

January 31, 2022

Attention: Ms. Poonam Puri, Independent Evaluator
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Request for Comment on the Independent Evaluation of the Ombudsman for Banking Services and Investments (OBSI) with respect to Banking-Related Complaints

https://www.obsi.ca/en/news-and-publications/resources/Public-Consultations/OBSI-Banking-Mandate-Stakeholder-Consultation_Final_updated_EN1.pdf

Ref: OBSI External Reviews: Public consultation period extended
<https://us4.campaign-archive.com/?u=280084084d6ba4b1d5b5a5c27&id=b8ef88d7e0>

Kenmar appreciate the opportunity to comment on OBSI. Kenmar Associates is an Ontario-based privately-funded organization focused on 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.

Overview

Complaints present a picture of consumer compliance, customer service and the impact of policies and procedures that might not be visible otherwise. As a risk management tool, a robust consumer complaint handling process can help Bank's proactively identify risks of consumer harm, compliance management program deficiencies and customer service issues.

The current bank ECB system needs an overhaul from top to bottom. It is built on a foundation of Jell-O and quicksand. The main issues are:

- It is fundamentally inappropriate and improper for a bank to have the power to select its own ECB and set the terms of engagement
- Despite the nomenclature used, neither OBSI nor ADRBO are true financial ombudsman services
- OBSI does not have a binding decision mandate or a mandate to investigate systemic issues
- There is potential for unhealthy competition between ECB's to the detriment of financial consumers
- The FCAC CG-13 approval criteria for ECB's are sorely in need of an update to reflect today's consumer needs and wants. We have provided FCAC a copy of our CG-13 analysis.
- FCAC oversight of ECB's is inadequate, infrequent and lacks transparency
- Approval of ECB's requires Finance approval, adding a unneeded political dimension to complaint resolution

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- Non-independent Bank internal “ ombudsman” divert complainants away from ECB’s to the detriment of complainants
- The CG-12 criteria for bank internal complaint handling are weak by international standards, limiting the potential of an ECB to introduce fairness into the complaint handling process. The FCAC is currently consulting on a replacement for banking, one that still omits Fairness as a guiding principle.

Many of the challenges facing OBSI are **external** to the organization. See *Strengthening Canada's External Complaint Handling System*: A. Teasdale <https://www.canada.ca/content/dam/fin/consultations/2021/echsb-etpsb-3.pdf> In 2020 the FCAC received 510 complaints related to compliance with the consumer protection measures that it oversees. **The top category was complaint handling procedures at 16%**. That is a not an insignificant observation.

Introduction

Putting the OBSI issue in perspective

Key metrics from per 2020 OBSI Annual Report:

- 314 closed banking cases
- **Average Banking compensation \$5,875** –highest \$300K
- 33% of cases took more than 60 days to close
- 29% of banking complaints (92 of 314) ended with monetary compensation
- **\$511,095 total** banking compensation (this figure includes any amounts the banks may have previously offered ,so OBSI increment is less)

NOTE: Canadian Imperial Bank of Commerce CEO Victor Dodig earned nearly \$9.7-million in 2020, which was about \$660,000 more than the year before. <https://www.theglobeandmail.com/business/article-pandemic-takes-a-cut-of-bank-ceos-pay-increases/>

The evaluation scope is limited to the following:

A. Whether OBSI is fulfilling its obligations as outlined in the Complaints Regulations and CG-13; and,

B. Whether any operational, budget and/or procedural changes in OBSI would be desirable in order to improve OBSI’s effectiveness in fulfilling the provisions of the Complaints Regulations and/or recognized best practices for financial services ombudsmen.

This constraint on the independent evaluation is limiting. There are many issues impacting OBSI effectiveness including, but not limited to: its FCAC restricted mandate, weak FCAC bank complaint handling rules, Govt. ECB competition Policy, a notoriously lightweight CG-13 Commissioner guidance document and infrequent FCAC compliance monitoring and guidance. Compliance with the stipulated documents is therefore inadequate to satisfy the expectations and unique **needs** of Canadian bank complainants. [The evolving **NEEDS** of Canadians having a complaint with a FCAC regulated bank must also be considered in the evaluation. **The**](#)

financial and non-financial impact on Canadians of unfair redress is very significant in impacting well-being.

We believe OBSI should have a strategic/preventative role, a role to identify root causes of disputes, share insights to encourage best practice and informed decisions by bank clients and to collaborate with banks and consumer groups to build financial capability and promote high standards of conduct. The idea is that if OBSI, with its deep insights, can help individuals, consumer groups and banks to prevent complaints and address them early, there will not be so many complaints (about 5 million p.a.) or so many entrenched disputes. Consumer satisfaction and outcomes will improve.

When filing a complaint, the bank client is pitted against a big Bank with bureaucratic management and a team of lawyers experienced in this area of law. When a complaint arises, their immediate goal is to make that complaint disappear as quickly, quietly and cheaply as possible. To achieve this outcome, they employ strategies and tactics that best suit their own interests, not those of their clients.

For most ordinary Canadians, the ECB is the last line of defence. The cost of legal representation makes such representation out of reach for most Canadians. Thus, there is a need for a free, strong, fair, independent complaint handling ECB, one that would also use its complaint database to recommend improvements in bank processes/products/services and consumer protection regulation. By virtue of its (implicit) mandate, the OBSI exists to *offset* this power asymmetry

Many of the issues we will be commenting on should have been settled years ago (e.g. Consumer Council of Canada Response to proposed reforms in banking dispute resolution

<https://www.consumerscouncil.com/initiatives/issue-areas/justice-resolution-redress/banking-dispute-resolution/>). We are disappointed that Canadian banking regulators and Government seem intent to keeping OBSI limited to a dispute resolution service (ECB) for individual complaints rather than a financial ombudsman service in place in other more consumer-focussed jurisdictions.

Key Principles

Fairness encompasses a lot more than procedural fairness. Fairness encompasses all the policies, procedures, practices and direct contact processes that level the playing field between the individual complainant and a Bank. A complaint process that is not consumer-friendly across the spectrum risks shutting out vulnerable/low income clients and minority groups. We believe OBSI meets Fairness investigation standards.

Kenmar suggest the Australian Financial Complaints Authority (AFCA) <http://www.afca.org.au/> as a benchmark. See also Ethical fairness in financial services complaint handling <https://dl101.zlibcdn.com/dtoken/79022a604a65da967d02281dd5843ad2> The key underpinnings of ethical complaint handling include the capacity of the complaint

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handler to abandon normative solutions, respond to ethical challenges considering likely comparisons, adopt an interpretivistic and reflexive stance, and to act ethically, free from the constraints of organizational policy, process and power.

Queen Margaret University Edinburgh Consumer Dispute Resolution Centre is a rich source of complaints handling research. Finance / FCAC may wish to contact them when redesigning the Canadian banking sector complaint handling system. See also *Industry ombudsman and access to justice: A case study of the Canadian financial, telecoms and travel sectors* Marina Pavlovic. UOttawa
http://www.ombudsmanforum.ca/en/wp-content/uploads/2021/03/Pavlovic.FCO_FinalReport.small_.pdf

See also Consultation Document: *Strengthening Canada's External Complaint Handling System* A. Teasdale comment letter
<https://www.canada.ca/content/dam/fin/consultations/2021/echsbe-tpsbe-3.pdf>

Responses to select Consultation Questions

According to empirical research by Andrew Teasdale (CFA), Canada has fewer complaints that reach an external independent medium than in other countries: Canadian ombuds complaints per capita are 2.3% and 5.6% of the UK's and Australia's per capita external complaints respectively, 6% of Norway's and 12% of New Zealand's. **FCAC need to better understand this lack of consumer uptake of our external complaint bodies and take corrective action.**

The fact that only a tiny fraction of the estimated 5,000,000 banking complaints filed each year reach OBSI and ADRBO might suggest that consumers are well treated. However CBC Go Public revelations, the FCAC sales practices and complaint handling reports along with consumer group reports and periodic media exposés suggest otherwise.

