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CANADIAN BANKERS ASSOCIATION

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Mr. Tyler Fleming
Director, Stakeholder Relations and Communications
Ombudsman for Banking Services and Investments
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Dear Mr. Fleming:

As one of the industry stakeholder groups with a strong interest in OBSI's operation, we are pleased to respond with the banking industry's comments on the *Consultation on Proposed Changes to OBSI's Terms of Reference*.

We have taken this opportunity to provide our views on both the proposed changes to the TORs as well as some of the existing wording that we feel might be improved. Our primary concerns are discussed first, followed by other concerns in the order that they appear in the TORs document.

Primary Concerns

Section 14 $350,000 monetary limit
OBSI and its predecessor, the Canadian Banking Ombudsman, were established to provide a free redress process for Participating Firms' Customers as an alternative to the more costly court system. The monetary limit on recommendations was established, recognizing that more sophisticated Customers with higher-value Complaints have the resources to pursue their Complaints through the court process.

OBSI also has provisions in its agreements with Complainants that the results of OBSI's deliberations and its recommendations are confidential and cannot be used in any subsequent litigation.

We therefore question why OBSI would want to investigate Complaints where the amount claimed by the Complainant exceeds the $350,000 limit. If OBSI investigates and recommends $350,000 in compensation to the Complainant and the Complainant decides to pursue further recompense through the courts, we suggest that most Complainants, notwithstanding the consent agreement, would want to use the OBSI finding in their favour to support their subsequent legal proceedings. OBSI already spends significant time and legal expense

contesting involvement in legal proceedings and we suggest that this provision would significantly increase OBSI's exposure to such situations.

If OBSI moves forward with this change to the TORs, we would suggest that OBSI ensure that it advises Complainants with claims exceeding $350,000 that, should a Participating Firm agree to an OBSI recommendation of any amount up to $350,000, it may ask for a full and final release before paying such a settlement.

Paragraph 9(c) time limitation for bringing complaint to OBSI
We recognize the need for OBSI to have some flexibility to extend the 180-day time limit for Complainants to bring their Complaints to OBSI in, hopefully rare, instances where there are extenuating circumstances. We appreciate the effort to clarify in the TORs what some of those extenuating circumstances might be. We would suggest, however, that instead of "in some instances", use of the phrase "in certain extenuating circumstances" would better express the intent that extensions beyond the 180-day limit would be the exception rather than common practice. In our view, 180 days is a reasonable time period for a Customer to decide to escalate the Complaint after being informed of the Participating Firm's decision and being advised of the right to escalate to OBSI. Only in exceptional circumstances should OBSI accept Complaints after a longer period of time.

In addition, if the Participating Firm has given the Customer the proper notice of the right to escalate the Complaint to OBSI and OBSI is considering accepting a Complaint after the 180-day limit, the process should require OBSI to explain the extenuating circumstances to the Participating Firm and obtain the Participating Firm's consent to investigate the complaint.

We would also suggest that any exceptions to the 180-day limit should be no greater than one year after the Participating Firm provided its final response and escalation information. Delays greater than one year would increase the potential for incomplete or inaccurate information due to extended time frames. Suggested wording might be "...investigate a Complaint more than 180 days <u>but not more than 12 months</u> after receipt in writing ..."

Other Concerns

Section 2(a) definition of "Complainant"
Since Customer is already defined as "an individual who, or small business that, applied for or received a Financial Service from a Participating Firm", there is no need for the words "small business or individual" in the definition of Complainant, so they should be removed.

Section 2(a) definition of "Participating Firm"
It is not clear that the affiliated entity is providing financial products or services to customers in Canada. We would propose amending the definition as follows:

> *"Participating Firm" means a Member that is a domestic or foreign financial institution or other entity, <u>and any affiliated entity controlled by such Member,</u> that directly or indirectly provides financial products or services to customers in Canada ~~as well as any affiliated entity controlled by such Member~~, provided that such affiliated entity is itself eligible for membership in OBSI but, for greater certainty, excluding any affiliated entity whose main business is the provision of insurance products or services.*

Section 7 threats to staff
We understand and agree that, should OBSI staff relay information to a Participating Firm about a client's threats to the Firm's staff, the Firm should not reveal to the client the identity of the person who conveyed that information. We are concerned, however, that the requirement to "keep the identity of the person who made such report confidential" would preclude the Firm from providing such information to authorities who may need to investigate the threat. We suggest adding an exception for the firm to provide the name to lawful authorities.

Consideration should also be given to adding the ability for OBSI to discontinue reviewing a complaint if threats are made about either the Firm or OBSI.

Section 8 fairness statement
We support the concept of fairness where the interests of all parties are balanced and "principles of good financial services and business practice, law, regulatory policies and guidance, professional body standards and any relevant code of practice or conduct applicable to the subject matter of the complaint" are taken into consideration. We need to ensure, however, that this does not override contractual agreements entered into by both parties.

