observations held in common in response to the above-referenced Consultation.

We stand together as a diverse coalition of organizations that collectively advocate on behalf of millions of investors and financial consumers across Canada. More specifically:

- We work on behalf of investors to catalyze advancements in the financial services sector and improve the marketplace for Canadians;
- We work to expand economic opportunity for Canadians living in poverty and champion financial empowerment;
- We educate and mobilize Canadians on a range of financial service issues, including those issues that impact the financial security of Canadians as they age;
- We promote increased financial competency and work to establish proficiency standards that are fit for purpose and deliver value for Canadians;
- We promote the fair treatment of consumers and work to ensure important services are affordable and accessible for all Canadians;
- We provide free legal services and public legal education to vulnerable communities at risk of suffering harm relating to their investments; and
- We provide support to investors when they have complaints against dealer firms.

Together, we speak for everyday Canadians ranging from a young couple saving for their first home, an aging professional planning for retirement, a single mother hoping to save enough for her children's education, or a retired senior depending on investments for living expenses. Our work seeks to prioritize the interests of these Canadians and ensure their concerns are reflected in the policy choices and decisions taken by governments and regulators. We join together with a common purpose and desire to endorse the benefits of this critical investor protection proposal. See the Addendum for a description of members of the Coalition.

General Comments

The Coalition strongly and unanimously supports the Canadian Securities Administrators' (CSA) proposed framework that would grant the Ombudsman for Banking Services and Investments (OBSI) the power to make binding decisions. An effective redress system with binding authority is a cornerstone of investor protection.

All stakeholders have a strong interest in ensuring investor complaints are resolved in a fair, efficient and effective manner. An accessible and functional dispute resolution system benefits both firms and investors and helps to strengthen confidence in our capital markets. For most Canadians with an investment-related complaint, civil litigation is simply too expensive,¹ complex and slow.² In most cases, OBSI is the only viable alternative for resolving complaints between firms and their clients.

We cannot overstate the importance of this proposal. For over 10 years, FAIR Canada and the other consumer advocates in the Coalition have repeatedly called for binding authority³ and we have not been alone in sounding the alarm. Independent experts on complaint handling systems have repeatedly told us that the lack of binding recommendations is harming Canadians and falls short compared to other countries with strong investor protection regimes.⁴

In its 2021 report, the Ontario Capital Markets Modernization Task Force appointed by the Ontario government also called for this serious issue to be addressed. It recommended that OBSI's recommendations be made binding to better protect investors and to help modernize our regulatory system.⁵ Similarly, in its 2023 Fall Economic Statement, the Ontario government expressed support for the Ontario Securities Commission's work to modernize the dispute resolution framework for Ontario investors.⁶ The CSA's proposal represents an important first step in addressing this critical issue.

We commend the CSA for proposing a thoughtful and balanced approach to implementing binding OBSI recommendations that will promote more cost-effective, timely and equitable closure for complainants. In our view, this proposal strikes a reasonable balance in allowing either party with a concern about OBSI's recommendation to ask for a review. By making the final decision binding on any party that requests a review, the proposal effectively ensures both parties fully commit to the OBSI process, which is intended to be an alternative to pursuing claims in court. Finally, we agree that OBSI should have flexibility in how it conducts reviews to ensure that the process remains at all times proportionate to the issues under consideration.

The CSA's framework provides a considered and proportionate response to failings of the existing system. Nonetheless, some in industry may oppose it, preferring the *status quo* which favours firms at the expense of individual investors who typically lack the resources needed for a fair fight in the courts. Instead, they are compelled to accept less than OBSI deems fair whenever a firm refuses to abide by OBSI's decision.

In considering industry objections, we invite the CSA to remember that binding recommendations are the only effective way to even the playing field for investors. Moreover, they are the norm in other jurisdictions, including the United Kingdom, Australia, New Zealand, Ireland, the Netherlands, the Czech Republic, South Africa, Singapore and Taiwan. Without binding decisions, this unresolved issue will continue to leave investors at the mercy of the worst actors and to undermine the integrity of our investment market.

