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Dr. Peggy-Anne Brown
Chair
Ombudsman for Banking Services and Investments
c/o Brown Crawshaw Inc.
777 Hornby Street, 11th Floor
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Dear Dr. Brown:

Thank you for the opportunity to provide the banking industry's comments on the proposed changes to the *Terms of Reference* for the Ombudsman for Banking Services and Investments. The banks have a strong interest in the effective and efficient functioning of all aspects of the process that their customers use to resolve any problems with their financial institution.

As you know, the banks established an industry-level ombudsman so that customers who had not been satisfied by the banks' own internal complaint-resolution process could have recourse to an independent redress body that could serve as an objective reviewer of each individual complaint, investigate whether the customer had been treated fairly and, if not, make impartial recommendations for a fairer outcome for the customer. We continue to support the need for an external redress body that offers this type of service to our customers.

We are concerned, however, about several of the proposed changes to the *Terms of Reference* and their impact on OBSI's impartiality. The details of our concerns are outlined below and in the attached Appendix.

Duties of Participating Firms

Changes made in 2006 to the *Terms of Reference* and others proposed in this review include provisions dealing with requirements on the participating firms. While we understand the need to have a clear understanding between OBSI and its member firms about each other's responsibilities, we believe it is not appropriate for participating firms' duties to be part of OBSI's *Terms of Reference*.

In our view, OBSI's *Terms of Reference* should deal with OBSI's role rather than the role of third parties. This is supported by both the Joint Forum of Financial Market Regulators' (Joint Forum) *Framework for Collaboration* (Framework) Guideline 3 objective for the OmbudServices:

To identify terms of reference to provide both participating firms and their consumers with a clear understanding of the range of activities and nature of consumer complaints which will be taken up by the OmbudService;

and the object set out in the OBSI Letters Patent:

adopt terms of reference within which the ombudsman of the Corporation will act.

We would be pleased to work with OBSI to discuss an appropriate way to address the responsibilities and expectations of both parties.

Changing Nature of Service

One of the fundamental principles of the ombudsman system is the concept of fairness. This was one of the main principles when the industry-level ombudsman was established and is echoed in more recent guidelines for the OmbudServices. The *Framework* in Guideline 4 sets out the fairness objective as follows:

To ensure that (a) the OmbudService approaches its work in respect of consumer complaints and makes its recommendations by reference to the standard of what is fair to both the firm and the consumer in the circumstances, and b) that the processes employed by the OmbudService are demonstrably fair to both parties.

Moreover, the current OBSI *Terms of Reference*, section 3 states that

The Ombudsman shall at all times serve as an independent and impartial arbiter of Complaints and shall not act as an advocate for the Participating Firm, the Complainant or any other person.

The revisions propose to open the door to a quasi-regulatory role with systemic issues, add a whistleblower role, and introduce the potential for bias in the preparation of statements of complaint. It concerns us that the objectivity and impartiality of OBSI could be compromised, to the detriment of participating firms' confidence in OBSI. We elaborate on these concerns below:

- **Systemic Investigations:** We do not support the proposal that OBSI undertake systemic investigations. We are concerned that the changes to the *Terms of Reference* go well beyond the intention of the Joint Forum as described in its December 12th letter and the role that would be appropriate for OBSI as the arbiter of complaints.

Beyond this broad concern, we do not support the removal of 9 (c) that prohibits OBSI from dealing with complaints with the objective of making a class action type recommendation.

With a class action scenario, there are also privacy and waiver issues to consider that are significantly different than when dealing with individual complaints. Privacy laws would not allow banks to disclose personal information of their customers to OBSI without their consent, and the logistics of obtaining consents from all members of a class of customers would be prohibitive.

Further, when OBSI deals with an individual complaint, it obtains from the complainant an agreement that any conclusions of the ombudsman cannot be used outside the ombudsman process, i.e., not in a subsequent legal action. Class action beneficiaries who may not sign a non-use agreement are not similarly circumscribed and could decide, having received compensation through OBSI's recommendation, that some greater amount might be

available through the courts, using the support of OBSI's recommendation and report. Further, information obtained by OBSI through its proposed process could be subpoenaed in a class action.

