



Submission to the Financial Consumer Agency of Canada: Internal Dispute Resolution Regulatory Requirements

Executive Summary

Consumer confidence in a well-regulated financial industry is a critical basis for financial stability, growth, efficiency. Regulations for Federally Regulated Financial Institutions (FRFIs) therefore play a vital role in ensuring fair and responsive dealings between customers and institutions.

The proposals contained in the *Commissioner's Guidance – Internal Dispute Resolution*, are inadequate to ensuring that the stated principles of *effectiveness, efficiency, and accountability* produce a fair result for consumers in dispute with financial institutions. The proposed regulations do not adequately guard against conflicts of interest in favour of the financial services provider and do not go far enough toward ensuring due process and redress for wronged consumers.

In-house mediation services contravene the first principle of fair dealings – lack of bias. An independent, third party mediator, with the mandate and authority to receive and investigate complaints and order restitution and compliance is crucial to ensuring trust in financial institutions and fairness for wronged consumers.

Consumers of FRFIs deserve regulatory protection, independent conflict resolution, and a comprehensive redress mechanism. Redress mechanisms are crucial to any regulation of FRFIs, and should include a fund from which wronged customers are paid restitution. An independent mediator should also be given investigative capacity, and the mandate to support criminal prosecutions, bolstered by stronger criminal legislation for financial crimes.

CARP is calling for comprehensive protections for customers of banking and financial institutions, with the following requirements:

- 1. A dedicated, independent agency with specialist knowledge in banking and financial services and the mandate, capacity and authority to:**
 - receive and investigate complaints;
 - mediate complaints;
 - support prosecutions.
- 2. A separate specialist tribunal to decide upon complaints with the authority to:**
 - order redress and restitution;
 - rescind fraudulent and criminal transactions.
- 3. A compensation fund for payment of restitution to victims.**



Seizing the Opportunity for Robust Regulations

CARP was disappointed with the December 2011 Supreme Court decision to disallow National Securities Regulator (NSR), championed by federal Finance Minister James Flaherty. The ruling deflated expectations for better investor protection at a time of decreasing consumer confidence in financial institutions.

The proposed NSR had been expected to include an enforcement and investigation function to provide a strengthened, more coordinated regulatory and criminal enforcement regime to better protect investors from misconduct in Canada's capital markets.

CARP members had wanted to see the NSR established because of the promised improvement in investor protection, including better investigation, mediation and restitution.ⁱ The single NSR would have been a great step forward toward replacing the 13 disparate provincial and territorial regulators currently in place.

Consumers could have expected a single, independent body, with the mandate and authority to address complaints, order restitution, and pursue criminal charges against individuals and institutions guilty of fraud, financial crime, or other malfeasance. And the financial industry would have benefited from the increased trust and confidence of investors.

CARP members polled have strongly endorsed a national initiative. They see value in having a single regulator and indicated even greater support for the agency to have enforcement and restitution powers. The same principles hold true for regulations regarding FRFI consumer conflict mediation. However, rather than strengthen and empowering the Ombudsman for Banking Services and Investments (OBSI) - the current FRFI mediator, the proposed regulations take a step back towards fractured arbitration that exposes customers to the losing end of conflicts of interest that in-house mediation is likely to produce.

Guiding Principles of Consumer Protection

The legal and regulatory framework should prioritize consumer protection. A robust legal and judicial framework should exist to protect consumers “from and sanction against financial frauds, abuses and errors.”ⁱⁱ Allowing FRFIs to self-mediate conflict with consumers undermines this principle of consumer protection, and does little to ensure fair dealing. The government has a responsibility to ensure that customers are protected against financial malfeasance and crimes and that they can appeal for due recourse and restitution should they be wronged by a financial professional or institution.

An effective mediator should be explicitly dedicated and responsible for financial consumer protection, with the necessary authority to fulfill its mandate. A comprehensive consumer protection system must include a tribunal with enforcement power, to order restitution and enforce compliance.

According to the organization for Economic Cooperation and Development (OECD), “they require clear and objectively defined responsibilities and appropriate governance; operational independence; accountability for their activities; adequate powers; resources

and capabilities; defined and transparent enforcement framework and clear and consistent regulatory processes.”ⁱⁱⁱ Achieving a level playing field between consumers and financial institutions that guarantees equitable and fair treatment of customers should be the priority.

New regulations should ensure that customers have “access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient.”^{iv} Complaints and redress processes must be free of conflict of interest, ensure equivalency in knowledge, expertise and resources for complainant and respondent.

Effectiveness, efficiency, and accountability are the stated goals of the proposed regulations, but these principles must give due recourse to customers and not favour institutions. The proposed regulations, for example, state that complaints should be resolved within 120 days. While expediency may be favourable to both banks and customers, the regulations must ensure that customers are afforded sufficient time to press for resolution and mediation, without running the risk of unduly elapsed time-frames. Short time frames for lodging complaints and seeking resolution and restitution will especially favour institutions, should in-house mediation be allowed to pass.

Making matters worse, the limitation period continues to run while a complaint is in the mediation process. At the very least, the limitation period should be suspended during the mediation process.

Redress is a crucial component of effective regulations and oversight. Currently, and under the proposed regulations, customers are not adequately guaranteed restitution. The complaints regime must include a mechanism to grant and enforce redress, including financial restitution. Customers must not only be allowed straightforward access to a complaints mechanism, but should have a reasonable expectation for redress and financial restitution. An independent mediator should also be empowered to support criminal as well as regulatory prosecutions.

Recommendations

These principles underpin CARP’s recommendations for new proposals for regulating the mediation process between FRFIs and customers. The government has a central role in guaranteeing fairness, independence, due recourse for consumer complaints and restitution. CARP is calling for comprehensive protections for consumers of banking and financial institutions that include the following elements:

1 A dedicated, independent agency with specialist knowledge in banking and financial services and the mandate, capacity and authority to:

- receive and investigate complaints;
- mediate complaints;
- support prosecutions.

2 A separate specialist tribunal to decide upon complaints with the authority to:

- order redress and restitution;
- rescind fraudulent and criminal transactions.

3 A compensation fund for payment of restitution to victims.

Consumers of FRFIs deserve regulatory protection, independent conflict mediation, and comprehensive redress mechanism. Financial stability, growth, efficiency and innovation are dependant on consumer confidence in a well-regulated financial industry. Both consumers and the financial industry will benefit from the increased trust and confidence of investors that can be fostered by clear and fair regulations.

Who we Are

CARP is a national, non-partisan, non-profit organization with over 300,000 members across the country. CARP is committed to advocating for social change that will enhance the quality of life for all Canadians as we age. Consumer protection is a principal concern for our members and our advocacy.

References

ⁱ CARP Poll, November 2011, <http://www.carp.ca/wp-content/uploads/2011/11/Advocacy-Poll-Report2.pdf>

ⁱⁱ G20 High-level Principles on Financial Consumer Protection, OECD 2011, <http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/48892010.pdf>

ⁱⁱⁱ Ibid.

^{iv} Ibid.