

# Request for Comment on the Independent Evaluation of the Ombudsman for Banking Services and Investments with respect to Banking-Related Complaints

## Introduction

The Ombudsman for Banking Services and Investments (“OBSI”) is an independent dispute-resolution service for consumers with complaints against their banks or investment services firms that could not be resolved by the consumers and the banks/investment firms on their own. OBSI is a free service, providing a valuable alternative to costly litigation. The work that OBSI conducts is confidential and non-legalistic, and it aims to find fair outcomes to disputes.

Under the *Bank Act*, financial institutions including domestic banks, foreign banks and foreign branches, as well as federal credit unions, are required to provide their customers with the services of an External Complaints Body (“ECB”). Canada has two ECBs for banking complaints: OBSI and the ADR Chambers Banking Ombuds Office (“ADRBO”). ECBs are supervised by the Financial Consumer Agency of Canada (“FCAC”).

The principal regulations under the *Bank Act* applicable to OBSI’s operations are found in the *Complaints (Banks, Authorized Foreign Banks and External Complaints Bodies) Regulations* (the “Complaints Regulations”). The Complaints Regulations require each ECB to submit to a third-party evaluation every five years in accordance with terms of reference established in consultation with the Commissioner of the FCAC.

OBSI is also subject to the guidance set out in *CG-13 Application guide for external complaint bodies* (“CG-13”), published by the FCAC.

## Appointment of independent evaluator

The Board of Directors of OBSI appointed Professor Poonam Puri to be the independent evaluator, a decision accepted by the FCAC.

Professor Puri is one of Canada’s most respected leaders in corporate governance and corporate and securities law. She is a Professor of Law and a former Associate Dean at Osgoode Hall Law School. She is the founder of Osgoode’s Business Law LL.M. program and the co-founder of its Investor Protection Clinic, the first of its kind in Canada. She has extensive experience in the organizational design and review of public sector and private organizations.

Professor Puri will be assisted by Dina Milivojevic and Trevor Fairlie. Ms. Milivojevic is a litigator and corporate lawyer with expertise in dispute resolution and corporate governance. Ms. Milivojevic has experience conducting investigations and independent evaluations in a range of contexts. Mr. Fairlie is a corporate and securities litigator with Groia & Company. He is also a supervising lawyer at the Osgoode Investor Protection Clinic, overseeing student caseworkers on pro bono securities litigation files. Prior to starting his practice, Mr. Fairlie articulated at the Enforcement Branch of the Ontario Securities Commission and summered with the Investor Protection Clinic at Osgoode.

## Independent evaluation timeline and process

The evaluation is expected to conclude with a final report by late March 2022 (updated). Consultation with stakeholders is a key component of the evaluation. To facilitate consultation, the evaluators are requesting that stakeholders provide comments on a variety of issues, as outlined in greater detail below. Written responses to this Request for Comment are due by **January 31, 2022 (updated)**.

During the review period, the team will also analyze a random sample of cases (including cases where OBSI recommended compensation and cases where it did not), review internal dispute resolution and

governance policies and procedures, evaluate performance against multiple metrics, and consult broadly within and outside of OBSI.

### Key matters under review

The terms of reference for the independent evaluation are included at **Appendix 1**. The independent evaluation will review 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 consultation document is confined to OBSI's banking-related mandate (not investments). There is a concurrent review of OBSI's investments mandate, which we invite all stakeholders to comment on separately. You can access the Request for Comment for OBSI's investments mandate at:

<https://www.obsi.ca/Modules/News/en/publicconsultation>.

### Questions

The areas of inquiry outlined below are drawn directly from the requirements of the Complaints Regulations and CG-13, as outlined above. The matters outlined below may not be relevant to every stakeholder wishing to submit comments to the independent evaluators. Please respond to the issues of relevance to you and/or your organization.

#### (1) Reputation

OBSI should maintain a reputation for being operated in a manner that is consistent with the standards of good character and integrity.

- To what extent does OBSI operate in a manner consistent with the standards of good character and integrity?
- To what extent is OBSI fair and impartial?
- What, if anything, could OBSI do to improve its reputation for operating in a manner consistent with the standards of good character and integrity, if necessary?

#### (2) Accessibility

OBSI should make its services available across Canada in both official languages. Its services should be easily accessible and free of charge to persons who make complaints to it.