The Coalition welcomes the opportunity to provide suggestions on specific aspects of the proposed framework. At the same time, we urge Canada's provincial governments to follow the Government of Saskatchewan's lead in publicly supporting binding decisions and expediting the introduction and passage of legislation to make this goal a reality. Canadians deserve nothing less.

The Current System is Failing Investors

OBSI's current practice is to name and shame firms that fail to comply with its recommendations. The evidence is clear; this practice is ineffective and encourages low-ball settlements that disadvantage harmed investors.⁷ It is also counter-productive, as it demonstrates OBSI's limitations and undermines confidence in the dispute resolution system and the investment market.⁸

The most significant shortcoming of naming and shaming is that it provides an opportunity and incentive for firms to settle for amounts lower than those recommended by OBSI.⁹ In the period 2015-2020, investment firms paid consumers almost \$3 million less than the aggregate amount OBSI recommended.¹⁰ An analysis of payments over the period 2018-2022 indicates clients received approximately \$1.6 million less than the amount OBSI recommended.¹¹ On average, consumers who accepted low-ball offers settled for 60% of OBSI's recommended compensation amount.¹² Given this data, why should investors feel that they are being treated fairly by the very firms that promised them they would put their interests first?

Binding decision-making will put an end to this harmful practice and should, instead, encourage firms to work harder to resolve client complaints fairly and honestly when they are first brought to their attention. This should lead to fewer cases requiring OBSI intervention – an ideal outcome. However, if this does not prove to be the case, binding authority will still ensure a more level playing field for investors who can count on a fair process and for the firms involved to respect OBSI's decisions. The alternative is no longer acceptable as the 2011 OBSI review aptly stated: "The system is unworkable if participating firms can simply reject an Ombudsman's decision."¹³ The time has come to address this issue and to enable OBSI to issue binding decisions.¹⁴

Comments on Consultation Questions

Responses to the CSA's specific consultation questions are set out in Appendix A. These responses also suggest some refinements to improve the proposal in a few places. They broadly reflect the views of every Coalition member; some members may provide further comments on aspects of the Consultation in separate comment letters.

We all agree that it is important that the CSA and provincial governments expeditiously implement the new approach following this Consultation. To this end, we encourage the CSA to create a working group that could provide any needed support to governments engaged in drafting the enabling legislation. We would also be happy to participate in further discussions at the legislative stage or when related regulations are developed.

Conclusion

Thank you very much for considering our comments on this critical issue. We welcome the CSA's efforts to improve outcomes for investors and are pleased to support these in any way we can. Coalition members will post this submission on their respective websites and have no concerns with the CSA or its members publishing it on theirs. Should you have any questions or wish to discuss any aspect of our submission, please contact Jean-Paul Bureaud, Executive Director, FAIR Canada at jp.bureaud@faircanada.ca or Tasmin Waley, Policy Counsel, FAIR Canada at tasmin.waley@faircanada.ca.

“J.P. Bureaud”

Jean-Paul Bureaud
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“Elizabeth Mulholland”

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“Laura Tamblyn Watts”

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“Doug Sarro”

Doug Sarro
Chair, Canadian Advocacy Council
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“Bill VanGorder”

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Chief Operating Officer & Chief Policy Officer
Canadian Association of Retired Persons

“Josh Morrison”

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Appendix A: Responses to Consultation Questions

Question 1: Impact of OBSI Not Being Designated or Recognized in All Jurisdictions

The Consultation seeks comment on the operational impacts of jurisdictions designating or recognizing OBSI as the identified ombudservice at different times.

We fully support each jurisdiction designating or recognizing OBSI as soon as possible. It goes without saying that synchronized adoption is not a prerequisite to a government's mandate and responsibility to protect consumers in its jurisdiction. What is crucial is adopting the framework as quickly as possible in as many jurisdictions as possible.