(1) Reputation

OBSI has a generally good reputation wrt standards of good character and integrity. The investigative staff are well trained professionals with empathy towards complainants.

(2) Accessibility

Access should mean more than a bilingual website and no charge access. Access should be viewed more broadly. Enhanced complaint handling can positively impact financial inclusion. For example, access fairness should recognize different cultures, people with disabilities, the elderly/ vulnerable clients and the socially-disadvantaged. OBSI can handle complaints in multiple languages and works hard to accommodate vulnerable consumers. We are not aware of any material issues or complaints. In our view, OBSI does a good job in this regard.

OBSI should consider creating and promoting more videos about its service, more advocacy tools such as instructional videos and more in-person or clinics around the country that can be attended by mentoring groups and individuals. Webinars could

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also be a useful tool. Periodic appearances on TV such as on BNN or CBC could reach a large audience and increase awareness of OBSI.

Forms used should be reviewed by forms design, plain language and behavioural finance experts to ensure ease of understanding and informed completion by complainants especially seniors and vulnerable consumers.

Seniors are particularly vulnerable, because of challenges such as physical or cognitive impairments, insufficient time horizon to replenish capital losses or death of partners who traditionally managed the finances. See CARP Comment letter to Finance on ECB's

<https://www.canada.ca/content/dam/fin/consultations/2021/echs-b-etpsb-9.pdf>

(3) **Governance**

In our opinion, OBSI governance is less than robust. To start with, the CBA, the banking industry lobbyist, has the sole privilege of nominating Directors to fill the pre-determined slot for a banking industry Director. This protected position should be open to competition and to all bank Participating Firms, not just to CBA member banks. Indeed, the nomination process and acceptance of new Directors should be more transparent.

For some time, a Director was a senior executive of a Member Firm that had been Named and Shamed. This certainly raised eyebrows from the public.

The latest example of weak governance made itself evident when the Board allowed less than a 30 day consultation period for responses to its mandatory 5 year independent review consultation. The Board demonstrated how remote it is from Main Street, expecting advocacy groups and individuals to provide informed comments in such a short period. Thankfully, after protests from consumers and ourselves, the Board agreed to a more reasonable timeline for comments.

More Directors with consumer protection experience and mindset are needed. Directors with consumer **protection experience will bring the voice of the consumer into the ECB Boardroom. We therefore recommend that the Board be overhauled with 75% of Directors being industry-independent with no prior history of industry employment or servicing. Three of the independents should have a consumer focus track record (street creds").** The Consumer interest Directors should be (a) capable of articulating the perspectives, needs and concerns of financial consumers and (b) be individuals in whom consumers and consumer advocacy organizations have trust/confidence.

Good governance should help reinforce trust and confidence not only in the external complaint body but in the regulatory system. A diverse and representative board should be naturally compelled to act in the overarching Public interest associated with best practises for a consumer ombudsman.

Without effective governance, OBSI will not be trusted by financial consumers or be depended upon to act in the Public interest.

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Please also see our comments on OBSI Terms of Reference *OBSI Terms of Reference Renewal Project: Public Consultation: Kenmar 2018*
https://www.obsi.ca/uploads/47/Doc_636594906331221105.pdf?ts=636675919886115394

(4) **Transparency**

OBSI transparency is reasonably good especially as compared to ADRBO or internal bank “ombudsman”. Policies, procedures, quarterly reports, an Annual Report, publication of its Loss calculation methodology are all publicly available.

OBSI does not publish all its cases (anonymized) on its website but does publish abbreviated Case studies.

Kenmar recommend that there should be better disclosure of the process by which the Board’s Governance Committee will identify candidates for the Board and for Committees. OBSI should set out in writing whether it will involve its Consumer and Investor Advisory Council in the process used to identify Director candidates (other than industry nominees).

There is a real question regarding the non-reporting of systemic issues. The FCAC will need to dig deeper to better understand how OBSI evaluates systemic issues and ensure OBSI commits to improvements.

Low-ball settlement cases should not be censored. They should be published.

The gagging of CIAC should cease as it creates a perception that OBSI has something to hide. The cone of silence keeps valuable insights away from consumers and advocates.

We recommend that OBSI publish its disclosure policy.

See also section **Publication of all OBSI decisions –transparency and accountability**

(5) **Impartiality and independence**

In general, we find OBSI investigations to be fair/impartial.

Given the changing demographics, we recommend that OBSI provide training to investigators in identifying clients facing diminished capacity and to have access to the designated Trusted Contact Person.

Some tweaking of administrative processes may be appropriate. For example, when OBSI has formulated a recommendation, it should send it to both the complainant and bank simultaneously. It is not best practice to approach the bank first and then present an agreed on recommendation to the complainant. This could intimidate the complainant.

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A binding decision mandate would likely cut down on the need to “negotiate” settlements and lead to greater independence.

(6) **Accountability**

OBSI’s Annual report is well done and fact -filled. It compares favourably with other financial ombudsman services although improvements are possible. We also find eNews informative. Each year we provide suggested improvements which the Board, we are sorry to say, do not respond to.

OBSI staff do respond quickly to specific questions and in a fulsome manner.

When we initiate discussion, OBSI actively participates.

OBSI should ensure its key documents such as Annual reports are not *protected*. They should be easy to copy and paste or convert to WORD.

We recommend that random samples of complaint cases should be periodically submitted for a qualified independent party review to assess and validate the standard of service.

(7) **Membership**

“To what extent does OBSI provide value for money?” This is difficult for us to answer. OBSI definitely plays an important role in the financial lives of Canadians. That being said, with a \$8.5 million budget, we would expect that OBSI would have been a more impactful harbinger of change in the banking sector. *OBSI should develop metrics satisfactory to FCAC to measure cost-effectiveness.*

(8) **Coordination with ADRBO**

Under current rules, a bank (or federal credit union) may change its ECB at will. If the bank has changed its ECB, the previous ECB must transfer existing complaints to the client’s bank’s new ECB. This includes all information related to the complaints. This process creates an unreasonable burden on complainants and extends the complaint cycle time to the detriment of complainants. It could even lead to abandonment of the complaint due to frustration and stress. **Kenmar strongly recommend that the original ECB handling the complaint be required to finish the investigation.** If compensation is applicable, the original bank must be held accountable. The current access system is unfair to clients and favours banks. *Banks should be required to provide at least 120 days’ notice of intention to change ECB’s.* The notice should be made public and prominent.

Consumers should not be asked to pay the price of a decision made by a bank to depart OBSI.

(9) **Timeliness and adequacy of communications**

The faster complaints are resolved, the better for consumers. Complainants to OBSI can end up facing late-payment charges, NSF fees or debt defaults that ultimately harm the consumers’ credit score while they await a recommendation from OBSI.

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The required 120 calendar day cycle time is too long; we encourage Finance and the FCAC to benchmark this time line against international standards. In addition, the cycle time should be measured from the time of consumer complaint so that any and all delays introduced by the bank are captured by the statistic. This visibility would highlight problematic issues at the bank that require corrective action improvement.