In addition, we do not believe that New Section (a) – (d) is consistent with the description provided in the Joint Forum letter. We are open to discussing with OBSI how a role, as described by the Joint Forum, can be managed.

- **Whistleblower:** Throughout its history, OBSI has emphasized the importance of maintaining the confidentiality of the information provided to it by both the customer and the participating firm, noting that full provision of information from both parties is key to performance of the ombudsman's role. It has acknowledged that the customer and/or the participating firm may not provide full information if they felt that the information would be used outside the ombudsman process. The addition of the whistleblower role to OBSI's mandate as proposed in the new section following 10 - NS (d) and section 25 would be contrary to the principle of full confidentiality. We are strongly of the view that it would be inappropriate for OBSI to assume the role of whistleblower should it identify a potential compliance issue.

OBSI has the ability to point out to either the firm or the complainant that a regulatory issue may be involved and that they should be in touch with the regulator – without itself breaching the confidentiality of the ombudsman process. We can see no reason for OBSI to play the role of whistleblower.

- **Objectivity of statements:** The proposed addition of paragraph 3(aa), which allows OBSI to “assist Complainants with the Complaint process, including helping them articulate their Complaint where necessary”, introduces the potential for a further bias to the investigation process. We understand that some consumers may require assistance with setting out their complaint and recognize that OBSI may be called upon to assist in this regard. We suggest, however, that it is inappropriate for OBSI to be sharing insights about the respective firm with the complainant. Further, the same OBSI staff person involved in helping the complainant to frame their complaint should not be responsible as well for investigating and making a recommendation on that complaint. Both practices have the potential to open OBSI to concerns about bias.

Time Frames for Complaint Process

The banks support OBSI having the mandate to investigate complaints where the participating firm has completed its investigation and advised the complainant of its decision on the matter, and where the firm and the complainant have reached a deadlock (as in paragraph 8(b)(ii) of the current *Terms of Reference*).

We have concerns, however, about the proposal to replace that section and instead impose on all OBSI participating firms the regulatory requirement that has been proposed by the Investment Dealers Association for its regulated firms. The IDA's proposal would limit internal complaint handling to 90 days, following which a complainant could take its complaint to OBSI, regardless of whether the firm has completed its investigation. While this is explained as giving a customer the option of either OBSI or continuing with the firm's internal process, the effect may be to eliminate the opportunity for a firm to resolve its most complex complaints on a timely basis for the consumer.

The banks are supportive of measures to resolve complaints as quickly as possible. The vast majority (96%) of banks' complaints are dealt within 90 days without being referred to the bank's internal ombudsman. The remaining complaints are the very ones that the internal bank ombudsmen were established to resolve. Typically a bank ombudsman will process a complaint

in less than 90 days from their receipt of the complaint and, if the customer decides to escalate the complaint to OBSI, the ombudsman provides OBSI with the bank's perspective on the complaint along with a full package of supporting information materials. Thus within 180 days the banks complete all but the most exceptional complaint investigations, including the complex cases that require the ombudsmen's attention.

We do not support inclusion of time frames for firm complaint handling in OBSI's *Terms of Reference*. We would welcome the opportunity to work with OBSI to establish separate working protocols for participating firms and for OBSI for completing case investigations and rendering the decision on complaints. Rather than requiring both the participating firms and OBSI to establish rigid time frames by which complaints must be concluded, we would prefer the flexible time frames suggested above that would be monitored on an on-going basis.

When setting out these working protocols for complaint resolution time lines, it would be important to establish parameters about when a complaint was first received by a firm. Complaints received informally by front line bank employees are not generally tracked and reported – emphasis at that stage is placed on resolving the complaint expeditiously rather than using staff time for tracking. If the complaint is escalated (to the level that the Financial Consumer Agency of Canada agrees is the reportable level for its purposes for self reporting consumer provisions complaints), then the tracking process begins. It would not be in customers' interest to slow this front-line process to institute the administrative processes that would be required to track complaints at this stage.

