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OBSI Terms of Reference Renewal Project: Public Consultation

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Kenmar appreciate the opportunity to provide comments on this TOR Consultation. Kenmar is an Ontario- based privately-funded organization focused on investment fund investor education via on-line research papers hosted at www.canadianfundwatch.com. Kenmar also publishes *the Fund OBSERVER* on a monthly basis discussing investor protection issues primarily for investment fund investors. An affiliate, Kenmar Portfolio Analytics, assists, on a no-charge basis, abused investors and/or their counsel in filing investor complaints and restitution claims.

We note that this Terms of Reference (TOR) does not reflect the Board's published position on the Battell Report or any decision by the CSA/JRC on the recommendations of the Battell Report. The consultation paper says the updated TORs are not meant to reshape or extend OBSI's mandate and that many of the key changes are merely structural or stylistic. We therefore cannot devote precious resources to the matter as the effort will have to be repeated when the expected reforms are enacted by regulators.

Even so, we have a number of comments that may be of interest to OBSI's Board of Directors.

Detailed Comments

There should be provision for the document to be dated in the Final version.

All reference to days should be defined as CALENDAR DAYS.

There should be a reference to the Memorandum of Understanding with the Canadian securities Administrators in the TOR.

The Board has previously stated: " *We also agree with a number of the review's recommendations regarding increasing our organizational transparency through increased publication of policy documents, guides, and case studies.*" This

transparency obligation should be incorporated in the TOR. Currently, CIAC reports and the Consent Letter for example are not publicly posted.

Complaint handling system: We recommend that OBSI establish a formal complaint system whereby stakeholders can launch complaints regarding OBSI's rules, practices, processes and conduct.

Order of precedence: Kenmar recommend that where there is a conflict between a securities law and SRO rules/ guidance, securities laws shall prevail.

Cycle time to handle a complaint Kenmar recommends that OBSI specify in its updated Terms of Reference the cycle time limit for making a recommendation to resolve a complaint. A statistical statement such as 80% in 180 days is meaningless and unfair to complainants. We could find no other financial Ombuds service that describes its service standard in probabilistic terms. Investment dealers are given 90 days. FCAC allows 120 days for banking complaints. We would not be terribly uncomfortable with a 180 calendar day standard for investment complaints.

The Consumer and Investor Advisory Council: We recommend that the CIAC be hardwired into the Terms of Reference under the governance provisions. While the financial services industry has the resources to make its views on policy issues known to OBSI, consumers are far less equipped and motivated to do so. The proper functioning of a transparent Consumer and Investor Advisory Council would allow OBSI's Board of Directors to obtain the consumer/investor perspective. All CIAC minutes, reports, research and recommendations shall be made publicly available. NOTE: In Dec. 2016 the Board said "*In the coming months we will be reviewing and implementing new terms of reference for the CIAC and seeking greater opportunities for engagement with this important OBSI resource.*" We do not see this reflected in the new TOR.

Oversight: We recommend that in addition to the traditional board Governance, that the TOR mention the roles of the FCAC and the JRC.

Add: **Immunity from liability**

OBSI, the Ombudsman, CIAC members, any person authorised by the Ombudsman to carry out any responsibilities or exercise any powers or discretions of OBSI or the Ombudsman and OBSI employees, contractors and agents shall not be liable to a party to a complaint for any loss or damage arising directly or indirectly in the course of carrying out OBSI functions in good faith.

Kenmar recommends that the updated Terms of Reference specify an obligation for OBSI to refer matters which may involve regulatory, criminal, fraudulent or other wrongdoing to the appropriate regulatory or other law enforcement agencies.

PART 2 – DEFINITIONS AND INTERPRETATION All key terms should be defined; for example, "substantive response" needs to be defined. Specifically, the term should have a characteristic of being a binding decision on the Participating firm. Also, "in writing" should be made clearer to include email and FAX.

Change definition of Participating Firm We would define "Participating firm" as the firm that has an Agreement with OBSI to provide ombudsman services for greater clarity and specificity. We want to ensure related parties, internal ombudsman etc. are excluded from the definition.

