Via email

February 15th, 2016

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

To: Deborah Battell dbattell@gmail.com and Mark Wright mwright@obsi.ca

I appreciate the opportunity to submit comments on OBSI governance , policies and practices.

OVERVIEW

With an increasing number of Canadians seniors/retirees , a decline in Defined Benefit Pension plans , a low return environment and an essentially unregulated advice industry, Canadians need and deserve an independent , trusted and respected arbiter for complaints. The cost of civil litigation in Canada, except for amounts > $200K. is prohibitively expensive. For most Canadians, OBSI represents the court of last resort. OBSI is a foundation of investor protection in Canada. Consumer trust in OBSI is critical and reforms are needed to acquire that trust .

In a Dec. 2012 presentation *The Role of Financial Dispute Resolution Schemes in Enhancing Consumer Trust and Confidence* http://www.oecd.org/daf/fin/financial-education/HKSeminar2012S3Melville.pdf in Hong Kong , Former Ombudsman Doug Melville laid out the situation in Canada. He made the following points:

1. Financial Dispute Resolution (FDR) is no substitute for good consumer-facing market conduct regulation
2. Good internal complaint data is not obtained from the financial service providers (would be very useful for public policy development)
3. Prevent inappropriate use of the term "Ombudsman" for firms' internal FDR
4. Difficult to make FDR well-known, but very important to be able to find it when a problem arises
5. Learning from complaint cases provides valuable feedback that helps financial service providers to improve
6. Goal is to make the client “whole” where maladministration is found to have occurred
7. Systemic issue investigation voluntarily withdrawn by OBSI Board in June of 2012 under pressure from industry and regulators
8. Current challenges include competition in banking dispute resolution and banks seeking cost and scope reductions ;Uneven regulator support across sectors and jurisdictions ;Under-resourced for complaint volumes post-global financial crisis and Lack of regulatory clarity re expectations and systemic (mass) cases

It should be obvious that regulators have not been supportive of OBSI. Perhaps OBSI exposes too many problems with the regulatory system? **This attitude has to change.**

It is thus very clear to me.-OBSI is at a crossroads. Retail investors have had enough of industry whining , regulatory delays and general inaction .A rise in "low ball settlements" demands that financial consumers are presented with real reforms. The time is NOW.

Commentary

Corporate governance: There should be Director position dedicated to retail investor issues . There should be term limits so that there is a continual refreshing of the Board .
I recommend that Community directors **not have any** prior industry relationships .

OBSI should implement recorded voting and public reporting of meeting minutes in order to improve transparency .

Review frequency: The independent review frequency is far too long to support good governance. I recommend a minimum 3 year cycle given all the regulatory reforms underway. These include enhanced cost disclosure and performance reporting, a Best Interests initiative, changes to mutual fund fee structures and the implementation of various Offering Memorandum exemptions in addition to the addition of EMD's, PM's and Scholarship trusts under OBSI's mandate.

Amend Terms of Reference(TofR): I strongly recommend amending the OBSI TofR to include a specific objective of providing feedback for continuous improvement of financial advice processes, practices and toolbox's . This would be in the Public interest. OBSI should report on all its cases in a generic/anonymous way so that lessons can be learned by the industry and the consumer will have another crucial education source. This is done by the UK Financial Ombudsman Service. A summary report could , for example ,provide opportunities for improving core advice industry issues such as an ineffective NAAF form, a shattered KYC process, very poor risk profiling practices, abusive complaint handling processes, deficient IIROC and MFDA complaint handling rules etc. The CSA should explicitly support OBSI's fairness principle(s) as they are consistent with "dealing fairly, honestly and in good faith" in securities Acts. [Since April 2013 the UK FOS has been required, under the Financial Services Act 2012, to publish all of its final decisions (apart from in cases where it would be inappropriate to do so). They have now published more than 60,000 decisions on their website. Their online "decisions database" can be searched by product type, outcome and key words]

Make OBSI decisions binding: I am of the firm conviction that making OBSI recommendations binding on dealers is in the best interests of all stakeholders and the advice industry. Experience shows that the status quo is incapable of leading to a well functioning dispute resolution system and providing the necessary level of investor protection and public confidence. Dealers should review professional liability policies to ensure that voluntary compensation is covered .