There is no question that the FCAC 120 cycle time standard lags other jurisdictions. We believe this should be dramatically improved. Without knowing all the issues, it is difficult to be definitive on potential corrective actions. Based on general approaches to cycle time reduction we offer the following ideas:

- Ensure an improvement plan is established and supported by management
- Remove unnecessary steps
- Measure each component of cycle time for improvement potential ; identify bottlenecks
- Review staffing levels
- Utilize technology where applicable
- Ensure the process is under a quality control regime
- Provide a consumer- friendly guide for consumers on how to file a complaint and assist them in articulating their complaint as necessary
- Streamline the flow of complaint files from banks (this is often a material bottleneck)
- Make cycle time reduction a component of management performance assessment.

OBSI's final written recommendations provide written reasons for OBSI's decision to recommend/not recommend compensation but from the consumer survey just 50% found the conclusion and recommendation clear . Plain language, avoiding acronyms/ industry jargon and deeper explanations would help improve this rating.

Materials provided by OBSI (and FCAC and banks) could be clearer about the limitation period for commencing a civil action and when and how such limitation periods are affected by the OBSI process, including when the limitation period for commencing an action starts, when the OBSI process will suspend that limitation period, against whom it is stopped, and what triggers the recommencement of the limitation time clock. It is vitally important that consumers know this information at the outset of the complaints process, certainly before they can be diverted to an internal "ombudsman".

(10) **Effectiveness**

"Does OBSI deal with complaints in a manner that affects only the parties to the complaint and in a manner that is proportionate to the harm alleged?". We're not sure exactly what this question means. We certainly would not want OBSI to have a blinkered approach to a complaint if it was apparent that it was likely that more people than the parties to the complaint were impacted. Examples would include a flawed fee calculation model or an unclear form or document.

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We want to see OBSI act when it recognizes repeat complaint issues and work with banks to resolve the underlying causes of these issues.

We recommend that OBSI design and implement a formal continuous improvement program that is responsive to results from investor/consumer and Firm surveys and feedback with prioritized satisfaction and quality metrics.

We recommend that OBSI develop and implement a program for conducting advanced data analytics. This could be used to identify emerging trends and systemic issues.

Kenmar recommend that OBSI build an internal policy/strategic function expertise to position OBSI to more effectively anticipate the need for change, prepare formal submissions to Government and regulators and to respond to requests for advice from Government and regulators.

More engagement with stakeholders, especially consumers, would improve effectiveness. These might include bank industry forums and liaison meetings, consumer group meetings, meetings with individual banks and advocacy groups, liaison with Investor Protection Clinics, links to academia, subject matter experts, third-party vendors and the like.

As things stand, OBSI can only make recommendations for redress. While there has never been an outright refusal by a bank, the real impact of a non-binding (on banks) mandate occurs downstream where Bank complaint handling is adversarial, abusive and unfair as revealed in FCAC's report and other sources .

Banks, knowing that OBSI cannot provide real justice to complainants, exploit this weakness in their responses to complainants. The banks are aware that many complainants will likely abandon a valid complaint because of fatigue and the fact that an OBSI "recommendations" can be ignored. This is a major design fault of the bank complaint system and explains the disturbing results of the FCAC internal bank complaint handling investigation report. The poor results can also be traced back to weak FCAC rules for bank complaint handling and light touch /low intensity FCAC enforcement.

Banks should not be permitted to take legal, collection or other action while a complaint is being investigated by OBSI.

Based on our research, we can say that OBSI compares unfavourably with several ombudsman services in not having a binding decision mandate or a mandate to investigate systemic issues. The 2016 Independent Review [investments] stated quite clearly **"In our view, therefore, OBSI is not a true industry ombudsman, it is a dispute resolution service."** The lack of a binding mandate and a clear mandate to investigate systemic issues reduces OBSI's effectiveness.

(12) Progress

“One of the purposes of this evaluation is to report on OBSI’s progress since the last evaluation (for banking complaints) was conducted in 2011.”.

OBSI has lost more banks to ADRBO and gained none during the period. The outlook for recapturing lost banks is bleak without Government intervention.

OBSI has suffered a steady erosion of its authority over the years. Beginning in 2012, a succession of financial services firms began refusing OBSI’s compensation recommendations, thus exposing the impotence of OBSI’s “moral suasion” model. Soon after the erosion began, OBSI lost its authority to investigate complaints involving segregated funds, on the basis that the funds are technically insurance products - a step that left harmed investors in jeopardy of falling through a needless jurisdictional divide. In 2014, OBSI surrendered its ability to investigate systemic issues, such as the widespread overcharging of clients that led to a succession of multi-million dollar no-contest settlements between bank-owned firms and the Ontario Securities Commission.

There appears to have been a decline in cycle time which is a positive.

Governance was finally improved via the inclusion of a Consumer Interest Director in Sept. 2020, first recommended in 2011.

The fact that several major banks have “fired” OBSI can be taken as a positive as they have chosen a demonstrably lower quality rated ECB.

The fact that OBSI did not detect and report on systemic issues during the period must be taken as a negative. It is a very important negative, since if systemic issues are not identified and addressed, the “system” will not improve. The FCAC report on bank internal complaint handling is clear- the system is broken.

Investigation of systemic Issues

OBSI's [Terms of Reference](#) were amended in December 2013 to remove OBSI's systemic issue investigative powers¹.¹ Systemic Issue was defined in the TORs as a matter such as undisclosed fees or charges, misleading communications, administrative errors or product flaws discovered in the course of considering a complaint against a Participating Firm which may have caused loss, damage or harm to one or more other Customers of the Participating Firm in a similar fashion to that experienced by the original Complainant. **In effect, OBSI would no longer report on some of the most common root causes of bank consumer complaints.** Consumer advocates were stunned by this unilateral change in mandate.

It is no longer sufficient for OBSI to act as a shield to assuage individual mistreatments. One must also, and more importantly, work to attenuate the maleficits of what can only be called the systemic governance failures caused by multiple forces through dealing explicitly with their systemic sources. This does not

reduce the importance of protecting Main Street investors, and of ensuring that individual wounds are taken care of, but it underlines that the burden of office of ombuds goes beyond these duties. What is required is the capacity to detect governance flaws at the origin of these failures, and to help launch the process that will ensure that the governance apparatus is appropriately repaired. The trigger may still be personal harm and complaints, but the answer can no longer be only personal redress; it must also entail eliciting what might be a plausible and reasonable appreciation of the nature of the dysfunction, and some promising organizational redesign and architectural repairs to the “system”.

The question of systemic issues was dealt with back in August 2013 by CIAC. <https://www.obsi.ca/en/about-us/resources/Documents/Comments-to-OBSI-Board-on-Consultation-on-OBSIs-Terms-of-Reference-1423771576-fe579.pdf> In their comments to the proposed TOR changes, the CIAC stated “*OBSI should not, therefore, propose significant changes that erode its mandate in ways that are inconsistent with its role as an ombudsman. Nor should politicians and regulators undermine OBSI’s role as an ombudsman when enacting consumer protection measures.*”. This recommendation was not heeded and OBSI changed its banking mandate to remove systemic issues. It did not however change its ombudsman nomenclature to reflect the dramatically reduced mandate. In order to harmonize with the banking mandate, the OBSI Board argued (see NOTE in REFERENCES) that systemic issue investigations in the securities sector should also be removed. **We argue that OBSI walked away from its Public interest obligations and this critical point should be highlighted in the independent reviewer’s report.**

OBSI rarely report on systemic issues despite the fact that a FCAC report and CBC GoPublic series of articles identified hundreds of cases of mis-selling, upselling and document adulteration .Ex-employees and anonymized current employees recounted horrific tales of client abuse. This was no surprise to us as we had reported abusive sales practices to the FCAC for years. The FCAC ECB report made the following observations:

- Both ECBs fall short of FCAC’s expectations for monitoring, identifying and self-reporting potential non-compliance with market conduct obligations
- Neither organization meets FCAC’s expectations for identifying and reporting issues that have the potential to affect a large number of consumers
- Since 2015, neither OBSI nor ADRBO has self-reported any systemic or non-isolated issues of non-compliance to FCAC. The control environment remains relatively informal at both ECBs. ADRBO has implemented a compliance policy and designated an employee responsible for oversight, but there is room for improvement and FCAC does not consider it an effective program for monitoring compliance. OBSI has not implemented a formal compliance program
- During the review, FCAC found that both ECBs are falling short of FCAC’s expectations for reporting systemic issues. While they do report systemic issues on occasion—roughly one a year—they report far fewer systemic issues than their counterparts in comparable jurisdictions, such as Australia

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OBSI clearly has some work to do as the Independent Evaluation will almost certainly conclude.