If OBSI is designated or recognized in different jurisdictions at different times, we do not foresee any fundamental operational issues that could not be overcome. This is, in part, because the proposal has preserved OBSI's existing processes leading up to a recommendation. Any operational impacts would only emerge at the review stage. As such, OBSI and firms should have little difficulty managing these relatively small impacts.

OBSI would need to track the location of where a complaint is initiated. It would also need to ascertain which process applied in the circumstances (i.e., binding or non-binding), and ensure it clearly communicates the appropriate process to both the client and the firm. We believe systems could be readily implemented to address these operational details. OBSI could also post information on its website about where it has been designated or recognized, together with an explanation as to how this impacts complainants based in those jurisdictions.

Question 2: Deeming Provision and Post-Decision Period

The Consultation asks for input about:

- a) a deeming provision, the circumstances that trigger it, and the appropriate length of time for a recommendation to be deemed a final decision under the deeming provision, and
- b) the post-decision period, and the appropriate length of time after which OBSI's decision would become final.

The Coalition supports the proposed trigger with respect to the deeming provision. We also agree that prescribing clear time periods for when a recommendation or decision becomes final and binding will help ensure complaints are resolved in a timely and predictable manner.

The amount of time should be sufficient to permit the client to seek independent advice regarding their options, including the consequences that flow from each option. The timing should also consider that clients living in rural communities or smaller centres may have more difficulty accessing this needed advice. Because both parties benefit from a quick and timely resolution, however, the designated time period should aim to minimize any other unnecessary delays in rendering a binding result. To this end, we

believe that 30 days would be an appropriate length of time after which recommendations and decisions would be considered final and binding.

We also strongly recommend that the CSA consider additional measures when a firm seeks a review of a recommendation. There is a risk that some firms may seek to use reviews to create further delays that may pressure their clients to settle. To address this risk, the CSA should consider additional measures designed to discourage this type of behaviour. For example:

- Requiring OBSI to publish its final decisions, together with the name of the firm.¹⁵ The prospect of being publicly named may discourage firms from asking for inappropriate reviews.
- Requiring firms that request a review to pay OBSI's costs for the review if it resulted in the same or a less favourable result for the firm. Cost consequences would inject an additional level of discipline for firms and help discourage frivolous or unmeritorious review requests.
- Requiring firms that request a review to pay interest on the compensation amount until payment is made if the review resulted in the same or a more favourable result for the complainant.

Finally, we recommend that OBSI develop plain language, investor-friendly explanations of the consequences of taking certain actions (whether accepting an OBSI recommendation, withdrawing from the process or seeking a review of a recommendation). OBSI would provide these explanations before starting the OBSI process and at each significant decision-making milestone in the process. This information could greatly assist the parties and help ensure that 30 days remains an appropriate time period.

Question 3: Complainant's Ability to Reject Decision

The proposed framework contemplates that complainants may not reject an ombudservice decision if they initiate a review of a recommendation.

We recognize that this is intended to balance the interests of both parties involved and to move them toward final closure. As noted above, both investors and firms benefit from authentic and meaningful commitment to OBSI's processes. Binding authority could address concerns that OBSI's processes might be used to prepare for a civil action. It could also inject additional discipline and commitment into OBSI processes, helping to deter frivolous requests and reducing unnecessary expenditures.

Making a final decision binding on the client, however, is a significant departure from the approach of comparable ombudservices in most peer jurisdictions. In most of these other countries, the client retains their choice to accept the decision, walk away from the process, or pursue other avenues of redress. The CSA's proposal does not explain why other jurisdictions have opted to preserve client choice in similar circumstances, nor does it clearly explain why the CSA is opting not to uphold this principle in Canada. To assess the appropriateness of the proposed approach, we need to better understand why other jurisdictions preserve the client's choice and why the CSA has determined this to be unnecessary.