As noted above, part of the problem in meeting the goals of such working protocols can be delays caused by the customer. The participating firm or OBSI can potentially process a complaint very quickly, but be held up by a customer who is either unable or unwilling to respond in a timely way. Therefore, in monitoring the success in achieving the goals of the working protocols, flexibility must be provided in any monitoring or reporting of adherence to time frames if the customer fails to cooperate or respond within a reasonable time.

Privileged Information

The banks understand and support the need for OBSI to have full and complete information about a case to make a fair and impartial recommendation. We cannot, however, support any requirement that privileged information be provided to OBSI as part of its investigation.

There is a long-standing common law right respecting solicitor-client privilege, reinforced recently in the Federal Court of Appeal decision in *Blood Tribe Department of Health v. Privacy Commissioner of Canada, 2006 FCA 334 (CanLII)*, where the court held that the Privacy Commissioner had no right to access privileged documents without a court order. This specific matter was considered by the House of Commons Standing Committee on Access to Information, Privacy and Ethics during the recent review of the *Personal Information Protection and Electronic Documents Act*. One witness, Vivian Bercovici for the Dominion of Canada General Insurance Co., noted that, "The impact of qualifying solicitor-client privilege, which has anchored a common law tradition for centuries, would be seismic." The Committee concluded that the regulator's needs should not supersede the right of solicitor-client privilege and recommended instead that a process for expedited review by a court be added to the legislation to allow the Commissioner to obtain a court order in appropriate circumstances. Similarly, OBSI has no legislative mandate and there is no case law to support that privileged documents can or should be provided to OBSI by a firm.

Moreover, the release to OBSI of privileged documents may prejudice the rights of a firm by forcing waiver of privilege. Should a legal action subsequently occur between the firm and

Appendix – Detailed Commentary

Section	Proposal	Comments
		<p>It is important the Terms of Reference include an introductory statement to set the tone and context for the specific language setting out the definitive terms that follow. This could be included within the “Purpose” section and could read along the lines of:</p> <p><i>The role of the Ombudsman is to receive unresolved complaints from individuals and small businesses having requested or received products or services from financial service providers and to provide fair process to the parties to the complaint in an impartial, confidential, and independent forum. These terms of reference describe the principal powers and duties of the Ombudsman, the scope of the Ombudsman’s mandate, and the process...</i></p>
1	Add duties of participating firms	Do not support
2	Define “Participating Firm”	<p>Change wording to</p> <p><i>means a financial services provider that is a Member of the OBSI, the financial service provider’s affiliates or any respective representatives (unless)</i></p>
2		<p>Definition of “Complaint” used in the <i>Terms of Reference</i> is circular, reusing the word in the definition.</p> <p>Proposed definition of “complaint” for OBSI Terms of Reference</p> <p><i>“Complaint” means a written expression of dissatisfaction, made to a Participating Firm by its Customer, about the provision within Canada of that Firm’s financial services</i></p> <p>Regulators and international bodies have defined Complaint as follows:</p> <p><u>FCAC</u>: A verbal or written expression of dissatisfaction by a consumer related to any area of activity of the financial institution.</p> <p><u>AMF (Quebec)</u> (FSCO, Ontario, uses a similar definition):</p> <p>A complaint is the expression of at least one of the following elements that persists after being considered and examined at the operational level capable of making a decision on the matter:</p> <ul style="list-style-type: none"> ▪ a reproach against an organization; ▪ the identification of a real or potential harm that a consumer has experienced or may experience; or ▪ a request for a remedial action. <p><u>ISO 10002:2004</u>: expression of dissatisfaction made to an organization, related to its products, or the complaints-handling process itself, where a response or resolution is explicitly or implicitly expected</p>
2	Defines “Systemic Issue”	Do not support – see cover letter
3 (d)	Substitute “evaluate” for “investigate” with	OBSI’s role in its <i>Letters Patent</i> includes “receive, investigate and make recommendations concerning complaints ...” Our perception of the ombudsman’s role is to receive all applicable information from both

