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To: Deborah Battell
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Request for Comment on the Independent Evaluation of the Ombudsman for Banking Services and Investments with respect to Investment-Related Complaints

In accordance with the 'Memorandum of Understanding concerning oversight of the Ombudsman for Banking Services and Investments' (MOU) between the Canadian Securities Administrators (CSA) and the Ombudsman for Banking Services and Investments (OBSI), OBSI is required to submit itself to an independent evaluation of its operations and practices for investment-related complaints. We write in response to the Invitation to comment on the Independent Evaluation that you are conducting.

McBride Bond Christian LLP is an Ottawa based law firm. Harold Geller (a member of the Ontario Securities Commission's Investor Advisory Panel) and John Hollander (a former member of the OSC IAP) lead a group of lawyers whose primary focus is assisting investors to recover investment losses resulting from Advisor/Dealer negligence and fraud. We represent clients across Canada, both before the courts and to the OBSI.

While we support the general notion of the OBSI, we are dismayed by what we perceive as the failure of the OBSI to act in keeping with its mandate. We also have grave concerns about some limitations in the OBSI mandate which result in fundamental unfairness to investors. These concerns aside, we continue to support the OBSI's potential, in the present regulatory and court environment, given the dearth of alternatives available to investors of modest means.

We have had the opportunity to review the comments of FAIR and the Ontario Securities Commission's Investor Advisory Panel. These are excellent commentaries. We support their analysis and recommendations. We highlight two of their recommendations that we support and add, in summary, our comments:

1. OBSI should be granted the power and obligation to make binding decisions for all parties. We understand that with the granting of binding power, the parties will have a right to Judicial Review.
2. The OBSI should return to its core mandate as arbiter and cease all mediation which we believe is not part of the OBSI's mandate and undermines this mandate. An arbiter, except when engaged by sophisticated parties represented by lawyers, cannot act as Mediator and Arbiter. An arbiter must independently assess and determine the outcome of the matters before her/him. A mediator's roles is to seek compromise. An investor is highly vulnerable within the mediation process given the profound disproportionate power relationship between her/him

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and the represented, highly funded, and sophisticated Dealer. When seeking a compromise, the OBSI cannot mitigate this power imbalance without appearing to be biased. As the OBSI makes great efforts to avoid the appearance of bias, when the OBSI acts as mediator the process is unfair to consumers. Which in turn, undermines the credibility of the OBSI.

We add the additional summary comments.

1. The requirement, in most cases, for consumers first to complain to Dealers as prerequisite for bringing their matters before the OBSI is unfair and prejudicial.

The Dealers complaint investigations are not fair and independent. They are often conducted by the same persons who represent the dealers in defending (not independently investigating) consumer complaints.

The same defensive strategies are used to deter complaints regardless of the objective facts or a "fair" analysis.

By requiring consumers to first run the gauntlet of the Dealer, the Dealer achieves the dual objectives of deterring complaints and gathering evidence for the defence of claims.

2. OBSI's abandonment of consumers who have complaints which arise from member dealers where the complaint relates, in part, from sale recommendations in order to fund financial transactions of financial products from another financial entity is arbitrary and harmful to consumers. The sale recommendations are part of the financial plan and advice of that advisor. These are financial recommendations and thus part of the OBSI's mandate. The fact that the funds are used to purchase a product not under the OBSI's mandate is irrelevant to the advice given for the plan and the sale.

An example, one of many, is the sale of mutual fund products to fund that same dealer's agent's recommendation to purchase insurance investment products. Clearly the recommendation to sell for a purpose is covered by the OBSI mandate. The OBSI rejects such complaints because the purchase is of an excluded product. The OBSI breaches its mandate by rejecting such claims and, in doing so, has forcibly harmed Canadian investors.

3. There is a fundamental unfairness in not requiring disclosure from the Dealer to consumers. In the ordinary course, the consumer does not have access to key documents such as compliance memos unless they act independently through PIPEDA requests or court mandated disclosure obligations. These records are held by the Dealer.

Without disclosure to the consumer, the consumer cannot provide informed consent to settlement offers or make informed settlement offers.

While OBSI receives such disclosure, which would be reasonable if OSBI was solely acting as arbiter, this is a fundamental flaw where mediated settlement occurs. This is a fundamental breach of fairness and vitiates consumer's consent to mediated offers.

4. Retail representation to OBSI on boards and committees. Most so called "consumer representatives" are not. They are community representatives with little direct experience assisting investors with issues that are relevant to OBSI.

As a simple example, even a highly intelligent, knowledgeable and kind, former regulator and, now, defence lawyer cannot be considered a consumer representative.

The regulators already have their input or board positions as does industry. More of the same undermines diversity. A defence lawyer is not a consumer advocate regardless of her/his recommendations.

This is merely one example of the serious concerns, consumers have with the composition of those who speak on behalf of the consumer at the OBSI Board and on committees.

We do note and appreciate that FAIR is a community representative and they are unequivocally also consumer representatives.

5. Transparency of the OBSI committees, standards, training etc is altogether lacking. A simple example is that the OBSI invites lawyers who represent dealers and advisors to assist in policy development and training of staff – but does not reach out to Kenmar, SIPA, or lawyers for consumers. This raises the perception, and likely unintentional reality, of bias.

We will be pleased to comment further in person or by correspondence to consider any other issue of interest to you in your work or to clarify our comments. We thank you for this opportunity to contribute to the discussion regarding the OBSI and its mandate.

Yours truly,



Harold Geller

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