From a practical perspective, it may be that few complaints typically involve dollar amounts that would make pursuing a claim in court feasible. After all, OBSI is intended to provide a more economical and efficient alternative to lawsuits. However, for complaints that do approach OBSI's \$350,000 compensation limit, the need to make it binding on the client may be less compelling. As such, we recommend the CSA consider whether a client should only be bound when the decision involves an amount below a certain threshold. This threshold might depend on how much it would cost to commence a lawsuit. At this stage, we do not have sufficient information to suggest a threshold, or even whether a threshold is warranted given OBSI's compensation limit. But it is worth exploring further, given the implications for clients and the fact that we would be diverging from accepted practice in other peer jurisdictions.

Finally, we would appreciate more information about the full scope of consequences for clients that ask for a review. We assume clients in these situations would be estopped from pursuing legal action before the courts, but it is not clear how narrowly or broadly estoppel would apply. Again, further information in this regard is necessary to assess the full impact of the proposal on investors' rights.

Question 4: Compensation Limit

The Consultation requests comments on maintaining the compensation limit amount of \$350,000.

The Coalition supports maintaining the compensation limit at \$350,000, with regular cost of living adjustments (COLAs). The COLAs should ensure the compensation limit is fully indexed to inflation so that it maintains its real value.

Periodic adjustments are consistent with the practice in the United Kingdom and Australia. In the United Kingdom, the Financial Ombudsman Service's (FOS) limit is adjusted each year in line with inflation, as measured by the Consumer Prices Index (CPI).¹⁶ Similarly, the Australian Financial Complaints Authority (AFCA) is required to adjust its compensation caps and monetary limits every three years in line with CPI/wage indexation.¹⁷

While there may be merit in increasing the compensation limit, we believe that it is more important for investors that decisions be made binding as soon as possible. The issue of the compensation limit can be deferred until we've gained some experience with the new binding process and have more data to assess the appropriate limit post-implementation of binding authority. In the interim, the CSA should consider developing a process for setting and reviewing the compensation limit that takes into account inflation and the impact on consumers.

Questions 5 and 6: Right of Appeal

Questions 5 and 6 seek comment on the absence of an appeal mechanism to either a securities tribunal or the courts. They also ask whether a statutory right of appeal to the courts or another third-party procedure for disputes should be included for amounts above a certain monetary threshold (e.g., \$100,000).

We do not see the absence of an appeal mechanism as impacting the fairness and effectiveness of the proposed system. The new review process strikes the right balance between efficiency and procedural fairness and ensures both parties can have their objections heard should they have serious concerns with OBSI's recommendations.

It is important to bear in mind that both parties are engaged in a process that begins with the firm's own internal complaints process. Only complaints that cannot be resolved internally proceed to OBSI. In some sense, OBSI is the first opportunity to appeal the initial outcome. Once it gets to OBSI, there is then a thorough investigation in which both parties are encouraged to voice their perspectives and produce information that supports their position. They can also engage in settlement discussions during this process, pending a final recommendation.

Assuming the complaint still cannot be resolved, the proposal would introduce a right to a review by a senior OBSI decision-maker who was not involved in the investigation and recommendation stage. Further, the proposal contemplates the availability of judicial review in appropriate circumstances. These processes are designed to help ensure disputes will be effectively and fairly resolved. At some point, however, further reviews can only prolong the process without shedding further light and increase the likelihood that the investor will feel pressure to settle because they cannot afford to continue.

We are also concerned that introducing an appeal mechanism would tilt the balance yet again in favour of firms, who have more knowledge, tools and resources to engage in appeals. An appeal option would effectively undermine the CSA's proposal by re-introducing a firm's ability to continue to challenge OBSI's recommendations at the expense of the more vulnerable party – the consumer.