Subsection 9 (a) Non-participation of interested parties
We are concerned that in some cases the non-participation of an interested party to the Complaint might prejudice OBSI's consideration of the Complaint, so we suggest that a second proviso be added to this subsection to specify that OBSI can proceed to consider the Complaint only if the non-participation of the interested party does not prejudice either the investigation or the finding.

Paragraph 9 (b)(i) complaint not resolved by firm
This paragraph could address the issue more clearly by merely saying "(i) the Participating Firm has completed its examination of the Complaint, informed the Complainant of its final conclusion, and the Complainant is not satisfied with the outcome." Use of the word "offer" implies a resolution to the Complaint that is monetary in nature, but some Complaints may be resolved with a non-monetary solution, such as a letter of apology or correction of an error.

Paragraph 9(b)(ii) 90-day internal time limit
For clarity, we suggest that the first part of the sentence include a description of when the 90-day limit starts, by inserting wording as follows: "90 calendar days have elapsed since the Complaint was received at the second level of complaint resolution within the Participating Firm ..."

Paragraph 9(c) time limitation for bringing complaint to OBSI
The section may read better if the initial word "if" is removed.

Subsection 9(e) Complainant-initiated court proceedings
It is our understanding that once a court proceeding is initiated, the plaintiff cannot put the action on hold while another investigation plays out – they must officially withdraw from the proceeding. We therefore suggest that the last phrase in this subsection be amended to read,

> "... a regulator), the Complainant has withdrawn from the action."

If the Complainant does not withdraw from the court proceeding, then OBSI should not take on the Complaint. Customers, who have been told of their options when the Participating Firm

provides its response and information about the right to escalate the complaint to OBSI, make a decision as to which course of action to pursue. If that course of action is not turning out the way they wanted, they should not be able to suspend that action to see if the other would be more favourable. Moreover, there is a very real potential for the duplicate and parallel processes to end with conflicting or at least inconsistent results, creating unnecessary confusion for all parties.

Subsection 9(g) Frivolous and vexatious complaints
We support this section and the types of situations that should lead to OBSI discontinuing its consideration of a complaint, but suggest that the concept of "abusive" also be included so the section would read "... not in a frivolous, vexatious, abusive or threatening manner." In our experience, abusive situations can arise and staff of OBSI and Participating Firms should not have to deal with such treatment.

Subsection 10(a) Exceptions for certain subject matters
In paragraph (i) we would like to see this exception expanded to include business decisions of the Participating Firm. For example, if a Participating Firm decides to no longer offer or modifies a certain product or service, or where a bank chooses not to do business with a particular client, such business decisions should not be the subject of an OBSI investigation.

Subsection 10(b) Court proceedings initiated by Participating Firm not concluded
We strongly disagree that OBSI should become involved in a Complaint that is already before the courts, whether initiated by the Customer or the Participating Firm. If the Participating Firm made an error, did not follow its policies and procedures or treated the Complainant unfairly, a Court will be able to determine that and make a decision accordingly. A concurrent secondary review by OBSI is not necessary and could be disruptive to the Court proceeding. It may even be prejudicial should OBSI arrive at a different conclusion than the Court. The Court also has the ability to award damages, so the duplicative OBSI process is unnecessary if the Complaint has already been taken to court. Again, there is a very real potential for the duplicate and parallel processes to end with conflicting or at least inconsistent results, creating unnecessary confusion for all parties and the potential for double recovery.

Subsection 10(c) More appropriate forum
We are completely supportive of OBSI being able to decide to not pursue a Complaint if it believes there is a more appropriate forum for it to be considered. The use of the word "decides" in subsection (c) itself, however, could be interpreted to mean that OBSI would have the ability to direct the Complainant and Participating Firm to another forum. OBSI should have the ability to refuse to take on a Complaint, but the decision about taking it to another forum should be left to the Complainant and the Participating Firm. We suggest that subsection (c) would be more appropriately phrased "where OBSI believes that there is a more appropriate place ..."

Section 11 Six-year time limitation
We appreciate the increased certainty of having a stated time limit on Complaints that OBSI will consider and understand that a preliminary investigation may be necessary to determine whether the time limitation applies. We do, however, have two concerns about this provision.

First, given that most commercial retention policies require organizations to keep records for no longer than seven years, we are concerned that the six-year time frame may result in banks not having the necessary records to properly investigate a Complaint if the combined six years plus the time for the Complainant to become aware of the problem results in a need for records that

no longer exist. A shorter time frame would assist with ensuring that the needed records are available – perhaps a time frame like the two-year limitation period in effect in several provinces would be more appropriate.

Second, the wording in this section is not clear as to when the OBSI limitation time period applies. The starting point is when the Complainant first discovers the problem, but it is not clear whether the Complainant must bring the Complaint to the Participating Firm or to OBSI within the six year time frame. The current wording could be interpreted to mean either and should be clarified to state that the Complainant must bring the Complaint to OBSI within the six-year time frame.

Subsection 12(a) Material interest
We support this provision for dealing with material interest situations involving the Ombudsman. The provision should be expanded, however, to include investigators as well, since potentially an individual investigator could encounter a case where they have a material interest and there should be a policy of assigning such cases to another investigator.