Define Determination e.g. "Determination" means a recommendation/ decision by OBSI about a complaint.

Define "non-monetary loss"

Change definition of complaint to mean **per account** If losses were incurred for similar reasons in two different accounts, each shall be considered a complaint and each shall be eligible for compensation of up to \$350,000.

In the para "Complainant" means any Customer of a Participating Firm or its Representative making a Complaint to OBSI and includes the authorized representative(s) of the Customer, such as a personal representative, guardian, trustee or executor "we recommend "or ex-Customer" be added, as the complainant may no longer be a customer of the Participating Firm.

Add text to TOR **If a Complainant does not accept a Recommendation or Determination in relation to the complaint, the Complainant is not bound by the Recommendation or Determination and may bring an action in the courts or take any other available action against the Participating Firm.**

"Standards" means any applicable statutory or regulatory requirements for handling and resolving complaints, as well as any other standards adopted by the Board for those purposes. We take this to include SRO complaint handling rules such as IIROC 2500B which we believe to be defective. This is our critique of the IIROC complaint handling rule <https://drive.google.com/open?id=0ByxIhlsExjE3ZGp5MWc1TUI4RzA> and one by CFA Andrew Teasdale <http://blog.moneymanagedproperly.com/> Since this rule, is in our view, deficient and unfair to complainants it should not be a rule that OBSI is tied to.

In the para ""Provision of a Financial Service in Canada" means the provision of a Financial Service

(a) to any consumer (Canadian or foreign) while that consumer is located in Canada; or .." define what is meant by "located" – does it mean permanent residence? Physical presence?

Authority: the authority for OBSI to act as an Ombudsman service should be cited. Specifically, in the case of investments, that authority is derived from CSA National Instrument NI 31-103. For banking, the authority derives from an FCAC approval letter.

Add a section on Systemic Issues to the TOR. Kenmar believes that it is important that widespread or systemic issues that are uncovered by OBSI as a result of its review of individual complaints are properly addressed by the financial system in order to adequately protect investors and retain consumer confidence in the financial system. We recommend that when a Systemic issue has been identified that OBSI immediately notify regulators and police as applicable. We further recommend that OBSI set out in its Annual Report the number of potential systemic issues it has identified in the previous year, both in respect of securities and banking complaints, and provide a generic description of the type of issues identified.

We believe the TOR should define the criteria for a recommendation /decision. viz. Each Recommendation and Determination:

- (i) must be in writing;
- (ii) may either reach:
 - (A) a conclusion about the merits of the Dispute; or
 - (B) the view that, given the procedures adopted by OBSI it would not be appropriate for OBSI to reach any conclusion as to the merits of the Dispute;
- (iii) must clearly set out reasons for any conclusion about the merits of a complaint;
- (iv) must specify any remedy, that OBSI considers fair and appropriate; and
- (v) must be provided to all parties to the Dispute.
- (vi) provide a timeline for the complainant to respond

PART 3 – OBSI ORGANIZATION AND GOVERNANCE We recommend changing two years to three years, adding service providers to Participating Firms as one of the constraints and including a proviso that at no time shall all the Directors be industry or ex-industry and no Director shall serve on the Board from a Participating Firm that has refused a OBSI recommendation. We also strongly recommend that at least one Board seat be reserved for a person that will give a Voice to the retail investor as described in the Battell Report.

PART 4 – OMBUDSMAN’S POWERS AND DUTIES Add 4.4. The Ombudsman is responsible for complying with applicable Human Rights legislation. Renumber existing para 4.4 as 4.5.

Part 5 (d) Complaint made to OBSI within 180 days - the Complaint was made to OBSI no more than 180 calendar days after the Complainant received a written notice rejecting the Complaint, or a written offer for the resolution of the Complaint, from the Participating Firm, subject to section 5.5 [OBSI may extend time for filing Complaints]; Add before the word *written*, the word **binding**.