- Are OBSI's services available across Canada in both official languages, free of charge?
- To what extent does OBSI promote knowledge of its services? What else could OBSI do to make consumers aware of its services?
- To what extent do participating banks adequately make consumers aware of OBSI's services? What more could be done, if anything?
- To what extent is OBSI's public guidance an effective tool for those navigating its services?
- Is OBSI doing enough to provide access for consumers? For example, are its materials and resources provided clearly and in plain language (and in multiple languages as well)? Are the complaint processes (forms, website portals, etc.) sufficiently easy to use? Is OBSI accessible for persons with mental health issues or disabilities?

- To what extent does OBSI's social media (LinkedIn, Twitter, Facebook, etc.) effectively provide information about its services?
- Is there anything else you would recommend to make OBSI more accessible?

### (3) Governance

OBSI's governance structure should provide for fair and meaningful representation on its board of directors and board committees of different stakeholders.

- To what extent does OBSI's governance structure allow OBSI to provide for fair and meaningful representation on its board of directors and board committees of different stakeholders?
- To what extent does OBSI's governance structure promote accountability of the Ombudsman?
- To what extent does OBSI's governance structure allow OBSI to effectively manage conflicts of interest?
- What, if any, changes would you recommend to OBSI's governance structure and why?

### (4) Transparency

OBSI should make information available to the public about its constitution and governance and the identity of its members; the terms of reference that govern its functions and activities as an ECB; all sources of funding for its functions and activities as an ECB, including the fees charged to each of its members for its services and the method of calculating those fees; and the results of the most recent evaluation.

- In your view, to what extent does OBSI meet the standards above?
- Are there any reforms you would recommend to make OBSI more transparent?

### (5) Impartiality and independence

OBSI should ensure that every person who acts on its behalf in connection with a complaint is impartial and independent of the parties to the complaint.

- To what extent is OBSI's dispute resolution service impartial, independent and objective? Are the standards used by OBSI fair to both parties?
- In determining fairness, to what extent does OBSI take into account good business practice and relevant laws, regulatory policies, guidelines, professional standards and codes of practice or conduct?
- To what extent are OBSI's decisions consistent?
- Is there anything else you would recommend to make OBSI more impartial, independent or objective?

### (6) Accountability

OBSI should consult at least once a year with its members, and with persons who have made complaints to it since the previous consultation, with respect to the discharge of its functions and performance of its activities as an ECB.

OBSI should submit an annual report to the Commissioner of the FCAC on the discharge of its functions and performance of its activities, including a summary of the complaints received and the average length

of time taken to deal with complaints. OBSI should make the annual report available to the public without delay after it is submitted to the Commissioner.

OBSI should advise the Commissioner in writing and without delay if it determines that a complaint raises a systemic issue (defined as serious and recurring complaints against an individual or firm).

- To what extent does OBSI consult (e.g., through reviews, questionnaires, surveys, etc.) with its members and complainants annually with respect to how it discharges its functions and its performance? Do the current methods provide for meaningful consultation with members and complainants?
- Does OBSI make its annual reports to the FCAC available to the public without delay? Is the information presented in the annual reports clear and comprehensive? Is critical information missing? What can be done, if anything, to improve the annual reports?
- What, if anything, can OBSI do to improve its consultation with stakeholders or reports to the FCAC?
- Is there anything else you would recommend to make OBSI more accountable to its stakeholders?

#### (7) Membership

OBSI should accept as a member any bank or authorized foreign bank that makes a request to it for membership.

- How onerous are the requirements for becoming a member bank of OBSI? Is the application process for becoming a member fair, transparent and easy to navigate?
- Does OBSI have a fair, transparent and appropriate process for setting fees and allocating costs among firms that use its service?
- To what extent does OBSI provide value for money?
- What, if anything, can OBSI do to improve its application process, the allocation of its fees and the value it provides to its members?

#### (8) Coordination with ADRBO

OBSI is required to coordinate with ADRBO in the handling of complaints that were incorrectly made to the wrong ECB, or that need to be transferred to the other ECB because the member bank has switched ECBs over the course of the complaint. Specifically:

- If a person has made a complaint to OBSI about a bank that is a member of ADRBO, OBSI should provide the person with ADRBO's contact information without delay.
- If an OBSI member bank becomes a member of ADRBO during the course of a complaint, OBSI should transfer the complaint and all related information to ADRBO.
- If an ADRBO member bank becomes a member of OBSI during the course of a complaint, OBSI should advise all parties to the complaint that the complaint has been transferred to it.

