



INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

Ian C.W. Russell FCSI
President & Chief Executive Officer

January 31, 2008

Dr. Peggy-Anne Brown, Chair
Ombudsman for Banking Services and Investments
P O Box 896, Station Adelaide
Toronto, Ontario
M5C 2K3

Via email: publicaffairs@obsi.ca
Terms of Reference Review
Ombudsman for Banking Services and Investments
PO Box 896, Station Adelaide
Toronto, ON M5C 2K3

Dear Sirs/Mesdames:

Re: Proposed Amended Terms of Reference for the Ombudsman for Banking Services and Investments (“Terms of Reference”)

Thank you for providing the Investment Industry Association of Canada (IIAC) with the opportunity to comment on the Terms of Reference for the Ombudsman for Banking Services and Investments (OBSI). The IIAC fully supports OBSI’s current mandate, which is to provide an independent and accessible means for financial service providers and their clients to resolve disputes. We believe this function is very important to the integrity of the Canadian capital markets. We do, however have a number of concerns about the proposed expansion of OBSI’s mandate, both generally and in relation to certain of the specific provisions designed to facilitate that expansion.

The proposed extension of OBSI’s Terms of Reference is a serious concern for the Canadian securities industry, and it is extremely important that the views of stakeholders are taken into account before such significant changes are made. Given the time of year at which the amended Terms of Reference were released for comment, the fact that the proposed changes were not widely publicized to the industry, and the relatively short

.../2

comment period, our first recommendation is that OBSI invest further time, and take more proactive steps to consult with the industry and obtain meaningful feedback before proceeding with any such changes.

Expansion of OBSI's Mandate - Systemic Issues

Our members have expressed serious concerns about OBSI's proposed expansion of its role to include the power to investigate systemic issues "*discovered in the course of a Complaint which may have caused a loss or inconvenience to one or more other Customers in a similar fashion to that experienced by the original Complainant*". This power is extremely broad, and potentially encroaches significantly on the jurisdiction of securities commissions and self-regulatory organizations. It also appears to go beyond the intent of the Joint Forum recommendations, which we understand, were to be restricted to administrative and mechanical types of issues, such as computer programming errors. We are particularly concerned that OBSI is able to effect such a material change to the scope of its authority without a review by a regulatory or independent industry body.

We recognize that OBSI has no power to, and will not obtain responsibility for rule compliance. However we note that the expanded mandate grants OBSI powers to investigate matters on a broad level, beyond a specific complaint, and could result in more substantive claims related to suitability or supervision issues. Such matters are clearly within the regulator's purview, particularly when they are being examined on a systemic rather than an individual basis. That OBSI would investigate systemic issues for the purposes of making recommendations in respect of client restitution, rather than overseeing regulatory compliance, is a relatively fine distinction and does not alleviate our concerns about that process.

We understand that OBSI staff may, in the course of an investigation of a client complaint, discover systemic technical problems. Providing information about such an issue would undoubtedly be helpful to the dealer in question to take remedial action to avoid similar problems in the future. However, an independent investigation to uncover possible systemic problems is an inappropriate role for an Ombudservice. An Ombudsman's proper role is not to anticipate future client complaints by determining that other individuals may have been similarly affected by an act or omission of a firm, but to react to client complaints as they arise and address each of them in an appropriate manner.

We question how OBSI would actually conduct a systemic investigation in the context of a specific complaint. In establishing that an action "*may have caused a loss or inconvenience to one or more other Customers in a similar fashion to that experienced by the original Complainant*", it is not clear that OBSI would be required to demonstrate that such complaint was part of a pattern. Without any clear guidelines as to how they

.../3

would make this determination, the amended Terms of Reference appear to grant OBSI the powers to undertake what amounts to a “fishing expedition” that may well extend into matters within the jurisdiction of regulators.

The ability to investigate firm processes without being confined to a particular context or complaint, or for that matter, a particular firm against whom a complaint has been lodged, with a view to compliance with an undefined OBSI or regulatory standard, and the subsequent compensation recommendations beyond what has actually been claimed by specific investors goes well beyond the mandate of a complaint resolution body. In fact, it extends beyond the powers granted to regulators, as it includes the ability to award compensation (through the use of threat of publication).

The amended Terms of Reference oblige firms to fully co-operate and assist the Ombudsman in investigations even where they are not directly related to the complaint, and also when the Ombudsman is seeking information on general industry practice. These types of investigations, done with the ability to extract compensation from firms or individuals within firms, without the safeguards of a more formal regulatory or judicial process, raise many concerns. Although we acknowledge that OBSI does not have enforcement powers, its ability to affect the reputation of firms and individuals through its publication process amounts to a significant penalty, so that non compliance is not without consequences to firm participants. The threat of this punitive action effectively acts as an enforcement tool wielded by an “impartial” complaint resolution body. The fact that this enforcement tool can be used when OBSI deems a firm to be uncooperative in respect of a systemic investigation, for which there may be no actual complaint against the firm, is extremely troubling.