PART 5 – COMPLAINTS TO OBSI

5.1 (b) No vexatious claims We accept that some complainants can be annoying but in many cases they are aggravated and emotional about how they have been treated by the firm /How many were as a result of low proficiency by intake personnel and a narrow knowledge of what to vet? If staff are blocking complaints because they are not as informed as they should be, this is a real problem for the

public We recommend that all complainants declined for being vexing be reviewed by senior staff and the statistics be included in the Annual Report.

5.1 (e) Claim made to Participating Firm within 6 years Kenmar recommends that the wording be revised as follows: "...the Complainant knew or ought to have known of the problem...." and should specify that the characteristics of the complainant will be taken into account (such as age, knowledge, degree of reliance on the advisor, extent of vulnerability) . It is not fair to vulnerable consumers, including persons with limited language skills, low financial literacy, and seniors who may have reduced mental abilities, to apply a limitation period without a full appreciation of these characteristics .As FAIR Canada has noted OBSI's process is not a court proceeding, and it is not subject to statutory limitation periods, OBSI should explicitly provide in its updated Terms of Reference that it "reserves the right to waive the limitation period in exceptional cases where it is fair and reasonable to do so."

5.9 Joint investigations with other Ombudservices The word cooperatecooperate should be corrected.

Execution of OBSI's mandate

"8.1 General practices – In carrying out its mandate and in resolving each Complaint, OBSI will abide by these Terms of Reference, the Standards and the following practices:

- *In determining what is fair, OBSI will take into account general 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. "*

We recommend these be placed in order of precedence e.g.

- a) legal principles;
- b) regulatory policies and guidance;
- c) applicable industry codes or guidance as to practice;
- c) good industry practice;
- d) professional body standards and
- e) previous relevant decisions of OBSI

PART 10 Monetary Limits: We recommend that the monetary limit be increased by the rate of inflation each year on the condition that the incremental amount is greater than \$500.

6.3 Regulatory proceedings and investigations If OBSI declines to take on a complaint due to an ongoing regulatory proceeding or investigation, OBSI shall take steps to ensure that the complainant is not adversely impacted by statute of limitation time constraints. If not, this would be an undue restriction of human rights and incongruent with the G20 HIGH-LEVEL PRINCIPLES ON FINANCIAL CONSUMER PROTECTION.

10.1 Limit on single Complaints – OBSI may investigate a Complaint involving a claim for any monetary amount if the Complaint falls within OBSI’s mandate under these Terms of Reference. However, OBSI may not recommend that a Participating Firm pay an amount greater than \$350,000 in respect of any single Complaint. Clarify if this limit includes interest that may be allowable. Explicitly state that interest may be part of an OBSI determination.

“Para 11.2 Fair practices

11.2 Fair practices – At a minimum, and regardless of whether the Participating Firm believes the Complaint falls within OBSI’s mandate, the Participating Firm should:

(a) appoint a senior official to act as the final internal decision-maker on unresolved Complaints;

(b) promote their internal and external complaint-handling processes through websites, brochures, mailings, emails and other means necessary to ensure Customers have ready access to them in the event of a Complaint ..”

What is an “external complaint handling process” in the context of this paragraph? Does this refer to OBSI in the case of securities? If so, we recommend the insertion of the word *regulated* in front of *external* for greater clarity. If it refers to an internal bank or insurance company “ombudsman”, we disagree as this process is not independent and is flawed. We do not want internal “ombudsman” promoted.

13.3 Settlement efforts while OBSI investigates – While investigating a Complaint, OBSI may seek to promote a resolution of the Complaint by agreement between the Complainant and the Participating Firm. The Complainant and the Participating Firm may also continue to seek to resolve the Complaint themselves if both parties agree. If no resolution is agreed upon, OBSI will complete its investigation of the Complaint and will either make a recommendation for its resolution or reject the Complaint.