- In your view, to what extent does OBSI meet the standards above?
- What changes, if any, should be made to OBSI's procedures with respect to its coordination with ADRBO in the scenarios contemplated above?

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

OBSI should inform parties to a complaint about OBSI's terms of reference and procedures for dealing with complaints and, on request, provide them with any further information and assistance. If OBSI determines that all or part of a complaint is outside its terms of reference, it should 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.

OBSI should make a final written recommendation to the parties to a complaint no later than 120 days after the day on which the information that it requires to deal with the complaint is complete.

This evaluation covers cases completed between November 1, 2018 and October 31, 2020. For part of this period, OBSI was dealing with the impacts of the COVID-19 pandemic and received a higher case volume than at the height of the Global Financial Crisis. The extraordinary circumstances of the pandemic affected most international financial ombudsman schemes and will be taken into consideration when assessing OBSI's performance, and OBSI's ability to provide its services in the context of rapidly rising case volumes will be evaluated.

- To what extent does OBSI meet the requirements and timelines set out above?
- When OBSI determines that a complaint is outside of its terms of reference, does it provide written reasons for its decision? To what extent are they adequate, well-reasoned and clear?
- Does OBSI provide prompt and effective assistance to consumers and firms who request assistance from them over the course of a complaint? Do OBSI staff communicate consistently and clearly over the course of a complaint?
- Are consumers and firms able to easily access information and documentation pertaining to their complaint?
- Do OBSI's final written recommendations provide written reasons for OBSI's decision to recommend/not recommend compensation?
- Does OBSI inform consumers of the limitation period applicable to their complaint?
- What, if anything, do you think OBSI can do to improve the timeliness or adequacy of its communications with parties to a complaint?

#### (10) Effectiveness

OBSI's complaint-handling procedures and outcomes should be suited to the nature of the complaint.

- Putting aside OBSI's decisions themselves, do you think OBSI has established processes that are demonstrably fair to both parties? Why or why not? Do both parties have an opportunity to be heard?
- To what extent does OBSI have the needed resources to carry out its functions?
- To what extent are OBSI's staff qualified, experienced and capable of devoting the required time and effort to individual investigations?
- 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?
- Should the \$350,000 limit on OBSI's compensation recommendations be increased?
- What powers do you think OBSI should have and, specifically, do you think OBSI should have authority to issue binding decisions?
- What other changes would you recommend, if any, to make OBSI more effective as a dispute resolution service?

#### (11) Comparison with other ombudsman services

One of the purposes of this evaluation is to conduct a high-level benchmarking exercise that compares OBSI to other financial services ombudsman schemes or equivalents in comparable international jurisdictions both operationally and with respect to OBSI's general organizational approaches to matters such as accessibility and transparency.

- To what extent does OBSI meet recognized best practices for financial services ombudsmen?
- How does OBSI compare to other financial services ombudsmen or equivalent organizations in other jurisdictions both operationally and with respect to organizational approaches to matters such as accessibility and transparency?
- If you have made or responded to a complaint to a financial services ombudsman other than OBSI, what differences did you notice, if any, between the way the complaint with OBSI was handled and the way the complaint with the other ombudsman was handled (e.g., accessibility, fairness, timeliness, transparency of the process, communications from OBSI staff, etc.)? Please feel free to reference financial ombudsman services outside of Canada.

#### (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.

- If you have made or responded to more than one complaint through the OBSI complaint process, have you noticed any change over time in the way the complaints were handled (e.g., accessibility, fairness, timeliness, transparency of the process, communications from OBSI staff, etc.)?
- Is there anything else that you have not mentioned that you would like the independent evaluators to know?

#### **Conclusion**

Thank you in advance for your submissions. Please ensure that they are submitted by January 31, 2022 (updated) at 5:00 p.m. Eastern Time to [pp@poonampuri.ca](mailto:pp@poonampuri.ca).

**Written submission will be published on the OBSI website and all or any part may be included in the final report unless submitters specifically request confidentiality.**

## Appendix 1

### Independent Evaluation Terms of Reference

#### Independent Evaluation Terms of Reference

The Evaluator will report on:

- 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.

The Evaluator will evaluate OBSI's operations and procedures applicable to the handling of banking complaints involving participating firms who are federally regulated financial institutions, including the effectiveness of complaint resolution.