That the outcome of an investigation into regulatory issues such as suitability or supervision may lead to compensation rather than a regulatory sanction only changes the character of the process to more closely resemble an investigation for the purposes of a class action lawsuit rather than an investigation to establish regulatory compliance. This perspective is supported by the proposed deletion of section 9(c) in the current Terms of Reference, which states that the Ombudsman shall not investigate or shall cease to investigate Complaints *“made by unrelated Complainants based on different facts that raise the same or similar issues with the object of making a “class action type” recommendation.”*

This expansion of the OBSI mandate beyond investigation and redress connected to actual complaints, to championing “potential” future compensation claims, takes the role of the Ombudsman from a neutral complaint resolution body to a client advocate. Compounding this issue is the fact that OBSI would not only act as the client advocate, but it would also then take on the role of the judge and jury without leaving the firm with any opportunity for appeal. In order to retain the confidence of the firms participating in the Ombudsman process, it is extremely important that it continue to act, and be perceived to be acting as an impartial party. Indeed, this impartiality is the cornerstone

.../4

of any Ombudsman function, and is clearly referenced in section 3 of OBSI's Terms of Reference.

Aside from the above noted process and fairness concerns relating to expanding the role of OBSI, we also note that an expansion of the OBSI mandate to launch an open-ended investigation of potential systemic problems will result in significant additional costs, both to OBSI and to the firms. Such costs are ultimately borne by the investor. The amount of resources necessary to conduct such investigations would be significant, as highly qualified staff would be required to understand the firms' functions and internal processes, and provide the proper context for recommendations to improve on these processes and award compensation. In order to facilitate such investigations, firms would be required to devote resources to ensure that their perspective is fairly represented.

The efficiency and competitiveness of our capital markets is already hampered by an excessive regulatory burden that reflects overlapping mandates and responsibilities. Given the clear investor protection mandate of the existing regulators, and their available resources and experience in fulfilling this mandate, it is unclear what additional value would be created by giving such power to OBSI. Granting further investigation and oversight powers to existing bodies will exacerbate the problem without providing commensurate benefits to the market.

Other Issues

Aside from our general concerns relating to the expansion of OBSI's mandate, there are a number of other provisions in the proposed Terms of Reference that are potentially problematic and should be re-examined.

Privacy Issues

If OBSI's mandate is expanded to examine issues that are not tied to a particular complaint, it is inevitable that issues related to privacy legislation will emerge. Current privacy laws prohibit firms from disclosing personal information of individuals without their consent. If investigations move beyond individual complainants, firms will inevitably be asked to disclose information about other clients. It would be highly impractical from a process perspective, and prohibitively expensive to obtain such consents from non complainants whose files may be touched by an OBSI investigator attempting to make a case in relation to what they believe may be a systemic issue.

Privileged Information

Although we agree it is important that OBSI have access to the relevant information necessary for a fulsome investigation and appropriate recommendation, we do not support the proposed requirement that privileged information be provided to OBSI as part

.../5

of its investigation. The concept of privilege is a critical element of due process, and has been supported judicially. The suggested elimination of such privilege in the context of an OBSI investigation is unprecedented and could be extremely prejudicial to Participating Firms' interests.

Action re: Potential Regulatory/Criminal Breaches

In respect of the new section inserted between existing sections 10 and 11, we note that subsection (d) appears to grant unfettered powers of disclosure and reference to law enforcement agencies. In contrast, we note that section 17 of the Ontario Securities Act places a number of procedural safeguards on these disclosure and referral powers in the context of investigations by the Ontario Securities Commission. These have not been adopted in the proposed OBSI Terms of Reference. It is fundamentally inappropriate for OBSI to compel documents and information from a Participating Firm and then freely share those documents and information with regulators and law enforcement. Moreover, the proposal does not limit the sharing of information to entities in Canada but rather would permit OBSI to share documents internationally, even where different self-incrimination regimes exist. The effect of granting OBSI such power puts it in the position of a potential "whistleblower". Given the provisions and history of the confidentiality of the OBSI process, this is a highly inappropriate role for it to take. It is the element of confidentiality and assurance that such information would not be used outside the Ombudsman process that has allowed OBSI to obtain the appropriate information from firms to undertake fulsome investigations of individual cases. It is appropriate for regulatory organizations such as the IDA and MFDA, rather than OBSI to oversee the legal compliance of the firms it oversees. OBSI currently has the ability to notify the firm and/or the Complainant that a regulatory issue may be involved and that they should be in touch with the regulator. This current approach is appropriate and should not be altered.