Prohibit use of " internal Ombudsman": Bank -owned Investment Dealers nudge complainants to their own " internal ombudsman " thereby potentially blocking a number of investor complaints from ever reaching OBSI.**There are three fundamental reasons for prohibiting the use of "internal Ombudsman".**

<u>First reason:</u> There is absolutely no Regulatory oversight on the internal Ombudsman activities or decisions or rationalized complainant rejections. I personally have experience where the internal Bank Ombudsman (iO) ignored the detrimental factual evidence of the Investment Advisor making investing misrepresentation. In addition, the iO actually manufactured a claim when it later turned out that there was no evidence to support the claim.

<u>Second reason:</u> The internal Ombudsman should not be allowed since they are clearly not independent. They receive company benefits , participate in profit sharing and bonus programs. Given the low level of transparency , they may even be eligible for stock options. It should be noted that ADR Chambers bank Ombudsman used by the TD Bank is a for profit entity!

<u>Third reason:</u> The use of the term "Ombudsman" by the Investment Dealer confuses investors and induces them to think that they are on a par with OBSI's degree of independence.

<u>Side Note:</u> If there is supposed to be a confidentiality agreement when a complainant is dealing with the OBSI, an explanation is required as to how the bank Ombudsman has the knowledge of the OBSI decisions related to a particular investor complaint.

This Investment Dealer- internal Ombudsman sequence is also harmful to complainants for the following reasons :

- Dealers should make a substantive offer that is fair and not dependent on a second internal review
- The internal Ombudsman is by definition not independent IIROC has no jurisdiction over this entity
- The limitation time clock is not stopped and worse ,the complainant is not told that the clock continues to tick on
- A rejection or another low ball offer drains the investor's will to proceed to OBSI, a more independent arbiter of complaints

The UK Financial Conduct Authority prohibits a two-stage dispute resolution process- Canadian regulators should build on their experience and research. If the CSA and SRO's are unable or unwilling to introduce a prohibition they should at least take extraordinary measures to prevent complainants falling into the arms of these entities. There should be a definitive sentence in How to file a complaint brochures that states it is **not mandatory** to consider the use of an "internal " Ombudsman if the service is offered by the Investment Dealer. I also recommend that the CSA " encourage " banks to cease using the confusing term "Ombudsman" for their internal service.

Deal with Low ball offers: It is my understanding that if a dealer is able to negotiate a settlement with a complainant lower than the OBSI recommendation then the dealer is shielded from Name and Shame and OBSI considers the file closed. According to media reports some of these settlements amount to 50 cents on the dollar or less. This is exploitation and abuse of the retail investor and

process. OBSI investigations/restitution recommendations should be based on core fairness principles and documented loss calculation standards. Allowing "low ball" restitution and the associated confidentiality agreements shield the industry from critical analysis. Any rejection of an OBSI recommendation should result in a Name and Shame News Release and an immediate examination of the case by the applicable regulator.

Firm up cycle time disclosure: Complainants need and deserve an upper cap on the expected time to resolution before they commit to using OBSI. A 120 day standard would appear to be consistent with other jurisdictions. Obviously, there may be a few complex cases where more time is needed but the overwhelming majority of cases should be settled within this time frame. If the reason for the delay is dealer non-cooperation, regulators should step in. If such non-cooperation becomes chronic , OBSI should have the mandate to recommend dealer deregistration to the CSA Joint Review Committee (JRC).

Increase Investor Compensation cap : The $350,000 limit has been in place since 2002, in effect cutting it by the amount of inflation. This is particularly important as more HNW elderly Canadians are exploited and file complaints.

Investigation reports: All final recommendations shall be released to both parties simultaneously and be approved in writing by at least one level of management above the investigator. Recommendations beyond $ 50,000 should be approved by the Ombudsman.

Access : OBSI should participate in opportunities to provide information to consumers with Participants, with regulators/government agencies and consumer organisations. The Ombudsman should make herself available for media interviews - there should also be periodic use of media releases for key announcements. This accessibility would extend to providing information and training for dealers, through speaking at conferences and training courses, providing briefings for staff, etc. More visibility as to the assistance available for disadvantaged/special needs consumers accessing OBSI, including its preparedness in appropriate cases to assist where oral complaints are made would be helpful.