The Evaluator will consider and evaluate:

- banking complaint case files completed between November 1, 2018 and October 31, 2020 (the "Review Period")
- current operating policies and procedures, including any changes made during the Review Period
- third party evaluations, financial audits and internal self-assessments between August 2015 and August 2020

The Evaluator will ensure that the complaint files included in their review sample are selected at random and include files with the following outcomes: out of mandate before investigation, out of mandate following investigation, compensation recommended and no compensation recommended.

In addition to examining case files, the Evaluator will undertake interviews with key stakeholders including participating firms, complainants, consumer/investor groups, FCAC and OBSI staff. Interviews may be conducted personally, in writing, by telephone, or by electronic means and may include the use of surveys.

The Evaluator will be given full access to information, meetings, communications, and OBSI staff for the purposes of the Evaluation. OBSI will use its best efforts to facilitate and coordinate access to former staff members and other stakeholders. Access to any materials or staff must pertain to the Review Period.

#### **A) Obligations under the Complaints Regulations**

With respect to requirement (A) set out above, the Evaluator's report must include analyses and conclusions on OBSI's performance with respect to the requirements of CG-13 and the following requirements for External Complaints Bodies set out in the Complaints Regulations:

- a) Maintain a reputation for being operated in a manner that is consistent with the standards of good character and integrity
- b) Make its services as an external complaints body available across Canada in both official languages and offer those services free of charge to persons who make complaints to it
- c) Ensure that every person who acts on its behalf in connection with a complaint is impartial and independent of the parties to the complaint
- d) Accept as a member any bank or authorized foreign bank that makes a request to it for membership

- e) If a person has made a complaint to it in respect of a bank or an authorized foreign bank that is a member of another external complaints body, provide the person with the name of that other body and its contact information without delay
- f) If it determines that all or part of a complaint is outside its terms of reference, 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
- g) Transfer a complaint received by it and all related information that is in its possession or control to another external complaints body without delay if a bank or an authorized foreign bank that is a party to the complaint becomes a member of that other body before a final recommendation is made in respect of the complaint
- h) Advise the parties to a complaint that is transferred to it by another external complaints body in writing and without delay
  - i. That a bank or an authorized foreign bank that is a party to the complaint has become a member of the body corporate, and
  - ii. that the complaint has been transferred to it
- i) Advise the Commissioner in writing and without delay if it determines that a complaint raises a systemic issue
- j) Inform the parties to a complaint about its terms of reference and procedures for dealing with complaints and, on request, provide them with any further information and assistance necessary to enable them to understand the requirements of those terms of reference and procedures
- k) Deal with complaints in a manner that affects only the parties to them
- l) Make a final written recommendation to the parties no later than 120 days after the day on which the information that it requires to deal with the complaint, as set out in its terms of reference and procedures, is complete
- m) Consult at least once a year with its members, and with persons who have made complaints to it since the previous consultation, with respect to the discharge of its functions and performance of its activities as an external complaints body
- n) Submit an annual report to the Commissioner on the discharge of its functions and performance of its activities as an external complaints body, which includes
  - i. a summary of the results of any consultation with its members and with persons who have made complaints to it,
  - ii. in respect of each of its members, the number of complaints that it received, the number of complaints that it determined were within its terms of reference, the number of final recommendations that it made and the number of complaints that, in its opinion, were resolved to the satisfaction of the persons who made them, and
  - iii. the average length of time taken to deal with complaints;
- o) Make the annual report available to the public without delay after it is submitted to the Commissioner
- p) make information available to the public about
  - i. its constitution and governance and the identity of its members,
  - ii. the terms of reference that govern its functions and activities as an external complaints body
  - iii. all sources of funding for its functions and activities as an external complaints body, including the fees charged to each of its members for its services and the method of calculating those fees, and
  - iv. the results of the most recent five-year evaluation.



## **B. Operational Effectiveness**

With respect to requirement (B) set out above, the Evaluator's report must set out analyses and conclusions including:

- a) A report on progress towards the recommendations from the previous independent reviews.
- b) A high-level evaluation of OBSI's operations with reference to its terms of reference, internal policies and procedures, and fairness statement.
- c) A high-level benchmarking exercise that compares OBSI to other financial services ombudsman schemes or equivalent in comparable international jurisdictions both operationally and with respect to OBSI's general organizational approaches to matters such as accessibility and transparency.
- d) An analysis of OBSI governance, including particular reference to stakeholder representation on OBSI's board of directors.

**[administrative details omitted]**