The latest OBSI Annual report reported that there was not a single banking systemic issue in Canada. How does such a statement get approved by the Board of Directors?

One would expect that OBSI staff at supervisory and managerial level would be observant and cognizant of patterns in the complainants' experiences. That is, one would presume that senior staff would be looking for systemic issues to address and to pass on to other stakeholders in the regulatory apparatus, not least the organization's titular overseer FCAC. Identifying and investigating Systemic issues is in the Public interest. Thus might the authorities avail themselves of the opportunity, indeed the imperative, to address the problem of malpractice closer to its sources. It isn't happening. And why not? **The FCAC must find out the answer.**

OBSI should be given an explicit mandate to investigate systemic issues and work collaboratively with banks to resolve the issue(s). In any event, OBSI must investigate a complaint in sufficient detail to confirm the presence of a systemic issue before informing the FCAC.

If the FCAC constrain OBSI's investigation of systemic issues and require reporting them to the FCAC there must be obligations placed on the FCAC once they have received the information. Will they be held accountable for ensuring the systemic issue is dealt with expeditiously and all consumers harmed by the issue fully and fairly compensated? This is a question for Finance to deal with. We add parenthetically that the FCAC do not have a strong track record for awarding compensation to harmed consumers. There should also be an obligation for the FCAC to report publicly on its actions to deal with the systemic issue(s) reported by OBSI.

See **NOTE** at end of Comment letter.

ECB's need to have binding decision on banks

Bank clients require a robust complaint handling system because, for cases involving claims for less than \$250 K, civil litigation is generally not a viable option. The pain and anguish of losing money and then being denied or short-changed on compensation creates high stress and adversely impacts the perceptions and integrity of the banking system. Because of victims' lack of financial knowledge and resources and regulatory inaction, Banks are confident that few consumers will be willing or able to challenge exploitive complaint rejection or low-ball settlement offers.

Complainants, frustrated by a bank's multi-step complaint handling system, are unlikely to start the time-consuming complaint process all over again with an ECB when they are aware, that even if their complaint merits compensation, an ECB

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recommendation can be rejected or low-balled with impunity. A binding decision mandate for OBSI will embolden, inspire and support bank complaint handlers in delivering fair outcomes for complainants. Until OBSI has a binding decision mandate, OBSI will continue to be an expensive, handicapped form of dispute resolution.

An OBSI with a binding decision mandate, coupled with our other recommendations, will:

- Eliminate or reduce the need for haggling by OBSI complaint handlers
- Reduce OBSI complaint cycle time
- Reduce ability of banks to divert complaints to their internal ‘ombudsman’
- Increase consumer uptake of OBSI services
- Drive banks to improve their complaint handling policies and practices
- Increase the average settlement amount
- Lead to improved industry conduct and products/services
- Ultimately result in less consumer complaints and
- Increase consumer satisfaction with, and trust in, the banking industry.

The major benefit of a binding decision mandate will be a better and fairer bank client complaint handling system. This is a WIN for all stakeholders.

Kenmar is of the firm conviction that it is vitally important that the Government of Canada take prompt, proactive action to provide bank ECB(s) with binding decision making authority so as to help those retail consumers who have been wronged receive fair compensation in a timely manner, if they accept the ECB decision. This approach to complaints is a pre-condition for maintaining confidence in our banking system and living up to our G20 obligations and international standards. See *G20 HIGH-LEVEL PRINCIPLES ON FINANCIAL CONSUMER PROTECTION Principle 9*
<https://www.oecd.org/daf/fin/financial-markets/48892010.pdf>

OBSI has a process for appealing its decisions, referred to as Reconsideration. There is no public information that provides any statistical information on how well Reconsideration works for complainants or how often it is utilized. **We recommend that OBSI examine the Reconsideration process for fairness, effectiveness and eligibility criteria for usage as well as how it is communicated to complainants.**

When OBSI is given a binding decision mandate, the Reconsideration process will need to be more independent and be seen to be independent, by the parties to the dispute. **We believe OBSI should establish a separate Reconsideration organizational unit which could be staffed by dedicated OBSI staff and/or with qualified outside independent adjudicators.** We suggest the following:

- Appeals can be made only if either party has good reason and just cause to challenge the OBSI recommendation
- The statute of limitations clock will remain stopped for 30 days after the Reconsideration decision has been rendered.

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- In order to prevent an abuse of the process, we recommend that reconsideration can be made by Banks only for cases involving compensation amounts higher than \$25,000.
- Reconsideration Appeals by Banks should be made public.
- The reconsideration process should be expeditious and be bound by OBSI's loss calculation methodology.
- All reconsideration response letters would have to be approved by the Ombudsman.
- If Reconsideration is denied, the OBSI decision would stand and be binding on banks. If reconsideration alters the original decision, the Reconsideration decision would be binding on banks.

A Dec. 16, 2021 PM letter (<https://pm.gc.ca/en/mandate-letters/2021/12/16/deputy-prime-minister-and-minister-finance-mandate-letter>) to Minister Freedland to "*Establish a single, independent ombudsperson for handling consumer complaints involving banks, with the power to impose binding arbitration.*" would be disastrous for complainants by undermining the ombudsman approach to streamlined dispute resolution. Low income and elderly complainants would be particularly harmed - they would require legal counsel that they cannot afford. **Binding arbitration should be abandoned. The FCAC and Finance should provide visible and determined pushback on the binding arbitration aspect of this Mandate.**

Multiple ECB's is bad policy

We are deeply concerned that the stress of having to handle complaints about banks that can unilaterally resign from OBSI with short notice may subconsciously impact the integrity of OBSI restitution recommendations .This stress creates an unhealthy tension among staff, that may , quite naturally, be worried about job security. Does the multiple ECB policy encourage OBSI to reveal a systemic issue if the possibility exists for the bank to transfer the ECB contract to for-profit ADRBO?

The FCAC had this to say:

" In addition, FCAC's review has validated some of the broader concerns raised about the multiple-ECB model by consumers and consumer groups. The multiple-ECB model is not consistent with international standards. It introduces inefficiencies and increases the complexity of the external dispute resolution system for consumers. FCAC also has concerns about how allowing banks to choose the ECB negatively affects consumers' perceptions of the fairness and impartiality of the system. Finally, the Agency questions whether the one-sided competition between ECBs for member banks is accruing benefits to consumers." – FCAC ECB Report <https://www.canada.ca/en/financial-consumer-agency/programs/research/operations-external-complaints-bodies.html>

See also ***Competition among Ombudsman offices Policy statement endorsed by the Members of the Australian and New Zealand Ombudsman Association (ANZOA)***

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http://www.anzoa.com.au/assets/anzoa-policy-statement_competition-among-ombudsman-offices.pdf for some very persuasive arguments to ban competition among ECB's.