Time Frame for Complaint Process

We are concerned about the provision allowing OBSI to launch an investigation of a complaint when 90 days have elapsed since the complaint was received by the participating firm. This target may be appropriate in circumstances where firms do not have an internal ombudsman process or where a Complaint is not being dealt with by the firm. However, where a complaint is being actively dealt with in accordance with the firm's established procedures, it is appropriate to grant additional time to ensure that the complaint cannot be handled by those procedures, before turning the issue over to OBSI. We recommend providing for an additional 90 days where the firm is undertaking an investigation and attempting to reach a resolution under their complaint handling procedures. Moreover, proposed section 15(f) of the Terms of Reference requires a Participating Firm to provide the client with a substantive response within 90 days. The regulation of business conduct including the timeframe for responding to complaints is

.../6

not within the mandate or competence of OBSI. This form of regulation falls squarely within the purview of the securities regulators, who have in fact regulated this conduct. It is important to note that section 15(f) is inconsistent with the proposed Complaint Handling Procedures published by the IDA for comment on November 9, 2007 which do recognize the need to extend beyond a 90 response target in certain circumstances. In order to provide an effective and clear process for Complainants and Participating Firms, the time lines must be consistent.

Impartiality of Process – Interests of Participating Firms

Amendments to certain other sections raise further issues in respect of the impartiality of the OBSI process. In particular, we note the addition of paragraph 3(aa) which allows OBSI to “assist Complainants with the Complaint process, including helping them articulate their complaint where necessary”. This may have the effect of OBSI assisting the Complainant in advocating their position in a way that will be most persuasive to OBSI staff. Although it is appropriate for OBSI to provide Complainants with general direction and information on how to formulate their complaints, it is inappropriate for OBSI to draft a complaint for which it will be subsequently investigating and making recommendations.

We are also very concerned about the implications of the change to section 24 which removes the following sentence. “*A recommendation of the Ombudsman should seek to achieve a resolution of a Complaint that is satisfactory to the Complainant and the Participating Firm.*” This provision appears to be the only one where the interests of Participating Firms are considered. The balance of the provisions in the Terms of Reference appear to be focused on obtaining a positive outcome for the Complainant without regard to interests of the Participating Firm. The removal of this provision takes to Participating Firms’ interests out of the equation and will make it more difficult for the Ombudsman to retain the support of Participating Firms.

Compensation

The replacement of the concept of damage or harm with “inconvenience” in respect of the amount of compensation to be awarded is troubling in that it is completely arbitrary and does not lend itself to any objective measurement standard or justification. It is appropriate for Complainants to be compensated for real losses that they suffer as a result of wrongful firm actions, but not for losses that cannot be more clearly articulated and quantified than under the category of “inconvenience”.

In addition, the concept, as stated in the proposed Terms of Reference that OBSI is meant as a forum for informally resolving disputes below a certain monetary size is seriously compromised if, in a systemic investigation, compensation is recommended for each potential (but not actual) Complainant. Given that each incident could result in

.../7

compensation of up to \$350,000, the total figures resulting from a systemic investigation could be extremely significant. Such material penalties should not be levied against a firm without reference to specific complaints and without significant procedural safeguards to ensure due process. As noted throughout this submission, the OBSI process does not have such safeguards in place.

Conclusion

In conclusion, the IIAC is very concerned about the direction OBSI appears to be taking with the proposed amendments to the Terms of Reference. It should be remembered that OBSI is a complaint resolution body, not a regulatory body. Its expertise and effectiveness is, and should remain, confined to this objective. The IIAC strongly opposes any expansion of OBSI's mandate and Terms of Reference along the proposed lines.

We would be pleased to discuss this matter further at your convenience.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'David Agnew', with a long horizontal flourish underneath.

cc David Agnew, Ombudsman, OBSI
Serge Dupont – Dept of Finance
David Wilson – Chair OSC
Bob Christie, Chair, Joint Forum of Financial Market Regulators
Larry Waite, President & CEO, Mutual Fund Dealers Association
Susan Wolburgh - Jenah, President & CEO, Investment Dealers Association
Adrian Burns, Director, OBSI
Len G. Flett, Director, OBSI
Daniel F. Gallivan, Director, OBSI
James R. Savary, Director, OBSI
Denise Verreault, Director, OBSI
Daniel W. Brintnell, Director, OBSI
Wendy Hannam, Director, OBSI
Ed Legzdins, Director, OBSI