Section	Proposal	Comments
	respect to complaints <i>Framework Guideline 3, Implementation point 4</i>	parties related to the dispute, examine the case at hand in light of individual policies and procedures, laws and published industry best practices, and make recommendations as to the fair resolution of the dispute. Use of the term "evaluate" ("judge the worth, quality or importance of"; "find or decide the value of") instead of "investigate" ("search into carefully; examine closely") may be placing more emphasis on the awarding of compensation. Since the <i>Letters Patent</i> uses the term "investigate" and it appears to better reflect the role of OBSI, we would urge its continued use.
3 (f)	Add ability to advise public re procedures for making complaints to participating firm or other body	Agree
3 (aa)	Assist complainants with complaint process and to articulate their complaint where necessary <i>Framework Guideline 3, point 6</i>	As noted in cover letter, we support OBSI providing assistance on process and general guidance on how to submit a complaint. We believe, however, that this type of assistance should occur as a general, common-sense matter of practice and does not need to be expressly included in the <i>Terms of Reference</i> . As an example, the use of the expression "articulate" could lead to an inference that OBSI is in fact advocating on behalf of a complainant, which could raise questions regarding the impartiality of the ombudsman process.
3 (g)	Delete prohibition on providing general information about a participating firm or financial service	It is not clear what additional general information about a participating firm that OBSI would appropriately be called upon to provide, beyond its complaint-resolution process. We do not see the need for this provision.
8 (a)	Delete ability for complaint to be made by complainant's representative	Not clear why this change is suggested. Banks frequently deal with complaints made through individuals assisting seniors, disadvantaged or incapacitated individuals as long as the appropriate powers are in place. We suggest that OBSI should also accept these.
8 (b)	Limit to 90 days time frame for internal complaint resolution – delete concept of deadlock having been reached or "reasonable time period"	In addition to the comments in the letter: <ul style="list-style-type: none"> • federally regulated financial institutions including banks and trust and loan companies have generally built complaint tracking systems that reflect the requirements of federal and provincial regulators such as the FCAC, AMF in Quebec and FSCO in Ontario that require reporting of complaints at one level higher than the operational level (i.e., the branch or Contact Centre). Any tracking of time lines must be based on the clock starting when the complaint is escalated to "the person responsible for the examination of complaints and designated as such in the organization's policy" (to use the AMF language). Otherwise there will be considerable systems development and other costs and will require an implementation period of no less than 2 years. • OBSI's per case costs are high. In 2005-2006, the most recent year for which an OBSI annual report is available, its budget was \$3,900,000 and it opened 328 cases for an average unit cost of \$11,890; the six largest banks' average per case cost was \$24,514 since their cases represent only 53% of the caseload but their share of the costs is 96%. In comparison, the Financial Consumer Agency of Canada – which is