Who can argue with this logic? The FCAC succinctly makes the case for a single banking ombudsman, which we recommend be OBSI. Our Comment letter on ADRBO makes it crystal clear – a second for-profit ECB is NOT in the Public interest. **[Despite the horrible results of the ADRBO review, the FCAC has not publicly taken any regulatory action or recommended to the Minister that ADRBO should lose its approval as an ECB.]**

As the FCAC has noted, only 2 of the large six banks have elected to be OBSI Participating Firms, the ECB that compares most favourably to international best practices. This suggests that their bank contracting practices are not seeking a best-in-class ECB. This means that clients of CIBC and BMO are receiving more professional complaint handling than the other 4 banks, which indicates a fundamental flaw in Finance's approach to external complaint handling. We argue that it is not in the Public interest and socio-economically irresponsible to continue with the competitive model. **Finance should eliminate the Multiple ECB framework and prohibit for-profit ECB's at the earliest possible opportunity.**

Cycle time

The turnaround time for a complaint is too long especially given the relatively small dollar amounts involved. According to the FCAC, the lengthy delays before beginning investigations appear to be caused mainly by inefficient transfers of information from banks to the ECBs. FCAC found that it takes OBSI approximately 25 days and ADRBO 27 days to assemble the required information. Banks do not appear to send comprehensive information about complaints in response to initial requests from the ECBs. FCAC observed ECBs making a number of follow-up requests in an effort to acquire all of the relevant information. The banks also made technical errors—for example, transferring information to the wrong ECB or to incorrect email addresses. This behaviour unduly increases complaint cycle time. **A bank's failure to properly support OBSI investigations appears to be a systemic issue (unreported by OBSI) that the FCAC must deal with. The FCAC needs to intervene and demand that banks must promptly respond to OBSI information requests. Enforcement action should be taken for continued non-cooperation.**

An ECB has 120 days to provide the consumer with a final recommendation once it has acquired all of the information it needs to carry out its investigation. This is an awful long time and does not compare favourably with other jurisdictions. **Kenmar recommend that the FCAC cut this cycle time in half.** This will cause the banks to overhaul their complaint management systems and bring them up to 21st century standards. **The cycle time should be measured from the date a client submits a complaint until the client receives a final response letter.** That is how retail consumers naturally evaluate performance.

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NOTE: The Federal Govt. will impose a 56 day standard for banks (was 90 days) commencing in June 2022. The new timeline requirements aims to bring the banks' complaints-handling processes in line with international standards. The new 56-day standard matches requirements for banks in the U.K., but it is less stringent than the 45-day limit in Australia. [We expect OBSI to concurrently improve its cycle time to international ombudsman standards.](#)

Out-of- mandate case response time too long

In 2020, 23 cases or 6% of bank complaints received were deemed out of mandate and 16 cases or 3% of investment complaints received were deemed out of mandate.

If OBSI determines that all or part of a complaint is outside its Terms of reference, it aims to provide the person who made the complaint with written reasons for that determination within 30 days after the day on which it receives the complaint. This seems like an awful long time to make a determination, given the crystal clear clarity of the ToFR. **We recommend 2 days.** It is manifestly unreasonable for complainants to have to wait a month for a determination. If there are an excessive number of such cases, it is entirely possible the root cause is the final response letter from the bank. In any event, if a banks' final response letter names OBSI as a potential escalation entity, that should be strong evidence that the case is in mandate.

[OBSI should track out- of -mandate cases, identify root causes and take steps to reduce such cases or work with an entity that can.](#) It is not adequate that OBSI make a determination of out -of -mandate, an ombudsman service should assist the consumer in locating the correct venue for resolving the issue if such an entity exists. [A list of the most frequent alternative services should be put on the OBSI's website.](#) Reducing out-of-mandate case evaluations will reduce its workload and support its Public interest mandate.

Name and Shame a sham

The Name and Shame "tool" is not only not effective, it can be counterproductive. A recent IE Editorial [Investors deserve a better dispute-resolution system; <https://www.investmentexecutive.com/newspaper /comment-insight/investors-deserve-a-better-dispute-resolution-system/>] said it best. "Back in 2016, the most recent independent review of the Ombudsman for Banking Services and Investments (OBSI) concluded that the system is inadequate and unfair to investors. But many financial industry participants knew long before the review that OBSI's lack of binding authority rendered the ombudservice impotent and incapable of ensuring proper dispute resolution." It's an open secret that Name and Shame was a ploy by Firms to deny OBSI a binding decision mandate. It's time for the FCAC (and CSA) to abandon the Name and Shame "tool" and do the right thing-make OBSI decisions binding on banks.

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Complainant assistance

Most retail consumers have difficulty navigating the complaint system and have trouble properly framing their complaint. Complainants are almost never aware of the rules, regulations and obligations that banks must follow.

The increasing complexity of financial products and of the financial services marketplace, coupled with the significant number of seniors/vulnerable clients/recent immigrants in Canada, means that many financial consumers may not be capable of articulating the nature of their complaint to their ECB (or Bank) and would benefit from this type of assistance. An incorrect framing of a complaint can result in undue economic loss for an unsophisticated complainant. Consumers may settle one problem, only to learn later that they are prevented from pursuing losses incurred from other problems that they did not know about.

The assistance should include helping with language difficulties, interpretation of applicable rules and terminology, explaining consumer rights, define expected timelines, explain statute of limitation constraints, framing of the complaint and revealing resolution alternatives but should not venture an opinion on the merits. Upfront assistance can help keep consumers steer clear of system bear traps and allow them to make more informed decisions.

The availability of this assistance service is generally unknown by those who need it most. **Kenmar believes OBSI could and should do more to raise awareness that its mandate includes the ability to assist complainants with the complaint process, including helping them articulate their complaint to a Participating Firm where necessary.** See *Super Complainers: Greater Public Inclusiveness in Government Consumer Complaint Handling*: Consumers Council of Canada https://www.consumerscouncil.com/wp-content/uploads/sites/19/2020/03/ccc_supercomplaints_web_en.pdf

Non-financial losses (NFL)

The criteria for non-financial loss awards should be made clearer and expanded. **Kenmar believe OBSI should be empowered to recommend an award for client stress, pain, suffering, indirect losses or fines or inconvenience caused by the dealer's complex or unfair complaint handling process and practices** .Non-financial loss awards are especially important for seniors and vulnerable clients. Recommendations for non-financial loss awards do not always mean a financial compensation. OBSI should also be able to recommend that banks award clients in non-monetary ways, such as a letter of apology, restoring an account, correcting a credit rating bureau record, or other steps to address the bank's errors or negligence. **OBSI should review the criteria for and size of NFL awards it can make in future to ensure they are up-to-date and meet the reasonable expectations of consumers**

Consider consumer feedback

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To its credit, OBSI surveys complainants for feedback of their experience. Here are some select consumer responses extracted from OBSI's 2020 Annual Report.