Finally, it is important to put the need for an appeal into its broader context. OBSI has a long history of delivering effective complaint handling services, independently evaluated and affirmed. It has repeatedly been shown to be a trusted, well-established, and independent organization that has been providing sound dispute resolution services to Canadian financial consumers and firms for over 25 years. The most recent review of OBSI found that it met or exceeded the standards set by the CSA for an independent, accessible and effective dispute resolution service. In particular, the most recent independent assessment found that:

- OBSI's reasons are fair and proportionate;
- It meets and exceeds its standards for independence and fairness; and
- OBSI is not biased in favour of either consumers or firms.¹⁸

Given these findings, we see no reason why another layer of review would be necessary beyond that which already exists and that being proposed. The proposed approach – an internal review rather than a right of appeal to an external body – is also consistent with the recommendations in the 2022 independent review. The review noted that a full right of substantive appeal would negate OBSI's purpose and undermine its authority.¹⁹

Lastly, we do not support appeals for disputes involving amounts above a certain monetary threshold, such as \$100,000. Establishing a monetary threshold may inadvertently encourage parties to abuse the OBSI process as a quasi-pre-discovery period for potential litigation, which would undermine the integrity of the process as an alternative dispute resolution mechanism.

Questions 7 and 8: Oversight and Accountability

Questions 7 and 8 request comment on the oversight framework for the identified ombudservice.

The Coalition recognizes the need for oversight of OBSI. It is reasonable that the granting of binding authority would be accompanied by some additional regulatory oversight. We believe the oversight regime to be developed by the CSA, however, should ensure that OBSI remains independent and at arm's length of the CSA. OBSI plays a unique role and has specialized expertise that should be respected.

The existing memorandum of understanding between the CSA and OBSI already provides a robust oversight framework. It could be supplemented by a tailored approach that enables the CSA to more formally approve changes to OBSI's Terms of Reference, By-laws and other significant documents that set out the scope of OBSI's services. We also note that the availability of judicial review provides another oversight mechanism in appropriate circumstances.

Our key concern is that the oversight framework maintains OBSI's independence and limits additional oversight to only what is necessary to promote accountability within a binding framework. Independence is a fundamental characteristic of a financial ombudservice and the oversight regime should be limited to ensuring that OBSI meets the core principles and standards of an ombudsman. We look forward to seeing details of the proposed oversight regime.

Question 9: Prohibition on Use of "Ombuds" Term

Question 9 requests comment on the anticipated effectiveness of prohibiting the use of certain terminology for internal or affiliated complaint-handling services that implies independence, such as "ombudsman" or "ombudservice", to mitigate investor confusion.

The Coalition supports the prohibition of these terms. They create confusion and can mislead clients into believing the internal ombudsman process is arm's length and wholly independent of the firm.

Addendum: Description of Coalition Members

FAIR Canada

www.faircanada.ca

FAIR Canada is a national, independent, non-profit organization dedicated to being a catalyst for the advancement of the rights of investors and financial consumers in Canada. We advance our mission through outreach and education, public policy submissions to governments and regulators, and proactive identification of emerging issues. As part of our commitment to be a trusted, independent voice on issues that affect retail investors, we conduct research to hear directly from investors about their experiences and concerns. FAIR Canada has a reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of retail investors and financial consumers.

Prosper Canada

<https://prospercanada.org/>

Founded in 1986, Prosper Canada is a national charity dedicated to expanding economic opportunity for Canadians living in poverty through program and policy innovation. As Canada's leading national champion of financial empowerment, we work with partners in all sectors to develop and promote policies, programs, and resources that enable all Canadians to prosper.

Public Interest Advocacy Centre (PIAC)

<https://www.piac.ca/>

PIAC is a national non-profit organization and registered charity that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services.

Future of Law Lab and Investor Protection Clinic (IPC) at the University of Toronto Faculty of Law

<https://futureoflaw.utoronto.ca/>

<https://ipc.law.utoronto.ca/>

The Future of Law Lab is a platform for students, academics, lawyers, and other professionals to participate in collaborative initiatives exploring how the law will evolve in the future. We dive into the intersection of law, technology, innovation, and entrepreneurship, with programming dedicated to each of these streams. As a hub of interdisciplinary activity, we are dedicated to bringing together individuals from all backgrounds to examine the changing face of the legal profession.

The IPC at the University of Toronto, Faculty of Law provides free legal services and public legal education to members of vulnerable communities who are at risk of suffering harm, or may have suffered harm, relating to their investments. The IPC engages in a broad range of activities to educate the community and

promote investor protection and rights. We focus on helping the elderly, newcomers to Canada, and others who may not be able to afford legal representation.

