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OBSI Terms of Reference Renewal Project: Public Consultation April 13, 2018

I greatly appreciate the opportunity to provide comments on this important Consultation.

Many external changes have occurred since the previous update of the Terms of Reference (TOR). My comments reflect my understanding of those changes. In addition there are the 19 recommendations made by the Independent Reviewer (the "Battell" Report) that need addressing in the TOR or related documents.

Detailed Comments

ADD text re Strategic intent: Explicitly state that the OBSI takes a strategic approach to Ombudsmanship, incentivising staff to use the intelligence gained from case to provide suitable additional value-added services to Participating firms and guidance to financial consumer users.

ADD or reference the Systemic Issues Protocol to the TOR

ADD public policy text per Battell Recommendation: " *An ombudsman may also use its experience to inform public policy. We understand OBSI provides perspectives informally but consider it would better demonstrate OBSI's expertise, value and independence if it commented more formally on proposed legislation and regulations. This would supplement its responsibility to proactively inform regulators about systemic issue*". This is very important to give real meaning to OBSI's assertions that it acts in the Public interest.

All reference to days should be defined as CALENDAR DAYS.

There should be an explicit reference made to the Memorandum of Understanding (MOU) with the Canadian Securities Administrators (CSA) in the TOR.

Transparency: An Ombudsman service should be transparent- such a commitment should be made in the TOR. Most importantly, I would want to see all CIAC reports and special complaint forms posted on the OBSI website. The previous Chair had censored such public disclosure.

Complaint handling system: We absolutely recommend that OBSI establish a formal complaint system whereby stakeholders can launch complaints regarding OBSI's rules, practices, processes, decisions- conclusions and conduct.

Order of precedence: Where there is a conflict between a securities law and IIROC or MFDA rules/ guidance, securities laws shall govern. This should be formally stated.

Cycle time to handle a complaint I agree with Kenmar on cycle time disclosure. OBSI should specify in its updated Terms of Reference a specific cycle time (in days) limit for making a recommendation to resolve a complaint. A statistical statement such as 80% in 180 days is meaningless to complainants. FCAC allows 120 days for banking complaints - Investment dealers have 90 days. The specificity allows complainants to assess whether an alternative venue would serve them better. NOTE: OBSI is unlikely to match international cycle times for resolution because of its extensive use of negotiated settlements.

The Consumer and Investor Advisory Council (CIAC): I recommend that the CIAC and its Charter be incorporated into the Terms of Reference.

Oversight: The TOR should mention the roles of the FCAC (banking) and the Joint Regulatory Committee (investments).

Referrals: The updated Terms of Reference should include an obligation for OBSI to refer matters which may involve regulatory, criminal, fraudulent or other wrongdoing to the appropriate regulator or police force.

Record retention: The TOR should define the period of time over which records will be maintained. Typically it is 7 years.

Statistical reporting: TOR should state that statistical data will be published on a quarterly basis on the OBSI website. Re Battell Recommendation 19. The stats would be more readily digestible if accompanied by a short report setting out the main insights and observations; and more meaningful if they contained comparisons with previous years and periods to show trends.

The Battell Report states "...That OBSI develops a prevention strategy that sets out how it will assist customers and firms avoid and reduce complaints." This aspect of OBSI's operations should be reflected in the TOR.

PART 2 – DEFINITIONS AND INTERPRETATION

The term "substantive response" should be defined as per NI31-103 for investment complaints and per FCAC Commissioner Guidance for banking complaints.

Define "non-monetary loss" This needs clarification and any dollar limit delineated.

"Standards" means any applicable statutory or regulatory requirements for handling and resolving complaints, as well as any other standards adopted by the Board for those purposes. This is fine as long as it excludes IIROC Rule 2500B *Client Complaint Handling* See <http://www.canadianfundwatch.com/2018/04/mre-issues-with-iiroc-client-complaint.html> *More Issues with IIROC complaint handling rules* .Since this rule is fundamentally unfair to complainants it should be deemed to be incongruent with OBSI Fairness Principles and disregarded.

Authority: the authority for OBSI to act as an Ombudsman service should be cited in the TOR. In the case of investments, that authority is derived from CSA National Instrument NI 31-103. For banking, the authority derives from an FCAC approval letter.

Add a section on Systemic Issues to the TOR. In the past, Kenmar Associates have expressed that it is important that widespread or systemic issues that are uncovered by OBSI as a result of its review of individual complaints are properly addressed by the financial system in order to adequately protect investors and retain consumer confidence in the financial system. I agree with this 100%. When a Systemic issue has been identified, OBSI should notify the firm, regulators and police as applicable. This should be summarized in the Annual Report. An example of this would be when a Financial Advisor has been found to have wrongfully made investments in DSC mutual funds relative to a complainant's needs criteria, then other non-complaining client accounts with DSC mutual funds purchases with the same Financial Advisor should be examined for appropriateness relative to the investor's investment needs criteria.

PART 3 – OBSI ORGANIZATION AND GOVERNANCE

I suggest changing the cooling off period for ex-employees of two years be increased to four years. I also strongly recommend that at least one Board seat be reserved for a person that will give a Voice to the retail investor as described in the June 2016 Battell Report. The reason OBSI exists is to deal with investor complaints so it is only natural they be represented on the Board of Directors. Recommendation 3 of the Battell Report states “That one of the community director positions on OBSI’s board be reserved for a consumer/investor advocate and that this appointment be based on nominations from consumer/investor advocacy groups.