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		<p>also supported by assessments on banks and other federally regulated financial institutions – in 2006-2007 had a budget of \$8,039,000 to accomplish not only investigations but also its consumer education mandate (10 compliance staff and 20 consumer education staff provide an order of magnitude) and it dealt with 1058 consumer provision investigations (as well as other voluntary code cases) for a per unit cost of \$7598. Considering that only compliance staff handles complaint investigations, FCAC’s average per unit cost for investigations is close to \$2500.</p>
8 (c)	<p>Formalizing the 180-day time limit the complainant has to bring the complaint to OBSI following the participating firm’s decision</p> <p>Allowing OBSI to consider a complaint outside that time frame if it considers it fair to do so</p>	<p>Agree</p> <p>Suggest limit of 12 months</p>
8 (e)	<p>Allowing the complainant to stop legal or other dispute resolution proceedings to allow OBSI to consider complaint</p> <p>(rationale – customer didn’t know about OBSI process before starting legal action)</p>	<p>We do not support the proposed change.</p> <p>We are not sure how this would be accomplished in practice.</p> <p>If this process would give the complainant the opportunity to use the OBSI process to uncover information that would subsequently be used in the regenerated legal process (inexpensive discovery process?), we do not feel that this is desirable, nor is it an appropriate use of an appeal process.</p> <p>We are also concerned that a complainant could be proceeding in another dispute resolution forum, realize that success there is not likely, and so decide to take information gathered there to the more informal OBSI process – essentially giving the complainant two opportunities to have the complaint heard – this is contrary to the policy position taken in 9 (d).</p> <p>If the problem underlying this suggestion is the complainant’s lack of knowledge of the OBSI option, we suggest that addressing the awareness issue would be preferable to allowing the complainant to switch processes.</p>
9(a)(iv)	<p>OBSI shall not deal with complaints where the subject matter relates to <i>(iv) the Commercial Judgement of a Participating Firm.</i></p> <p><i>Nevertheless, the Ombudsman may investigate a Complaint that the process by which the Participating Firm</i></p>	<p>Do not support</p> <p>This change is quite troubling as it gives OBSI the mandate to look not just at whether a firm made a Commercial Judgment that was biased or unfair, but at whether the policies and practices generally were followed. This opens participating firms to the possibility of a client being compensated because some internal requirement unrelated to the client issue at hand was not followed (e.g., the Notice of Assessment for the previous year was collected when requirements stated the current year).</p> <p>We urge OBSI to retain the original wording, “made a Commercial Judgment”, instead of changing it to the underlined wording to the left. This confines OBSI’s involvement to the client issue at hand.</p>

Section	Proposal	Comments
	<i>implemented its policies and practices was biased, incomplete, not in accordance with the Participating Firm's policies and procedures or was otherwise unfair;</i>	
9(c)	Deletes prohibition on class action recommendations to allow systemic issues to be dealt with	Do not support
9(d)	Clarifies that complainants cannot bring concluded court or other dispute resolution matters to OBSI	Support
NS after 10	Add ability for OBSI to deal with systemic issues	Do not support – see letter
10 (a)	Requires participating firm to assist with determining extent of systemic issue and to provide information about affected individuals	It would be contrary to the requirements of the <i>Personal Information Protection and Electronic Documents Act</i> for the firms to provide individual client information to OBSI without the client consent as OBSI does not qualify under any of the exceptions in PIPEDA.
10 (b)	Ability for OBSI to recommend compensation to individuals or small businesses and that firm take measures to prevent future occurrences	Do not support – see letter
10 (c)	Establishes penalties for failing to cooperate with investigation or recommendation re systemic issue	Do not support – see letter
10 (d)	Establishes whistleblower power	Do not support – see letter Provisions in securities legislation that permit securities regulators to compel disclosure of information and documents prohibit the release of that information and documentation to law enforcement authorities and also prohibit its being admitted or as evidence against the person who