Subsection 18(c) Tolling agreement
As has been done in the past, OBSI should consult with Participating Firms on the form of tolling agreement that suspends the limitation period during OBSI's investigation of the Complaint. It should not be a unilateral decision imposed on Participating Firms. Suggest that the wording be:

> "...enter into an agreement with OBSI and, ... in a form determined by OBSI <u>in consultation with Participating Firms,</u> to suspend ..."

As noted above, the banks already have in place a blanket tolling agreement. If newer versions are being considered for other Participating Firms that are not substantially similar to those already executed by the banks, OBSI should provide the banks with the option of executing a new tolling agreement.

Subsection 18(d)
Capitalize "customers" as it is a defined term.

It bears repeating in this section that Customers have 180 days to bring their Complaint to OBSI, so we recommend that the wording be:

> "inform all Customers who have made a Complaint of their right to bring their unresolved Complaint to OBSI <u>within 180 days</u> ..."

Section 19 Participating Firms' internal complaint handling process
Since federally regulated financial institutions (FRFIs) as of September 2, 2013 must follow the federal requirements in the Financial Consumer Agency of Canada (FCAC)'s Commissioner's Guidance *CG-12 Internal Dispute Resolution* we recommend that, similar to the provision for members of MFDA and IIROC, the TORs exempt FRFIs from Section 19. Otherwise, should the provisions in CG-12 ever change, there may be an unnecessary conflict between OBSI's and the FCAC's requirements, leaving FRFIs in a difficult situation that would likely result in non-adherence to OBSI's TORs. Also recognizing that there may still be Participating Firms that are not subject to any of the IIROC, MFDA or FCAC provisions, we propose that the following wording be inserted in Section 19:

"... established by IIROC or the MFDA, as applicable, and are not subject to this Section 19. Participating Firms that are federally regulated financial institutions subject to guidance issued by the Commissioner of the Financial Consumer Agency of Canada are not subject to this Section 19. All other ..."

Subsection 20(a) and (b) Ongoing legal proceedings
If, notwithstanding our representations otherwise, OBSI investigates a Complaint concurrently with an ongoing legal or other proceeding, then both these subsections' references to "any subsequent legal or other proceedings" should be amended to "any ongoing or subsequent legal or other proceedings."

Subsection 20(c) Disclosure of non-co-operation or refusal to OBSI Board
We understand that OBSI management must ensure that its Board is aware that OBSI will be publicly disclosing a Participating Firm's refusal to follow a recommendation before the public announcement. As the Board is not involved in the day-to-day decisions on Complaints, however, it is important that this notification to the Board is for information purposes only and that the Board is not opining on the decision made nor acting as an appeal structure to review decisions by the Ombudsman. Otherwise the impartiality of the Board could be questioned. Perhaps adding, "for their information" ("...to OBSI's Board and the appropriate regulators for their information before such information or ...) would provide clarity.

Subsection 20(c) Disclosure by Participating Firm
We understand and support the provision that precludes the Participating Firm from disclosing information to the OBSI Board, given its impartial role in decisions. With respect to disclosure to its Regulator, however, the Participating Firm should have the same ability as OBSI to discuss and defend to the Regulator its position on the Complaint in advance of OBSI's publication.

Once OBSI has released the information about the Participating Firm's refusal to cooperate or follow a recommendation, the Participating Firm should have the ability to disclose to the public information about the file – subject to privacy laws – that supports its position. The Firm should not be limited by what OBSI itself may have disclosed, since OBSI might not have disclosed key facts related to the Firm's position. Alternatively, OBSI may wish to consider giving the Firm the option of including its response as part of the OBSI publication of the Firm's refusal to cooperate.

We suggest that the provisions allowing the Participating Firm to disclose information in response to a request by the Regulator, while adding transparency, are unnecessary. With respect, any requests for information by a Regulator to a Participating Firm will supersede confidentiality provisions in the OBSI TORs.

Subsection 20(d) Disclosure by OBSI to employees, agents, etc.
OBSI's employees, agents, advisors and consultants are presumably subject to contracts that include confidentiality provisions. We suggest adding to the end of this section, "provided such bodies are subject to the same confidentiality obligations as OBSI."

Subsection 20(e) Define "person"
While we presume that "person" in this subsection may include the Complainant, the Participating Firm or any other party that OBSI might contact about the Complaint, we suggest that it might be valuable to clarify that to ensure that going forward any proprietary information that any party might provide and want to keep confidential would be captured by this provision.

From the Participating Firms' perspective, a Firm might disclose to OBSI to defend a Complaint proprietary information about one of its systems that, if that information were to be disclosed, might cause a competitive disadvantage to the Firm.

Section 33 Investigators
In the third sentence, we suggest specifying that individual investigators believe compensation is warranted and that they escalate the Complaint – "In instances where **an** OBSI investigator believes compensation is warranted … the investigator shall escalate the Complaint to either the Ombudsman or …"

In conclusion, we reiterate our thanks for the opportunity to provide our input to the review process for the TORS and invite you to contact us if you have any questions about or wish to discuss our suggestions.

Yours truly,