How well did OBSI staff understand your problem or complaint? **In banking 50% unfavorable**; in investments 37% unfavorable

What OBSI's final written conclusion or recommendation clear? **In banking 33% unfavourable**; in investments 20% unfavourable

Did OBSI help you understand the complaint process and/or OBSI's terms of reference? **50% unfavourable in banking**; 37% unfavourable in investments

The fact that 50% of complainants answered the question *How well did OBSI staff understand your problem or complaint?* **Unfavorable** should be of concern to the OBSI Board and the FCAC. Complainant responses provide valuable clues as to how OBSI can improve. **We recommend that OBSI analyze the feedback results and inform the FCAC (or JRC for investments) and the Public of the planned actions to address the consumer issues.**

OBSI final response letters should be adequate and reasonable, seek to expose the background, context and reasons, cover why procedures were used in the way they were and include a rationale for the decision. **We recommend more research on what constitutes a letter that the typical Main Street complainant can understand so an informed decision can be made on the recommendation(s).**

Expand Role of the Consumer and Investor Advisory Council (CIAC)

The CIAC should be empowered to act independently and required to respond to consultations that could impact OBSI or retail consumer client complaint handling. It should have a research budget to further its work. Its analyses, research and recommendations should be publicly disclosed. The CIAC should be required to prepare an Annual report of its work, such report to be published on the OBSI website. The Consumer and Investor Advisory Council should also publish its meeting agendas and minutes of its meetings and any special reports related to consumer protection to improve transparency. **The CIAC should be formally woven into the OBSI governance structure.**

We do not understand why the FCAC is permitting the OBSI Board to ban public disclosure of CIAC work. This lack of transparency is not in the Public interest. Given the high quality and integrity of CIAC members, we expect some serious issues are being raised yet we see little OBSI action or proposed reforms. **We urge the FCAC to compel the Board to remove the shackles and let the people of Canada know what the CIAC believes needs to be improved for better retail bank consumer protection.**

Illegal activities reporting

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OBSI does not disclose how it handles cases involving criminal and quasi- criminal activities. **We recommend that OBSI disclose its process for handling criminal activities such as fraud, theft, signature forgery, document adulteration, misrepresentation etc.**

Victims have expressed concern that they are not permitted to turn files over to police if they feel the files indicate fraud or other criminal activity. OBSI should amend its rules to permit this as a basic human right. Re Consent Letter <https://www.obsi.ca/en/for-consumers/obsi-documents.aspx#Consent-letter> *You cannot share the information you get from us with anyone except the firm's regulators and anyone who has also signed this agreement. You cannot use information you get from us in any legal action.*

Review the 180 day limit

Under current rules. OBSI may refuse to investigate a complaint if the consumer did not file it with OBSI within 180 calendar days of receiving the Firm's response. **Given the growing complexity of complaints, weak complaint handling rules and the impact of COVID-19 on Canadians , we recommend that OBSI consider increasing the limit to 270 days or even a year.**

Review compensation cap

Kenmar recommend that, as a minimum, OBSI should provide a mechanism for annually adjusting the cap (if any) for inflation. The FCAC should ensure that the cap is identical between banking ECB's for consistency and to prevent ECB arbitrage.

Decrease interval between independent ECB reviews

The financial services industry is undergoing tremendous change due to social, technological/AI and economic factors. Digitalization, crypto currency, new payment schemes and more exposure to complex products add to the speed of change. **Given all this change, we strongly recommend that the independent review interval be compressed to a minimum of three (3) years, the original timeline in place when OBSI was first formed.**

Publication of all OBSI decisions –transparency and accountability

One significant consequence of the lack of transparency attendant on OBSI's investigative and decision-making processes is that it prevents a systematic assessment of the decision-making practices employed, including whether or not OBSI did in fact maintain its impartiality in the process of coming to a recommendation, or alternatively whether it adopted particular working assumptions of complainant or Firm characteristics in its decision-making.

A number of leading financial ombudsman services such as the UK FOS publish all their decisions. Currently OBSI publish decisions only for Name and Shame cases

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(very few). Anonymized abbreviated Case studies are also published from time to time. Publishing all OBSI decisions with appropriate privacy safeguards would:

- Provide increased transparency of OBSI operations ;
- ensure that stakeholders had access to a, full accurate and balanced picture of the decisions reached ;
- ensure that interested parties could see for themselves the decisions made – rather than the decision reported by one of the parties to have been made ; and
- give further assurance to all stakeholders about the quality and consistency of ombudsman decisions

The publication of decisions has the potential to benefit financial consumers as well as financial Firms – by making complaints handling by financial Firms better informed and by reducing the number of unnecessary referrals to the ombudsman service. It will also enhance OBSI transparency and accountability– and enable a broader range of stakeholders to make informed comments on the issues OBSI handles. **We strongly recommend that OBSI be required to publish all decisions subject to applicable privacy protection.**

Conclusion

In general, OBSI staff do a credible job at investigating individual complaints even with one arm tied behind their back. There are numerous improvements that can be made but the larger issue is the sorry state of complaint handling by the Canadian banking industry and the low standards FCAC have established.

The constraint on OBSI's ability to investigate systemic issues is unfair and off-side with international standards. For example see AFCA's protocol: " AFCA has a formal obligation to identify systemic issues, serious contraventions and other breaches outlined in section 1052E of the Corporations Act, [refer these to the financial firm for a response, work with them to resolve the issue and report the details to ASIC,](#) or any other relevant regulator such as APRA or the ATO" <https://www.afca.org.au/about-afca/systemic-issues> .Australia's consumer protection laws are more developed than Canada's. It's time to change that.

Retail consumers are at a relative disadvantage when it comes to a complaint against a bank; they cannot afford the cost of a thorough legal opinion, legal advice, or representation while banks either have counsel on staff or are retained to answer any question that arises. A well-equipped OBSI can help reduce the imbalance.

If the banks who use OBSI can essentially threaten to leave the independent system and are trying to use the competition based ECB structure as leverage, then financial consumer confidence falls and our financial and regulatory system loses public trust. Four of Canada's 6 major banks have already moved to ADRBO - it is just a matter of time before the remaining two do as well. **The government**

should abandon the competing ECB Model and declare OBSI as the sole banking ECB.

While certain Board actions and inactions have prevented OBSI's maturation as an ombudsman, the performance of OBSI as an *ombudsman* service is limited by FCAC's relatively low standards for OBSI and for bank complaint handling processes in general. Does FCAC really want an ombudsman service or does it want a stripped down complaint by complaint dispute resolution service? We know what the bank's want.

An Ombudsman can serve as a bulwark of financial consumer democracy in troubled times, protecting Canadians and helping industry, regulators and government to improve in the face of a tough economy and fiscal constraint. See *The judgment of wider courts: ombuds as producers of governance* <http://www.gouvernance.ca/publications/09-06.pdf> for a review of the Ombudsman as a producer of better governance. **We urge that Finance/FCAC mandate that OBSI perform as an ombudsman, not just a dispute resolver.** That would be in the Public interest.

The internal "ombudsman" step of bank complaint handling should be prohibited. Prohibition will motivate banks to handle the complaint right the first time and make access to OBSI faster, if such access is needed, as well as reduce consumer confusion. The third step is an internal ombudsman (or whatever nomenclature the bank uses to describe the third step) -such an entity adds more stress to complainants, requires signing another document with restrictions, eats up valuable limitation clock time and in some cases does not even end up in a binding decision. In effect, these non-independent "ombudsman" divert complainants away from Finance- approved ECB's and cause "complainant fatigue". This diversion is to the benefit of the banks as they control the complaint process.

If internal "ombudsman" are not banned, we strongly recommend that internal "ombudsman" must make complaint records available to the applicable regulator(s) upon request. Confidentiality agreements must expressly state that the complainant has the right to share complaint files with applicable regulator(s).