Section	Proposal	Comments
		provided it, in proceedings in respect of alleged provincial offences. Examples include the <i>Ontario Securities Commission Act</i> , subsections 17 (3) and (7), and section 18. Accordingly it is inappropriate for OBSI to seek to compel information and documents from firms if OBSI's terms of reference will permit it to provide that information to law enforcement agencies or other regulators, including those outside Canada.
11	Allows OBSI to recommend firm pay up to \$350,000 to each single affected individual in a systemic issue	Do not support – see letter
	Firm released from liability for amount greater than \$350,000 <u>regardless of outcome of OBSI's consideration</u>	Support
15	Duties of participating firms	Previous inclusion of this concept in the <i>Terms of Reference</i> was not discussed with Members. Do not support inclusion of duties of participating firms in OBSI <i>Terms of Reference</i> . Section 15 in its entirety should be deleted.
15 (a)	“decision-maker” in lieu of “arbiter”	Do not support - see 15 above
15 (b)	Requirement for firms to promote complaint-handling process	Do not support - see 15 above Moreover, banks are already required under the <i>Bank Act</i> , and other firms under rules promulgated by their SRO to promote their complaint-resolution process. There is no need for OBSI to duplicate this requirement.
15 (c)	On receipt of complaint, tell of complaint-handling process and that unresolved complaints can be referred to OBSI after 90 days	Do not support - see 15 above Banks are already required to provide information on complaint-resolution process to customers who complain.
15 (d) (i)	Added requirement to cooperate with relevant info about customer of another firm	Do not support – see 15 above Moreover, it is not appropriate to require one firm that is not involved in the complaint to provide information about the client of another firm, even where a release from the complainant has been obtained.
(ii)	To provide info on general industry practice to assist with complaint re another firm	Do not support Banks consider internal policies to be protected as proprietary and highly confidential, and need to ensure that they are held confidential; otherwise their proprietary rights are compromised. This would involve having audit rights of OBSI file management procedures at any time to make certain

Section	Proposal	Comments
		<p>that these policies are retained and destroyed in an appropriate manner.</p> <p>As well, OBSI would need to give legal assurances to firms that provision of the policies does not in anyway affect the proprietary rights that firms routinely claim over such policies. Banks do not produce such policies in litigation unless compelled and even so, only the relevant portions.</p>
15 (e)	<p>Added "on request" and deleted "non-privileged" information to be provided</p> <p>Deleted "as soon as reasonably practical"</p>	Do not support
15 (f)	<p>Added 90-day time limit to provide customer with conclusion on complaint and reference to OBSI</p>	<p>Do not support</p> <p>See cover letter</p>
15 (g)	<p>Suspending limitations period</p>	<p>Do not support – see 15 above</p> <p>Moreover, the limitation periods established under the Ontario <i>Limitations Act</i> (as amended in 2006) may be suspended or extended by written agreement by the parties, i.e. the parties involved in the dispute. There is no legal requirement under the Act that a third party intervener be a party to the suspension agreement.</p> <p>Further, we are concerned that if OBSI is a witness to any dispute in interpretation of the proposed suspension agreement, this agreement would be properly producible in any subsequent legal action.</p> <p>The firm may have a counterclaim on an unpaid debt or other cause of action against the complainant and it may be in its interests to proceed with that other action and not suspend the limitation period. While there may be cases where a firm is able and willing to cooperate with a suspension of the limitation period, OBSI has no mandate to prejudice the legal rights of a firm by requiring it as part of their "duties" to agree to a suspension.</p>
15 (h)	<p>Require all complainants to be advised of recourse to OBSI regardless of subject matter</p>	<p>Do not support – see 15 above</p> <p>Moreover, duplicates <i>Bank Act</i> requirements and rules of SROs for other participating firms.</p>
20	<p>Ability to recommend compensation for <u>loss or inconvenience</u> instead of "loss, damage or harm" (applies in 24 as well)</p>	<p>Amendment from "damage or harm" to providing recommendations for compensation based on 'inconvenience' is inconsistent with the general powers of OBSI that state it will provide resolutions in the framework of the law. In common law Canada, there is no basis for compensation by a court for mere 'inconvenience' and therefore, by downgrading the OBSI threshold from "damage or harm" to "inconvenience", it now falls outside of OBSI's scope.</p>
23	<p>Adds "regulatory policies and</p>	No concerns

Section	Proposal	Comments
	guidance, professional body standards” to considerations in determining fairness	
24		
25	<p>Penalty for failing to assist with complaints re another firm’s client, industry practices and prompt provision of info re own clients is publication of offence</p> <p>May report firm to regulator if cooperation required by regulator</p>	<p>Do not support – see 15 above</p> <p>Do not support</p>
26	<p>OBSI reporting</p> <p>Edit – “anonymized” instead of “(with all personal identifiers removed)”</p> <p>Add “information required by law or regulation”</p>	<p>Support</p> <p>No concerns</p>