Systemic Issues: Systemic issues appear to lurk in the shadows. OBSI do not reveal any information and neither has the JRC. This is unacceptable. In its 2014 Annual Report dated March 19, 2015 https://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20150319_31-340_obsi-annual-report.htm the JRC stated that it will monitor compensation refusal cases and consider patterns or issues raised by them. Nothing has been revealed on this topic since.

Precedence : When a dealer Rep is fined, the money , if collected, goes to the regulator. But what happens when there is also a recommendation for restitution from OBSI. Which takes precedence? I would hope it is the complainant.

Hardship cases: OBSI should establish a fast track system to expedite the investigation of such cases through the OBSI system. This is particularly important for seniors who may be living on fixed income.

Regulatory arbitrage : The unwillingness or inability of OBSI to fully investigate an investment portfolio containing a Segregated fund is incredibly unfair to complainants.
I cannot see how one can properly assess the suitability a portfolio if you exclude any significant asset, let alone a more complex insurance based investment vehicle like a Segregated fund. Indeed how can either the OLHI (the insurance ombudsman and an unregulated entity) or OBSI provide the type of necessary clear cut decision that retail investors deserve if they are forced to separate the asset allocation pie for separate analysis. In my opinion OBSI , should refuse to participate in such unprofessional activities to protect its reputation. Ironically, CRM2 is accelerating the issue. Regulators and politicians need to deal with this serious and growing problem on a priority basis.

Clarification needed by regulators : Some fuzzy areas require a defined position by regulators. These include dealer accountability in cases where there is Off book transactions , Personal financial dealings or Outside Business Activity (approved or otherwise). Investors believe they are dealing with a dealer representative so in my opinion , the dealer must be held accountable for all actions of its employees/agents.

Name and Shame : I do not consider Name and Shame as an effective deterrent. Too many dealers are shameless given their observed behaviours. If IIROC and the MFDA automatically launched an investigation that might make a difference in behaviour. We have also been told that OBSI do not Name and Shame if a victim agrees to accept a lower than recommended offer, so naturally they offer low ball offers. This practice undermines the one tool OBSI has to inspire dealer acceptance. I recommend OBSI publish all cases of low ball settlements .

Link to law enforcement : Victims have expressed concern that they are not permitted to turn files over to police or regulators if they feel the files indicate fraud or other criminal activity. OBSI should amend its rules to permit this as a basic human right. Please note that the UK FOS authorizes the use of the FOS decision in a court proceeding if the dealer refuses to pay. Re *what a "final decision " by an Ombudsman means* http://www.financial-ombudsman.org.uk/publications/factsheets/final_decision.pdf " If a consumer accepts an Ombudsman's final decision by before the deadline we give them, the decision becomes legally binding. " The UK Parliament made Ombudsman decisions "legally enforceable" in court – which means that consumers have the back-up of the law to support decisions the Ombudsman has made in their favour.

OBSI Operational Staff turnover negitively affects the thoroughness and commitment with lack of dedication that becomes obvious when examining the results of an investigational effort

This statement requires the ensuing facts to add credence to this assertion.

This comment relates to the perceived lack of competence and thoroughness when dealing with a rotational number of OBSI staff persons involved in an investor complaint. There is also the question of impartiality and question of dedication that comes with the turnover of employees at OBSI.

Here are three examples of note that should also raise some red flags about the basic principles of impartiality and dedication with the incoming staff hired by OBSI.

The first person we dealt with at the OBSI in November 2011 was employed by OBSI as a Case Assistance Officer and later as a Case Review Officer. This person joined the OBSI in April 2011 after working for the Canadian Imperial Bank of Commerce (CIBC) as a Financial Service Associate. This person departed OBSI in November 2012 for a position with the Parliament of Canada.

My case was not assigned to an OBSI investigator until May 2012. This person was classified by OBSI as a Senior Investigator, but where was the related experience ? This Investigator joined the OBSI in March 2007 after working for the Financiere Banque Nationale for 3-years. Prior to that, this person worked for BLC Financial Services for 2-years. Prior to that, this person worked for Banque Laurentienne for 2-years. This person departed OBSI in October 2013.

After we appealed for a review of our case in January 2013, we were directed to the Manager of Investigations. This person was hired by OBSI for this position in November 2011. Previously, this person was Vice-President/Legal Counsel defending the interests of a CSA registered securities company. 2-years later this person departed from OBSI for a position of Legal Counsel at the OSC. 18-months later this person was promoted to the position as OSC Senior Legal Counsel. (Later, in this submission there are more details related to this experience)

The abridged details below raises the issue of the OBSI questionable dedication effort that should have been, but was not applied to our investor complaint.