PART 4 – OMBUDSMAN’S POWERS AND DUTIES

Add a specific discrete requirement that the Ombudsman is responsible for complying with applicable Canadian Human Rights legislation.

Re: Part 5 (d) – Complaint made to OBSI within 180 days - the Complaint was made to OBSI no more than 180 calendar days after the Complainant received a written notice rejecting the Complaint, or a written offer for the resolution of the Complaint, from the Participating Firm, subject to section 5.5 [OBSI may extend time for filing Complaints]; Before the word *written*, ADD the word **binding**. This is critical.

PART 5 – COMPLAINTS TO OBSI

5.1 (e) **Claim made to Participating Firm within 6 years** I agree with **the** Kenmar recommendation. The wording should be revised as follows: “...the Complainant knew or ought to have known of the problem....” and should specify that the characteristics of the complainant will be taken into account (such as age, knowledge, degree of reliance on the advisor, extent of vulnerability). It is not fair to vulnerable consumers, including persons with limited language skills, low financial literacy, and seniors who may have reduced cognitive abilities, to apply a limitation period without a full appreciation of these characteristics . As FAIR Canada has noted. OBSI’s process is not a court proceeding, and it is not subject to statutory limitation periods, OBSI should explicitly provide in its updated Terms of Reference that it “reserves the right to waive the limitation period in exceptional cases where it is fair and reasonable to do so.”

PART 10 Monetary Limits:

The TOR should accept the Battell recommendation that OBSI reviews its compensation cap to bring it closer to the IROC arbitration limit and amends its terms of reference to require the compensation cap to be adjusted in line with inflation, on a three yearly basis.

Re: 6.3 Regulatory proceedings and investigations If OBSI declines to take on a complaint due to an ongoing regulatory proceeding or investigation, OBSI shall take steps to ensure that the complainant is not adversely impacted by statute of limitation time constraints. If not, this would be an undue restriction of human rights and breach Fairness Principles.

Re: “Para 11.2 Fair practices – At a minimum, and regardless of whether the Participating Firm believes the Complaint falls within OBSI’s mandate, the Participating Firm should:

- (a) appoint a senior official to act as the final internal decision-maker on unresolved Complaints;**
- (b) promote their internal and external complaint-handling processes through websites, brochures, mailings, emails and other means necessary to ensure Customers have ready access to them in the event of a Complaint ..”**

Most important- substantial evidence can be made available to OBSI to support the following –

What is an “external complaint handling process” in the context of this paragraph? If it refers to an internal bank or insurance company “ombudsman”, I disagree because this process is not independent and is flawed. Internal “ombudsman” are NOT external as the CSA has declared them to be non-independent of the firm. The most important point is that Participating firms should direct complainants to OBSI, without diversion to their own internal “ombudsman”, if a complainant is not satisfied with the Participating firm’s response.

13.3 Settlement efforts while OBSI investigates – While investigating a Complaint, OBSI may seek to promote a resolution of the Complaint by agreement between the Complainant and the Participating Firm. The Complainant and the Participating Firm may also continue to seek to resolve the Complaint themselves if both parties agree. If no resolution is agreed upon, OBSI will complete its investigation of the Complaint and will either make a recommendation for its resolution or reject the Complaint.

This 13.3 Section is very concerning. Why on earth would OBSI contact both parties in the middle of investigation and approach them with an opportunity to settle? This creates many opportunities for complainant exploitation due to the huge asymmetry of information and knowledge between firm and a desperate complainant (see complaint fears expressed in the Battell report). Such a process is likely to give rise to low ball settlements such as those reported in the Battell report. See para 4.1.2 Client Views in the Battell Report on how this practice can lead to low ball settlements.” *The majority of clients reported being pleased to have received something back (something being better than nothing) and were complimentary about OBSI’s staff and efforts. But most reported feeling they were in a weaker bargaining position and said they had simply caved in.* **This para should be deleted from the TOR and from practice standards.**

NOTE: Per the 2017 JRC Annual Report of 150 cases, 15% were settled for amounts less than OBSI’s compensation recommendations. Per the Battell report in 2015, 23 (18%) of the 131 non-backlog cases that OBSI assessed as deserving compensation, received less than OBSI recommended.

13.8 Consequences of refusal of a recommendation – If a Participating Firm refuses an OBSI recommendation for resolution of a Complaint:

(a) OBSI must first disclose to the Board and the Participating Firm’s regulators and then to the public: “Public” should be defined as a posting on its website and a News Release through a recognized news service.

PART 16 – CONFIDENTIALITY AND DISCLOSURE Para 16.1 (a) all discussions and correspondence between OBSI and the Complainant, the Participating Firm and their respective representatives that form part of the dispute resolution process are not to be disclosed for any purpose other than to a professional advisor or used by the Complainant or the Participating Firm in any ongoing or subsequent legal or regulatory proceedings; and.. This should be broadened to include any person or entity of the Complainant’s choice in order to be congruent with Fairness Principles and Human Rights Laws.

16.5 Disclosure to regulators - Nothing in these terms of reference prevents a complainant from sharing information with a regulator for regulatory purposes. Complainants, Participating Firms and OBSI may comply with a written request from a regulator for disclosure of information, documents, records or things. Where OBSI complies with such a request, or where OBSI notifies a regulator that a Participating Firm has refused a recommendation or failed to comply with its obligations under these Terms of Reference, the Participating Firm and the Complainant may discuss the Complaint and the underlying facts with the regulator. The TOR should be changed so that complainants definitely have the unrestricted right to also share information with police , Human Rights Commissions and Privacy Commissions as deemed necessary.