This paragraph appears to be a practice standard. We question whether it should be in the Terms of Reference. Whether it is in the Terms of Reference or in any other document, we are concerned about this practice. As we understand it, OBSI would contact both parties in the middle of investigation and approach them with an opportunity to settle. What would trigger this interruption of an investigation? We see many opportunities for complainant exploitation due to the huge asymmetry of information and knowledge between firm and a desperate complainant. Such a process could give rise to low ball settlements such as those reported in the Battell report. We recommend deletion of this text from the TOR and if such a practice is in force, that it be discontinued or better defined. NOTE: Per the 2017 JRC Annual Report of 150 cases, 15% were settled for amounts less than OBSI’s compensation recommendations.

13.4 Nature of compensation – Where OBSI recommends payment of compensation, it may do so to compensate the Complainant for monetary and non-monetary losses. The word *loss* needs clarification. As OBSI loss calculation methodology allows for making clients whole, it could very well be that losses are actually opportunity losses – this means the client may not have “lost” money in an absolute sense but is still owed compensation.

13.8 Consequences of refusal of a recommendation – If a Participating Firm refuses an OBSI recommendation for resolution of a Complaint:

(a) OBSI must first disclose to the Board and the Participating Firm’s regulators and then to the public: “Public” should be defined as a posting on its website and a News Release.

13.9 Escalation before OBSI publicizes refusal. Do you mean here to require formal Ombudsman approval rather than just escalation?

PART 14 – RECONSIDERATION REVIEWS In accordance with Fairness principles the Participating firm should also have access to reconsideration. The limitation clock shall remain stopped during the reconsideration period.

PART 16 – CONFIDENTIALITY AND DISCLOSURE Para 16.1 (a) all discussions and correspondence between OBSI and the Complainant, the Participating Firm and their respective representatives that form part of the dispute resolution process are not to be disclosed for any purpose other than to a professional advisor or used by the Complainant or the Participating Firm in any ongoing or subsequent legal or regulatory proceedings; and This is not accurate. Kenmar have acted as Intervenor in a number of cases and we are not “professional advisors” if that means a lawyer or para-legal. This should be broadened to include any person or entity of the Complainant’s choice in order to be congruent with Fairness Principles.

16.5 Disclosure to regulators - Nothing in these terms of reference prevents a complainant from sharing information with a regulator for regulatory purposes. Complainants, Participating Firms and OBSI may comply with a written request from a regulator for disclosure of information, documents, records or things. Where OBSI complies with such a request, or where OBSI notifies a regulator that a Participating Firm has refused a recommendation or failed to comply with its obligations under these Terms of Reference, the Participating Firm and the Complainant may discuss the Complaint and the underlying facts with the regulator. We believe complainants should have the right to also share information with law enforcement and statutory Privacy Commissions as deemed necessary.

16.7 Confidentiality Requests We recommend adding a proviso that such requests shall not include any document that would be reasonably expected to be associated with the investigation of a complaint.

PART 17 – ANNUAL REPORTING

17.1 Matters to be reported – OBSI will prepare and publicly disclose an annual report as well as other reports containing statistics, anonymized case studies of Complaints for educational purposes (with Complainant and Participating Firm identifiers removed), other information that the OBSI considers appropriate to the interests of interested parties and the general public, and information required by law or regulation. We recommend that this be clarified to ensure that the reporting be separated as between investments and banking and that each should meet or exceed the respective minimum reporting requirements defined by applicable regulators. For example, there should be statistics by geography and age for investing totally separate from banking. The Board has previously stated "*We will also be acting on recommendations from the external review regarding improvements to our demographics data collection*" so this should be reflected in the updated TOR.

PART 18 – THIRD PARTY EVALUATIONS

18.1 Periodic evaluation – OBSI must submit itself to knowledgeable, independent third-party evaluations of its operations, conducted according to timelines established by its regulators. We recommend that OBSI add a provision that allows the Board to authorize a more frequent cycle as circumstances dictate.

Kenmar Associates agree to public posting of this Comment Letter.

We would be pleased to discuss our comments and recommendations with you in more detail at your convenience.

Respectfully,

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