# DAVID MCNABB LL.M (ADR), C. MED

July 9, 2012

Tyler Fleming
Director, Stakeholder Relations and Communications
Ombudsman for Banking Services and Investments

via email only publicaffairs@obsi.ca

Dear Tyler Flemming:

**Re: Comments: OBSI Investment Suitability and Loss Assessment Process (2012)**

I am responding to the request for public comments regarding OBSI enhancements and changes to its suitability and loss assessment process published May 10 2012. I am a Deputy Ombudsman with the RBC group of companies and the comments in this letter are my own. I provide a final appeal within RBC of unresolved investor complaints. RBC and my RBC Ombudsman office colleagues may or may not share any or all of my comments.

My case experience gives me familiarity with OBSI iterated methods and methodologies. My comments in this letter are informed by my case experience and my research and educational interests. Previously, I responded to the initial OBSI request for comments issued May 26 2011. My comments concern the proposed use of common indices in most suitable performance comparisons.

Recommendation:

***Apply an appropriate GIC term and rate using the dollar weighted method of reporting investment performance ( portfolio after deposits and withdrawals for the period) in most suitable performance comparisons, rather than common indices.***

When determining 'harm' in suitable performance comparisons I am un-convinced that the system wide use in Canada of common indices as suitable benchmarks is at all appropriate, especially in the absence of a more thorough and robust policy discussion of its effects on secondary trading in the capital markets here in Canada. I can imagine the possibility of new moral hazard for advisors and investors and real consequences with this proposal.

In the extreme, advisors could now say to new investors not to worry about investment losses because there is a natural hedge against losses built into the complaint system. *'You will do no worse than the market if I make a mistake with an investment selection, because in Canada we use common indices to decide investor 'harm' in suitable performance comparisons'.* Investors accepting advisor recommendations may have the belief or false belief that there could be security of performance built into the investing enterprise in Canada.

This policy issue – the use of common indices to decide investor 'harm' in suitable performance comparisons-- and its effects on the investing enterprise have not been widely and publicly debated and settled in Canada outside of OBSI and its experts. Worse still, inadvertently and unintentionally, the OBSI proposal to use market indices rather than a GIC rate by extension, could be seen to be biased support generally to keep investors in markets and paying fees on portfolios fully invested in markets, as

common indices follow inevitable cycles including market corrections. Using common indices to redress investment losses could have the effect of keeping an investor fully invested in up or down markets negating the need for investors to think about going back to cash once already in markets. An investor facing imminent retirement and also harmed by unsuitable investment losses, wants to be returned to a cash position that will help achieve a real retirement objective, rather than merely a previously un-suitable portfolio redressed using common indices.

What is the appropriate benchmark when returning investors to the position they otherwise would have been in except for suitable investments? Worthy of debate and consideration is a GIC rate (term appropriate) applied to the dollar weighted portfolio holdings for the period. Whether an investor has a conservative or more aggressive appetite for risk and growth, there is always a purchase or sale of an investment from or to cash. Implicit in a strategy to hold investment positions or to transfer a portfolio to another advisor, is the option of the investor to give sell instructions- to cash- rather than holding or transferring assets. From a policy perspective investors generally accept that their capital is at risk once invested in markets which by their nature are uncertain. The investing enterprise between an advisor and an investor is an exercise in informed, although uncertain speculation in securities and markets. From a policy perspective it makes sense that liability findings made by OBSI with 'certain' hindsight will be redressed with a certain (sometimes notional) 'cash' starting point for the calculation, rather than securities and markets benchmarks whose performance is uncertain.

***Conclusion***

It appears that this OBSI proposal to use common indices is rooted in part in the expert role it claims for itself in deciding suitability, which in this context is a concept in administrative law used by regulators. Suitability of an investment portfolio is only one important standard in deciding civil liability for harm and loss arising from alleged failings of an investment advisor for appropriate care- in legal terms a breach of a duty of care. Deciding and using suitability by itself in Canada to redress civil liability (together an OBSI construct or method) mixes and uses concepts from administrative and civil law in a narrow and unsustainable way in my view. A focus by OBSI on deciding a reasonable level of care or service in a particular set of circumstances, with a background review of suitability, widens the lens of the case review to the relationship between the advisor and investor. The advisor and investor become parties to a civil dispute about an appropriate level of care in a particular investing relationship rather than respectively, subjects and witnesses to a proceeding used normally to determine compliance with securities laws and regulations and advisor discipline.

The question used to organize a complaint review matters to the investing enterprise in Canada. Rather than a narrow determination of suitability, a new organizing question for OBSI reviews could be….What is a reasonable level of professional care and service offered by an advisor in the face of the investor's reasonable efforts to understand and collaborate with the advisor, in a particular set of circumstances? Together with a redesigned and meaningful public appeal mechanism where the advisor and investor names become public along with the dispute substance, only after an impasse in facilitated settlement discussions, an OBSI review will be seen to revert back within the usual boundaries of mediating civil liability through facilitated settlements in the shadow of the civil justice system in Canada using accepted Alternative Dispute Resolution methods and models.

Sincerely,

David McNabb LL.M (ADR), C.Med
cc. RBC Ombudsman