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Re: Regulation respecting complaint processing and dispute resolution in the financial sector

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The Portfolio Management Association of Canada (**PMAC**) is pleased to have the opportunity to submit the following comments regarding the *Regulation respecting complaint processing and dispute resolution in the financial sector* (the **Consultation** or the **Draft Regulation**).

PMAC represents over 300 investment management firms registered to do business in Canada as portfolio managers (**PM**s) with the members of the Canadian Securities Administrators (**CSA**), including the Autorité des marchés financiers (**AMF**). We have 161 member firms that are registered to do business in Quebec, including 18 that are principally regulated by the AMF. PMAC's members encompass large and small firms, and "traditional" as well as on-line firms, managing total assets in excess of $2.9 trillion for their clients.

OVERVIEW

PMAC's mission statement is "advancing standards"; we are consistently supportive of measures that elevate standards in the industry and improve investor protection. PMs generally manage client assets on a discretionary basis; they are subject to the highest proficiency standards in the industry and are fiduciaries to their clients, with a duty to act in clients' best interests.

PMAC supports the AMF's goal of ensuring the fair processing of consumer complaints in the financial sector and of imposing standards for investor complaints across different types of firms. However, we have serious concerns that, as drafted, the Draft Regulation will impose undue regulatory burden and costs to PM firms, without a corresponding investor protection benefit. We have detailed our key recommendations and concerns below.

KEY RECOMMENDATIONS

Our key recommendations are as follows:

1. **Maintain the existing principles-based approach to complaint handling for portfolio managers:** the Draft Regulation is overly prescriptive and does not take into account the variety of business models and client types served by PM firms. There is no indication that the existing principles-based complaint handling regime set out in the *Securities Act* (Quebec) is not working well for PM firms and their clients. We do not believe that a "one-size-fits-all" model for the entire financial sector will be in the best interests of the clients of PM firms.

2. **Exclude permitted individuals and institutional clients from the requirements:** the prescriptive approach and timelines set out in the Draft Regulation are not appropriate for sophisticated and institutional investors. These investors have a variety of arrangements with their advisers which may require a more specialized approach to complaint management. These investors also have the sophistication and means to pursue other forms of dispute resolution. They may prefer to use alternate means to do so.

3. **Remove the requirement for firms to offer a complaint drafting service:** this requirement would put firms in a conflict of interest situation and will not be in the best interests of the client nor meaningfully improve the complaint process.

4. **Reconsider the independence and conflict of interest provisions:** There is arguably an inherent conflict of interest between the firm and its employees and the complainant. It is impossible for employees to act with independence and avoid this conflict of interest and as such, firms cannot comply with section 5(2), as drafted. The firm and its employees are limited to managing the conflict of interest.

5. **Clarify the application of the Draft Regulation outside Quebec:** it is not clear whether PM firms whose principal regulator is a CSA jurisdiction other than the AMF must comply with the requirements in the Draft Regulation, based on section 13.14 of NI 31-103 and the *Securities Act* (Quebec). If firms with clients in Quebec must adhere to the Draft Regulation, this will cause significant additional compliance burden, given the differences between the proposed complaint handling regime and the existing regimes under NI 31-

103, the *Securities Act* (Quebec) and OBSI. PMAC does not believe that there is any additional investor protection policy reason to deviate from the existing complaint handling regime for firms who are not principally regulated by the AMF.

These key recommendations are discussed in further detail below, and we have also provided some additional commentary on the Draft Regulation.

Maintain the principles-based approach to complaint handling for portfolio managers

PMAC supports the AMF's goal of ensuring the fair processing of consumer complaints in the financial sector. However, members are concerned that the Draft Regulation requirements with respect to the complaint process and dispute resolution policy are overly prescriptive. Although we do not object to a requirement to assign a responsible person and handle complaints with diligence and within prescribed timeframes, PMs should have the ability to create the policies and procedures that function best for their business type and clientele.