At this time of economic uncertainty, consumer access to fair and timely complaints handling is more important than ever. **Effective retail client complaint handling is a socio- economic issue for ordinary Canadians.**

We urge Finance to proceed with a public consultation on internal bank complaint handling as it unnecessarily costing ordinary Canadians millions of dollars each year. Such a consultation (or Royal Commission) will provide Finance invaluable insight with regard to the efficacy of FCAC Guide CG-12, FCAC oversight of the bank complaint handling process, FCAC enforcement practices, the destructive role of bank internal "ombudsman", bank complaint handling practice standards (CG-12) and culture, complaint cycle time and consumer feedback on how deficient complaint handling has harmed Main Street. This insight will provide Finance the empirical evidence for the improvements needed in bank complaint

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handling and in ECB mandates. Finance should proceed with this publicly committed consultation without further delay.

See APPENDIX I for actions FCAC could take to optimize OBSI efficiency and effectiveness

Kenmar agree to public posting of this letter (and our letter on ADRBO) and urge that for ALL letters received. Transparency in public policy development is critically important. The Canadian Public is no doubt very interested in seeing how the banks are wanting to handle their complaints.

We sincerely hope this feedback proves useful to Policy and decision makers.

Do not hesitate to contact us if there any questions or clarifications needed.

Ken Kivenko, President
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APPENDIX I FCAC Support activities

The following items would help OBSI function and mature as an ECB.

The designated Senior Complaints Officer (SCO)

The FCAC should ensure that the bank's designated SCO is an employee and under direct supervision of the Bank's banking unit. An employee of a bank's corporate office should NOT qualify as a SCO. **An SCO must be empowered to make a binding decision on behalf of the banking organizational unit that led to the complaint.** The compensation package of a SCO should be based solely on his/her work as a SCO and, to avoid a conflict of interest, not be compensated by a remuneration scheme tied to a bank's financial performance. **The FCAC must define the minimum criteria for a SCO to be eligible as a SCO and make those criteria publicly available.**

Consumer access to an SCO should be clear, simple, smooth and seamless.

Policies and Procedures A Bank must establish, maintain and implement policies and procedures to deal effectively, fairly and expeditiously with retail consumer complaints. **The policies and procedures must be supported by, and be, congruent with the Bank's Ethics Policy and all applicable FCAC regulations and rules.**

Eliminate Internal bank "ombudsman" from complaints process

The internal "ombudsman" complaint process is inherently prone to misuse and abuse, in particular because it gives banks an incentive to reject complaints at the first two steps on the basis that only a relatively small number of complainants will

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persevere and the bank then has a third chance to rectify any shortcomings or, more likely, again provide an unsatisfactory offer. The internal "ombudsman" is neither independent of the bank nor is it transparent - it adds a barrier to accessing OBSI while the statute of limitation clock continues to run. Unlike OBSI, these entities do not disclose their loss- calculation methodology or Fairness policy.

Banks should resolve a complaint fairly and thoroughly at the first steps and give clients' direct unimpeded access to OBSI if they are dissatisfied with the Bank's final response letter.

Kenmar recommend that the FCAC prohibit the use of any dispute mechanism that does not fall under its direct regulatory control. If the FCAC is unable or unwilling to do this , it should require that these non-independent, opaque internal " ombudsman" conduct their work within the FCAC regulatory time periods and have a binding authority as a legal representative of the regulated bank (at least two such " ombudsman " do not have binding decision authority) . **We recommend that OBSI should immediately cease accepting final response letters from internal "ombudsman" that do not meet the criteria.** This approach will cut back on complainant frustration and anger with the existing client complaint handling system.

The 3 stage process is not seamless- to obtain internal "ombudsman "access, the complaint must be completely refiled and new, sometimes onerous terms/conditions imposed. This step adds to complainant stress and is a barrier to ECB access. The internal "ombudsman" process favours banks, not complainants. The process is no substitute for the independent FCAC regulated OBSI complaint handling process. **Kenmar recommend that if the FCAC wishes to permit internal "ombudsman ", it should make consumer access seamless- eliminate the need for the complainant to completely refile the complaint.** The FCAC should also set out some criteria and rules for this "off book" entity.

It is well known that the more steps in a complaint process, the more likely the retail complainant is to give up. **The internal "ombudsman" step is flawed by design and fundamentally unfair. It should be eliminated**

Eliminate "ombudsman" confusion

Kenmar believes that banks should not be able to confuse consumers by calling any of their internal complaint handling entities "ombudsman" as their processes do not meet international criteria to be called an "ombudsman" nor can be said to be "unbiased" given the criteria they operate under. We agree with the recommendations contained in the previous two independent reviews of OBSI "[t]hat OBSI meet with participating firms that have an internal Ombudsman's Office function to discuss this naming problem and to suggest a re-naming of the internal function to reduce confusion by consumers between the firm's internal function and OBSI." Characterizing the internal resolution entity an *ombudsman* adds to consumer confusion and diversion from OBSI. This recommendation was

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either not done or banks refused to change their spots. We certainly hope new FCAC rules coming into force in June will eliminate this confusion.

Since for-profit ADRBO is clearly non-independent, FCAC should take steps to have them change their nomenclature so non-independence is crystal clear and **NOT** deceiving.

Embrace multi-sector ECB structure

There should be a single, not-for-profit financial ombudsman service for Canadians .The current system is confusing, complex and slow. A single ECB would be easier to oversee, will have access to a larger complaint database , reduce the public perception that banks control the complaint process , increase consistency of decisions and be perceived by Canadians as a trustworthy , fair and efficient complaint resolution service. It would also be more cost-efficient. **As a practical matter, we recommend that OBSI be that entity as it has the basic building blocks, experience and credibility in place.** A number of changes would however be required.

The potential benefits are significant. Such a system provides a deeper insight into bank corporate culture as most of the largest investment dealers are bank-owned. The interaction between banking and investing is becoming blurred. Products like market linked GIC's, PPN's etc. are investments although they are not classified as securities. We expect this trend towards innovative products to accelerate. Borrowing to invest via loans or HELOC's is another important intersection point. In the case of mutual funds, an in-branch bank employee can arrange for leveraging and sales in one coordinated action.

An ECB acting in both sectors can be an invaluable information source to government, OSFI and FCAC on emerging issues and opportunities for financial consumer protection policy improvement.

A multisector ombudsman exhibits the attributes of a strong and effective ECB system in Canada.

A single ECB will provide a uniform and consistent set of principles and processes to financial services complaint handling. A multi- channel ECB would have economies of scale to invest in technology and systems to aid in improving complaint handling for Canadians.

Lastly, a multisector ECB provides the GOC a window on securities markets that could, if designed properly, partially make up for the breakdown in the formation of a national securities regulator.

OBSI is a good example on how such a system would work. We cannot see any material downside to a multi-channel financial dispute resolution service.

Impact of the Financial Consumer Protection Framework (FCPF) legislation (coming into force on June 30, 2022) on OBSI

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FCPF is intended to enhance bank conduct standards and improve consumer outcomes. What impact will these higher standards have on OBSI investigation processes and compensation recommendations? FCPF has clearer KYC, KYP and appropriateness standards which should impact OBSI's approach to loss calculation. How will the new requirements for including charges in appropriateness determination impact OBSI? One thing is for sure- Banks must put measures in place where the power dynamics do not frustrate the delivery of ethical fairness in complaint handling.