CanAge

<https://www.canage.ca/>

CanAge is Canada's national seniors' advocacy organization. As an independent, non-partisan, non-profit organization, we educate and mobilize people on the issues that matter to older Canadians. We work to improve the lives of older adults through advocacy, policy, and community engagement.

Consumers Council of Canada

<https://www.consumerscouncil.com/>

Consumers Council of Canada is a national, independent, non-profit, voluntary organization that is working towards an improved marketplace for Canadian and Ontario consumers. Its aim is an efficient, equitable, safe and effective marketplace. The Council conducts an active consumer-interest research program, represents consumers in institutional roles across the economy, including in financial services, and is active on behalf of Canadian consumers internationally through its membership in Consumers International.

Canadian Association of Retired Persons (CARP)

<https://www.carp.ca/>

CARP is the largest seniors' advocacy group in Canada with over 330,000 members and 25 chapters across Canada. CARP's mandate is to improve healthcare and financial security and support the human rights of Canadians as we age. Our vision is to have a society in which everyone can live active, independent, purposeful lives as they age.

CFA Societies Canada

<http://www.cfacanada.org/>

CFA Societies Canada is a collaboration of 12 Canadian member societies, whose mission is to lead the investment profession in Canada by advancing the highest professional standards, integrity, and ethics for the ultimate benefit of Canadian society.

Kenmar Associates

www.canadianfundwatch.com

Kenmar Associates is an Ontario-based privately-funded organization focused on investor education via on-line research papers hosted at www.canadianfundwatch.com. Kenmar also publishes the Fund OBSERVER on a monthly basis discussing consumer protection issues primarily for retail investors. An affiliate, Kenmar Portfolio Analytics, assists, on a no-charge basis, abused consumers and/or their counsel in filing investor complaints and restitution claims.

Endnotes

¹ Canadian Lawyer Magazine's [2021 Legal Fees Survey](#) found that the cost of a civil action up to a 5-day trial is about \$83,000 in western Canada, \$46,000 in eastern Canada, and \$71,000 in Ontario.

² For example, the Advocates' Society paper [A Call for Action on Delay in the Civil Justice System](#), 2023, notes at p. 3 that it takes almost 1.5 years for a motion longer than 2 hours to be heard by a judge in Toronto, and more than 4 to 5 years for a civil action to proceed to trial.

³ For example, see FAIR Canada's [Open Letter to Minister of Finance](#), November 15, 2011.

⁴ Phil Khoury, [OBSI 2011 Independent Review](#), 2011 [Khoury]; Deborah Battell and Nikki Pender, [Independent Evaluation of the Canadian OBSI Investment Mandate](#), May 2016 [Battell]; Poonam Puri and Dina Milivojevic, [Independent Evaluation of the OBSI Investments Mandate](#), June 13, 2022, [Puri].

⁵ [Ontario Capital Markets Modernization Task Force Report](#), January 2021, p. 104.

⁶ [Building a Stronger Ontario Together - 2023 Ontario Economic Outlook and Fiscal Review](#), p. 32.

⁷ Battell, *supra* note 4, p. 1 and 28.

⁸ *Ibid.*, p. 1.

⁹ Puri, *supra* note 4, p. 34.

¹⁰ *Ibid.*, p. 35.

¹¹ [CSA Staff Notice 31-364 - OBSI Joint Regulators Committee Annual Report for 2022](#), October 2023, p. 4.

¹² *Ibid.*

¹³ Khoury, *supra* note 4, p. 31.

¹⁴ Puri, *supra* note 4, p. 40.

¹⁵ The client's name would not be published and would remain confidential.

¹⁶ FOS, [Award Limits Increase](#), March 23, 2023.

¹⁷ AFCA, [Incoming Adjustments to AFCA's Monetary Limits and Compensation Caps \(1 January 2024\)](#), November 28, 2023.

¹⁸ Puri, *supra* note 4, p. 8 and 46.

¹⁹ *Ibid.*, p. 42.