We acknowledge that some segments of the financial sector may have problems when it comes to complaint handling that raise investor protection issues. We believe that any regulatory response should be proportionate, and that resources should be directed to those segments of the industry responsible for the largest number of complaints. It is not clear why the changes proposed in the Draft Regulation are needed with respect to PM firms, or that the existing complaint handling requirements are not adequately protecting the clients of PM firms. Evidence suggests that PMs are responsible for a small percentage of client complaints within the securities industry. We were not able to find statistics regarding complaints against securities firms to the AMF. However, the Ombudsman for Banking Services and Investments (**OBSI**) publishes complaint statistics in its Annual Report. While PMs represent 58% of OBSI members, complaints against them were only 6% of the total complaints regarding investments in 2020. This does not take into account complaints in the banking, insurance and credit rating sectors. PM firms owe a fiduciary duty to their clients and are already subject to a comprehensive supervisory regime that includes complaint handling provisions under the *Securities Act* (Quebec) and complaints documentation under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**). A one-size-fits-all approach for the entire financial industry – one that would treat an insurance broker the same as a PM for example - is inappropriate.

The complaint handling regime should be tailored to the specific sector, type of business and the client types served by firms. Principles-based regulation is more flexible, relevant, and recognizes the professional judgement of registered firms and their ability to handle client complaints. Members view the Draft Regulation as highly prescriptive. These prescriptive requirements fail to acknowledge the fiduciary duty owed by PM firms to their clients. The prescriptive policy and procedural requirements and timelines will impose additional compliance burden and costs for smaller firms and will require them to engage in potentially unnecessary additional client communications.

Exclude permitted individuals and institutional clients from the requirements

We strongly believe that permitted individuals and institutional clients should be excluded from the Draft Regulation. These are sophisticated individuals and entities that are often advised by experts and have the ability and means to pursue dispute resolution in a manner that suits them best. For these reasons, the OBSI mandate only applies to retail clients and we ask that the AMF adopt a similar approach with the draft regulations. Permitted and institutional clients of PM firms would not benefit from the proposed framework, the requirements (such as the 60-day complaint handling timeframe) may not be applicable to their unique circumstances. Requiring PMs to engage the complaint handling processes for these clients would add additional burden for both the firm and the client. The existing principals-based complaint regime is better suited to these sophisticated clients.

Remove the requirement for firms to offer a complaint drafting service

Members disagree with the requirement to provide a complaint drafting assistance service to clients as described in section 11. It is not clear in which circumstances this would be required and specifically what the firm is expected to do. Is it simply to transcribe what the client is saying or is it intended that the firm should assist the client in formulating the complaint? From an investor protection standpoint, PMAC is concerned that such a process would lead investors to place undue reliance on firms when there is clearly a conflict of interest in them doing so. Additionally, it is possible that this requirement could become very onerous if the client's concerns are not clear, if the client requires significant assistance, and if the client is not satisfied with the wording of the complaint. There is also a risk that the firm representative could be accused of influencing the client with respect to the wording of the complaint. PMAC appreciates that the AMF is seeking to establish an easy-to-use and accessible dispute resolution mechanism for investors that does not require investors to spend money to lodge a complaint. However, asking firms to provide

complaint drafting assistance would place the firm in a direct conflict of interest with a client in a way that risks confusing the client and, in the case of bad actors, could be detrimental to the client's ability to have their claim resolved fairly by the AMF.

Furthermore, it is not clear whether the 60-day time period begins to run before or after the complaint is drafted – we suggest that the time period should only begin once the claim has been drafted.

Reconsider the independence and conflict of interest provisions in section 5(2)

We do not believe that s. 5(2) is realistic as drafted; it is not possible for the complaints officer and the individuals responsible for processing complaints to "act with independence and *avoid any situation* in which they would be in a conflict of interest" (emphasis added). The fact that they are employed by the PM firm that is the subject of the complaint is arguably inherently a conflict of interest situation, and their employment with the firm precludes them from being "independent". This is especially true for small or one-person firms – there is no possibility of independence. The individual who is processing complaints can endeavour to approach the complaint with objectivity and abide by their duty to act in the best interests of the client, but they cannot avoid the conflict altogether or be completely independent. We refer to the various conflicts of interest provisions and guidance in the CSA's recently adopted changes to NI 31-103 (Client Focused Reforms) and note that although the firm and its registered individuals will always be in a conflict of interest in this instance, policies, procedures and controls could be enacted to appropriately manage the conflict. We suggest that section 5(2) be re-drafted to require firms to manage the conflict appropriately in the circumstances.