OBSI can help crystallize FCAC FCPF policy/rules by using its fairness principles in making real world redress recommendations based on its interpretation of FCPF. This is true value- add of a financial ombudsman. The OBSI recommendations could be used as signposts for FCAC FCPF rule changes or guidance given their recognized status as having world- class complaint handling processes and loss calculation methodologies. Conversely, OBSI decisions could elicit bank industry challenges, requiring the FCAC to make a determinative decision. This is a positive activity as it helps reduce ambiguity for Banks. **FCAC should make maximum use of OBSI's complaint data to monitor FCPF implementation progress.**

The role of the CBA

The banking industry lobbyist, the CBA, adds to complainant confusion. At Step 3, the CBA says in dark bold print "**If the problem still can't be settled to your satisfaction, involve your bank's ombudsman.**" This sure sounds like a preferred step. As a footnote following the Step 3 information, the CBA provides a non- bolded comment saying "If 90 days have passed since you raised your complaint at step two (e.g. with a manager, local executive office or customer care centre), you can bring your issue to the external complaints body used by your bank (see step four)." Note that there is no time constraint on how long Step 1 can take. The 90 day clock only starts after complainants have engaged 2 Steps. A 3 step process causes retail consumers to get exhausted and abandon valid complaints. A 3 step complaint handling process is not the best interests of retail financial consumers.

It should also be noted that not all internal "ombudsman" can provide a binding offer, so in effect, there could be no offer at all after 3 stages. All in all, a complaint system from Hell. Despite these deficiencies, the banking lobbyist CBA is given the privilege of providing nominees for OBSI's Board of Directors, a privilege ECB competitor, ADRBO, does not offer. (reference *Resolving problems with your bank*; <https://cba.ca/resolving-problems-with-your-bank>)

We recommend that the CBA should lose its privilege as the nominator of an OBSI Director. A more open nomination process should be put in place. We note that ADRBO does not involve the CBA in its Board nomination process.

Agents for Banks

If a bank uses Mobile Mortgage Specialists or Third Party Sellers or otherwise outsources product or services sales and distribution, those entities must be OBSI Participating Firms so that investors can have free,

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unimpeded access to OBSI if they are dissatisfied with the outsourced entity's resolution of a complaint. These entities must comply with FCAC complaint handling rules and be subject to FCAC oversight (or banks held accountable for their actions).

Enhance CG-12 for banks

We urge the FCAC to upgrade the standard of complaint handling by banks to international standards. We provided extensive comments to the FCAC on their consultation, stressing Fairness as a core principle. An enhanced bank internal complaint handling rule should reduce OBSI workload, decrease cycle time and improve consumer trust in the banking system. **Kenmar urge the FCAC to put improved bank complaint handling on its TOP priority list.**

We provide three examples of Guides as potential benchmarks

- **ASIC Guide Internal Dispute resolution**
<https://download.asic.gov.au/media/3olo5aq5/rq271-published-2-september-2021.pdf>
- **DISP 1.3 Complaints handling rules - FCA Handbook**
<https://www.handbook.fca.org.uk/handbook/DISP/1/3.html>
- **ISO 10002 Guidelines for complaints handling in Organizations**

Quebec's AMF has also done some excellent work on complaint handling. We recommend FCAC connect with them.

Enhance annual bank complaint reporting

The required CG-12 annual reporting requirement is rudimentary. To better support the complaint handling process and ECB's, the reporting should include as a minimum, the dollar range and average of compensation paid and the range and average cycle time regarding the handling of complaints, measured from date of filing of the complaint. It should also include the percentage of cases in the bank's favour.

The report should be a standalone report and not subsumed within another report – it should be readily locatable on the bank's website. **The reported data should reflect the handling of complaints by the Bank itself before escalation to an ECB or the voluntary internal "ombudsman".**

A separate set of statistical data for any complaints that complainants have decided to escalate to the bank's internal "ombudsman" could also be provided.

Banking complaint statistics should NOT be merged with investment or insurance statistics as it can mask the true performance of the bank's complaint handling processes.

We are of the firm conviction that improved public statistical reporting will incent banks to improve consumer complaint handling and fair treatment of consumers.

Enhance FCAC oversight of OBSI

In order to prevent the kind of nasty surprises uncovered via the FCAC ECB review and keep current , we urge the FCAC to establish a formal oversight process that would necessitate periodic meetings with the OBSI Board and senior management to discuss complaint statistics, operating issues, conduct issues with banks , systemic issues and compliance with CG-13.

Each year the FCAC ECB Oversight Committee would disclose to the Public, a Report card on the ECB's and related issues and reforms / changes being undertaken. This dialogue would have the benefit of informing the FCAC of any emerging issues or trends that might require FCAC intervention in a timely manner.

Kenmar see a great opportunity here for the FCAC in improving ECB's accessibility, such as when consumers require assistance with the process , when banks drag out the process by introducing non -independent " ombudsman" or when the ECB inserts unreasonable barriers to access.

We'd like to see the FCAC play a bigger role in enhancing public awareness of ECBs to promote consumer trust and confidence.

Finance should conduct promised public consultations on internal complaint handling

In a February 19, 2020 Finance Department News Release *Ministers Morneau and Fortier welcome FCAC reports on complaints handling and announce review* <https://www.canada.ca/en/departement-finance/news/2020/02/ministers-morneau-and-fortier-welcome-fcac-reports-on-complaints-handling-and-announce-review.html> , then Minister Morneau stated " *The Department of Finance Canada will launch public consultations in spring 2020 to address the findings of these reports and look at how to strengthen the external complaints bodies system in Canada.*"

The promised public consultation on **internal** complaint handling practices was never held. If it had been held, many consumer cases of inappropriate product sales, upselling, overcharges, inappropriate insurance coverage, excessive fees, forgery, lack of express consent etc. as well as abusive complaint handling by banks would have been made visible. **Kenmar urge the Department of Finance to hold this public consultation so as to be better informed on the requirements put forward in the proposed Bank complaint handling rule and bank conduct in general.** See also *A year after FCAC report, promise of consultations still unkept* | Wealth Professional <https://www.wealthprofessional.ca/news/industry-news/a-year-after-fcac-report-promise-of-consultations-still-unkept/354320>

The FCAC could on its own initiative, launch such a public consultation. We have little doubt that it would provide valuable solid evidence to support additional consumer protection reforms.

Push back on Federal plan to make binding arbitration the norm

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A Dec. 16, 2021 PM letter (<https://pm.gc.ca/en/mandate-letters/2021/12/16/deputy-prime-minister-and-minister-finance-mandate-letter>) to Minister Freedland to "Establish a single, independent ombudsperson for handling consumer complaints involving banks, with the power to *impose binding arbitration*." would be disastrous for complainants by undermining the ombudsman approach to streamlined dispute resolution. Low income and elderly complainants would be particularly harmed - they would require legal counsel that they cannot afford. We are very concerned that the idea could spread to the investment side. **Finance and the FCAC should provide visible and determined pushback on the binding arbitration aspect of this Directive.**

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NOTE:

OBSI Response to TOR change comments

Just before Christmas in 2013, OBSI declared that it would no longer deal with systemic issues:

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"OBSI took on the mandate to investigate systemic issues in 2010 at the request of financial regulators, including the federal Department of Finance, in response to a 2007 independent review of our operations. As noted in our original consultation paper, in developing regulations concerning banking dispute resolution the Department of Finance adopted a new policy direction: any potential systemic issues identified in the investigation of an individual complaint must be referred by external complaint- handling bodies such as OBSI to the FCAC, leaving the investigation of the issues to the FCAC. *In light of proposals for enhanced oversight of OBSI by securities regulators, we believe that there should be one policy on systemic issues across the entire organization and that the policy be that systemic issues are for us to report to regulators and for regulators to investigate and respond to. As a result, OBSI is removing the systemic issue investigative powers from our Terms of Reference (former Section 11), which also necessitates a change to the definitions section.*"

https://www.obsi.ca/uploads/15/Doc_636445205509299317.pdf?ts=636917881173815899 With the stroke of a pen, OBSI self-eliminated itself from investigating systemic issues in banking and securities. Needless to say, consumer advocates were not pleased with this turn of events.