It could also demonstrate that once OBSI has reached a rejection decision, even when the investor later returns with additional research showing Regulatory violations by an Investment Advisor, OBSI ignores and refuses to re-consider the Advisor wrong-doing facts. OBSI never contradicted or refuted any of the additional evidence facts that were presented to them by the complainant investor. OBSI just said "we do not have any basis for changing our (their) original findings".

I would be happy to share with the new OBSI Management the substantial details related to the basis of this comment.

Here is a chronological example of the tardiness in the way OBSI delt with the case in question.

January 13th 2013 - We made a formal request for the OBSI to reconsider our complaint case that had been rejected by OBSI.

After realizing that the OBSI Investigator had not provided details to show that a thorough examination had been made regarding the Regulatory violations behind our complaint, we did our own research into the applicable CSA, OSC and IIROC Regulatory laws, rules and guidelines. In this way we discovered the Regulatory violations that applied to our case.

The OBSI Manager of Investigations agreed to review our case based on the new information.

March 17th 2013 - As we had not rececieved any contact from the Manager of Investigations, we contacted the Deputy Ombudsman who reported that the Manager of Investigations was considering the information we provided.

April 18th 2013 - The OBSI Manager of Investigations (MofI)and I plus my advocate adviser intervener had a conference call with the MofI to discus various details of my appeal request. That was the last we heard from the OBSI Manager of Investigations.

July 7th 2013 - As there had been no response of any kind from the Manager of Investigations after our conference call, contact was made again with the Deputy Ombudsman, Investments.

July 17th 2013 - We received a response from the Deputy Ombudsman, Investments. The response was that he had spoken with the Manager of Investigations and we would receive a response from the Manager by the end of the month (July 2013). **We never received any further contact from the Manager of Investigations.**

October 15th 2013 - Once more we contacted the Deputy Ombudsman, Investments and he responded by saying he would be speaking with the Manager of Investigations that day and would provide an update on the review of our case. **Nothing ever happened, we never received any information from anyone at OBSI.**

October 23rd 2013 - A further request was made of the Deputy Ombudsman as to when we could expect feeback. **There was no response. Many months later, we discovered that the Manager of Investigations had in fact departed in that October 2013 month from the OBSI for a position with the Ontario Securities Commission.** This explains why there was no response from the Manager of Investigations, as had been promised starting 6-months earlier. (At 80-years of age, I guess they were trying to take the easy way out by waiting to see my name in the local newspaper Obituaries)

January 6th 2014 - There was no response for the next three months from anyone at OBSI and then we received a letter from the Deputy Ombudsman, Investments rejecting our revised claims of wrong-doing by our Investment Advisors and their Investment Dealer employer. The rejection included two innocuous reasons for rejecting our new details of complaint. The more pertinent powerful reasons included in our complaint submission were ignored.

January 8th and 13th 2013 - We responded with emails showing the reasons why the Deputy Ombudsman, Investments rejection reasons were faulted.

January 20th & 23rd 2013 - As we had received no response, we emailed the Deputy Ombudsman again requesting a response to our rebuttal of his explanations for rejecting our submission.

January 24th 2014 - We were advised by the OBSI Deputy Ombudsman, Investments that our case had been escalated to Mr Sasha Angus, the Senior Deputy Ombudsman. **There was no response from this person.**
We understand he departed fro OBSI around this point in time.

February 14th 2014 - Rather surprisingly, we received a letter from the OBSI Ombudsman & CEO, Mr Douglas Melville, confirming the original OBSI rejection of our complaint with no consideration rejecting or discrediting or refuting any of our most recent evidence of wrong-doing with Regulatory violations by our Investment Advisors and/or their Investment Dealer employers.

February 19th 2014 - We sent a 4-page Registered Mail letter responding to the Mr Melville letter. We enumerated most of the Securities Regulation Laws, Rules and Guidelines that had been violated by our Investment Advisors and/or the Investment Dealer. **I will be happy to supply a copy of our February 19th 2014 letter upon your written request.** There has been no further response from OBSI.

Please feel free to contact me if you wish to discuss any of my comments included in this submission.

I grant permission for public posting of this Comment letter.

Peter Whitehouse

Retail investor