Clarify the application of the Draft Regulation outside Quebec

It is not clear how the Draft Regulation would apply to PMs and other registrants whose principal regulator is in a CSA jurisdiction outside of Quebec. Section 13.14(2) of NI 31-103 provides:

> (2) In Québec, a registered firm is deemed to comply with this Division if it complies with sections 168.1.1 to 168.1.3 of the *Securities Act* (Québec).

If the Draft Regulation is applicable to PMs and other registrants whose principal regulator is not Quebec, (whether because they are also registered in Quebec or

have clients located in Quebec), this will represent a significant additional burden for these firms.

For example, the requirement to designate an individual to handle complaints, and to implement the prescriptive requirements in the Draft Regulation will require additional time and expense for implementation, training and compliance monitoring. Given that firms outside of Quebec have a period of 90 days to resolve complaints internally under NI 31-103 before the OBSI process is engaged, a resolution timeframe of 60 days in Quebec will require a separate process. Other requirements under the Draft Regulation (the content of policies and procedures, the requirement to designate a complaints officer, the requirement to analyze complaints, record-keeping requirements) are not harmonized with NI 31-103, which will cause the firm to incur additional costs and could result in inconsistent treatment of complaints depending on where the client resides. PMAC does not believe that any of these differences would justify the regulatory burden imposed on firms, nor would these differences have a material impact on investors. As such, we urge the AMF to maintain the existing principals-based regime under the *Securities Act* (Quebec) for Portfolio Managers registered with other CSA jurisdictions, which is aligned with the complaint handling regime under NI 31-103 and is working well for those firms and their clients.

Additional comments

In addition to the above key recommendations, we request additional clarity on the following portions of the Draft Regulation:

a. *Definition of "complaint"*

Members are concerned that the definition of "complaint" is ambiguous, and the exclusions from the definition are too narrow. Under the current regime, section 168.1.2(1) of the *Securities Act* (Quebec) allows the registrant to determine and include in its policies "the characteristics that make a communication… a complaint that must be registered in the complaints register". The definition of "complaint" in NI 31-103 is also more principles-based and includes a limitation period: a complaint that a) relates to a trading or advising activity of a registered firm or a representative of the firm, and b) is received by the firm within 6 years of the day when the client first knew or reasonably ought to have known of an act or omission that is a cause of or contributed to the complaint.

The same is true of the OBSI definition.[1] The firm has the discretion whether to engage its complaint handling policies depending on where the complaint is lodged.

We suggest that PMs should continue to have the ability to exercise their professional judgment in determining what constitutes a "complaint" and when the requirements should be engaged. Clients contact their PM for many reasons, some of which are outside of the control of the PM. For example, the client may complain that their investment portfolio has decreased in value, and this may be due to fluctuations in the market. Such a communication should not necessarily engage the complaint handling process under the Draft Regulation. If the complaint handling process is engaged for frivolous matters, the time and expense to the firm of undertaking the process would be significant and would not result in any investor protection outcome.

b. "Member of the clientele"

It would be helpful for the AMF to clarify what is meant by "member of the clientele", and whether this would include joint account holders and beneficiaries of client accounts, as was suggested during the AMF Webinar held on Thursday, September 16, 2021. If the definition is intended to include third parties (such as a family member or beneficiary), this could cause a problem if the client (account holder) is not in agreement with the complaint of a third party that is considered a "member of the clientele". If the PM owes a fiduciary duty to the client, they must act in the client's best interests and may be in a conflict of interest situation vis-à-vis the third party complainant. It would be helpful if the AMF could provide additional guidance regarding the registrant's obligation in this situation.

OBSI defines "Customer" as "an individual who, or small business that, requested or received a Financial Service from a Participating Firm or its Representative, regardless of whether the Financial Service was received through an account at the Participating Firm, provided that it is reasonable for the individual or small business to believe that they were requesting or receiving a Financial Service from a Representative or a Participating Firm." We suggest that introducing a similar reasonableness test may improve the definition of "member of the clientele".

[1] (see OBSI Terms of Reference) "Complaint means an expression of dissatisfaction made by a Customer about the Provision of a Financial Service in Canada by a Participating Firm or Representative of a Participating Firm, made a) in writing or b) verbally either i) at the reportable complaint level (if the Participating Firm's regulator has established such a level or ii) at any level, if the Customer's dissatisfaction has been recorded by the Participating Firm."

c. *"that cannot be remedied immediately and for which a final response is expected"*

Members also request additional guidance and examples of what would constitute "remedied immediately" and "for which a final response is expected". Members suggest that if the matter can be remedied within a reasonable period (because it must be referred to another staff person, for example) this should not engage the complaint handling process and the registrant should not necessarily be required to document the interaction as a "complaint". Again, we suggest that a reasonableness standard would be more appropriate.

It is not clear what the expectation of a final response adds to the definition of "complaint". Depending on the situation, the client may simply want the matter resolved, and may not request a formal response. Is it expected that the registrant would ask the client whether a final response is expected (which would then engage the complaint handling process, regardless of the nature of the complaint)? The approach adopted by OBSI may be preferable – it recognizes that most complaints can be resolved without the OBSI's intervention and provides a list of the types of complaints that the OBSI will review and those that it would decline. This model defers to the professional judgement of firms while giving investors a right of recourse should they not be satisfied with the firm's response within 90 days of filing a complaint.

d. *Timing of complaint resolution*

Members note that depending on the circumstances, it may be difficult to resolve a complaint within the 60-day timeframe. This is especially the case where the investigation involves different firms, several staff within a firm or extensive documentation. If documentation is requested from the client, but not received within the 60-days, the complaint may not be resolved on time. The firm may be forced to close the file without resolving the complaint if the client has not provided sufficient information to conduct the investigation, which may not be in the client's best interest.

We believe that is would be preferable to extend the 60-day time period to 90 days. Not only will this assist firms in seeking an appropriate resolution (which, depending on the complexity of the issue and firm size/resources, can be an extensive process), but the 90-day period will align with firms' obligations under the OBSI process outside of Quebec, providing harmonization and making compliance more efficient and effective.

As noted above, the time should not be counted until the complaint is appropriately drafted or expressed by the complainant.

e. Communications with clients

Regarding section 14, and section 14(3) in particular, it would be helpful if the AMF provided additional guidance regarding what is expected in terms of continued communications with the client. If no offer is presented or if the client refuses the offer, for example, it is not clear what further communications with the complainant would be required. Such communications may be counterproductive and could be time consuming for the registrant. We urge the AMF not to codify requirements for additional paperwork where there is no investor protection benefit to such communication.

With respect to section 14(3), if the complainant files a proceeding with a court or adjudicative body, the relevant court or tribunal procedures would become effective, and these may preclude further direct communication between the registrant and the complainant (if they are represented by legal counsel, for example). We therefore suggest that section 14(3) be clarified or removed.

f. Qualifications of complaints officers and staff

We support the requirement for firms to appoint a dedicated complaints officer. Although we do not understand them to be strict requirements, the considerations in sections 6(1) and 7(1) regarding the professional and personal qualifications recommended for the complaints officer and staff responsible for processing complaints are onerous, especially for a smaller firm with few employees. The designated officer may have other responsibilities at the firm (it may be the CCO, the COO or the CEO for example). For reference, we know that over 60% of PMAC's member firms have a CCO who performs at least one role outside of the compliance function. It may not be possible for such a firm to hire individuals with specialized work experience and in-depth knowledge of legal and regulatory matters, or for the firm to perform solvency and judicial background checks on such individuals. Further, these qualifications may not be necessary for a firm to implement, manage and carry out an effective complaints-handling process. We note that the existing requirements in the *Securities Act* (Quebec) and NI 31-103 do not prescribe such professional qualifications and we believe that the Draft Regulations should be amended to remove these qualifications.

CONCLUSION

We respectfully request that the AMF maintain the existing principles-based complaint handling regime in the *Securities Act* for PM firms, taking into account the fiduciary duty owed by PM firms to their clients, and the small proportion of client complaints related to PM firms. We are concerned that the Draft Regulation will impose undue regulatory burden on PM firms, without a corresponding investor benefit. If the Draft Regulation is enacted, we strongly urge the AMF to exclude permitted and institutional clients from the requirements. We also request that the AMF clarify that the Draft Regulation only applies to firms whose principal regulator is the AMF.

We would be pleased to discuss any of our comments with you at your convenience. Please do not hesitate to contact Katie Walmsley at (416) 504-7018 or Victoria Paris at (416) 504-7491.

Yours truly,

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