FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

July 25, 2011

Mr. Tyler Fleming
Director, Stakeholder Relations and Communications
401 Bay Street
Suite 1505, P.O. Box 5
Toronto, ON M5H 2Y4

Sent via e-mail to: publicaffairs@obsi.ca

Dear Mr. Fleming:

Re: Consultation Paper: Suitability and Loss Assessment Process dated May 26, 2011

FAIR Canada welcomes the opportunity to provide comments on OBSI's approach to determining suitability and assessing investor losses in response to OBSI's Consultation Paper: Suitability and Loss Assessment Process (the "Consultation Paper").

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in securities regulation. Visit www.faircanada.ca for more information.

Executive Summary

1. FAIR Canada believes that a single, national ombudservice for investment complaints is vital to the integrity of the Canadian financial services market. FAIR Canada supports continued mandatory OBSI participation for IIROC and MFDA member firms because it is a simple and inexpensive means for retail investors to seek redress for their individual complaints.

2. OBSI is appropriately guided by the principles of fairness and informality.

3. The Terms of Reference and the Framework for Collaboration contemplate wide scope in the nature of the recommendations that the Ombudsman can make and is broader than monetary compensation for financial or non-financial losses and can include "other action" as a result of an act or omission which has led to damage, harm or loss.

4. FAIR Canada supports the overarching principle upon which OBSI's loss methodology calculations for investment complaints are based – that is, to determine a reasonable

estimate of the financial position the investor would be in had the unsuitable investment advice not been given and acted upon.

5. Given regulatory requirements for determining suitability, it is entirely appropriate that OBSI look beyond the KYC form and review other evidence in order to determine the client's actual KYC information applicable at the time the investment was made. The KYC form is simply one tool the advisor will use to fulfill their obligations to know their clients.

6. (a) When assessing whether an investment was suitable for a particular client, it is necessary to look at the features of the investment, what the registrant knew or should have known at the time the recommendation was made, and the client's actual KYC information at that time.

   (b) We agree with OBSI that disclosure of the risks and characteristics of a recommended investment does not make it suitable for the investor if the investment is not in agreement with the investor's objectives and risk tolerance. Disclosing information or providing investment literature for an investment that is otherwise not suitable for an investor does not make it suitable.

   (c) We agree with OBSI's key principle that investors should be able to rely on their advisor and firm to make suitable investment recommendations without the investor having to verify the suitability of those recommendations. Investors should not be expected to "second guess" the suitability of recommendations provided by their advisor.

   (d) FAIR Canada agrees that if it is determined that the investments and/or strategies were unsuitable for the investor, it is then necessary to determine the amount of financial harm suffered and an appropriate compensation amount.

7. (a) The appropriate methodology for calculating an investor's losses will depend on the particular facts and circumstances.

   (b) FAIR Canada believes that whether it will be more fair and reasonable to calculate the position the investor would have been in had they been suitably invested based on an index (and in particular, an index fund), a fixed income type of investment or some other investment will depend on all the facts and circumstances of the particular complaint.

8. (a) FAIR Canada agrees that, in certain situations, the investor will have a duty to mitigate losses when they become aware of them.

   (b) While an investor's ability to obtain compensation may be properly reduced or rejected if they are reckless, careless or fail to take reasonable steps to mitigate their losses, FAIR Canada cautions that a subjective standard based on the particular client with an appreciation of all the facts of the particular case, including but not limited to the individual's age, degree of reliance on the advisor, level of sophistication and

financial knowledge, need to be taken into account in determining whether there has been a failure to mitigate losses.

(c) FAIR Canada argues that it is incorrect to suggest that an investor can ratify a purchase by continuing to hold an unsuitable investment after they knew it was not suitable. It may be appropriate to determine that, at some point, the investor clearly had a duty to mitigate their losses by selling the investment, but continuing to hold an unsuitable investment should not be sufficient to ratify a purchase.

(d) FAIR Canada recommends that OBSI consult with other leading jurisdictions to evaluate other jurisdictions' approaches to the issue of mitigation in the loss assessment process compared with OBSI's.

(e) FAIR Canada agrees that OBSI needs to consider whether an investor had knowledge of an unsuitable investment or strategy from the time of the recommendation, or was otherwise sufficiently knowledgeable to have known of the problem, and did not take reasonable steps to question it. If so, OBSI should apportion financial harm accordingly; this approach is similar to that of contributory negligence.

9. FAIR Canada believes it would be helpful if OBSI were to provide further details on how it determines when interest will or will not be payable and when it will calculate interest on the actual loss amount (Option 2) versus interest on the amount unsuitably invested (Option 3).

10. FAIR Canada recommends that OBSI consider broadening the scope of its non-financial losses to include pain and suffering (in addition to distress or inconvenience and damage to reputation or loss of privacy, which it does compensate for).

---

1. Single National Ombudservice is Essential

1.1. FAIR Canada believes that a single, national ombudservice for investment complaints is vital to the integrity of the Canadian financial services market, particularly given the complexity of the financial services landscape and the multi-step and multi-organization process that exists in Canada for investors to seek redress[1].

1.2. FAIR Canada supports continued mandatory OBSI participation for IIROC and MFDA member firms because it is a simple and inexpensive means for retail investors to seek redress for their individual complaints, even though it is a system in which member firms hold a great deal of power, expertise and knowledge. FAIR Canada encourages readers to review our support letter dated June 1, 2011 at http://faircanada.ca/wp-content/uploads/2011/01/FAIR-Canada-OBSI-Support-Letter.pdf.

[1] Expert Panel on Securities Regulation, "Final Report and Recommendations" (January 2009) at page 34.

1.3. FAIR Canada believes that the approach to determining suitability and loss assessment should be viewed in the broader context of the role and mandate of an ombudservice, and in light of the existing regulations of the registrant-client relationship.

2. Fairness and Informality

2.1. OBSI is to make a recommendation with reference to what is, in the Ombudsman's opinion, fair in all the circumstances[2]. The UK's Financial Ombudsman Service is required to determine complaints by reference to what is fair and reasonable.[3] We consider a decision that is fair to also be one that is reasonable. In considering what is fair in all of the circumstances, the Ombudsman must take into account relevant law and regulations, regulators' rules, policies and guidance, applicable professional body standards, codes of practice or conduct and general principles of good financial services and business practices.[4]

2.2. Pursuant to the International Ombudsman Association's ethical principle of informality, an ombudsman, as an informal resource, does not participate in any formal adjudicative or administrative procedure related to concerns brought to his/her attention.[5] Fairness guidelines dictate that an ombudsman is not bound by the formality of the rules of evidence or procedures of a court of law and is rather an alternative to the legal system.[6] Although not the advocate for any side in a dispute, the Ombudsman's duties do include assisting a complainant with the complaint process, including helping them to articulate their complaint, where necessary.[7]

3. Power to Recommend Other Action

3.1. According to section 22 of OBSI's Terms of Reference, after the investigation of a complaint, "…the Ombudsman shall make a recommendation for compensation or action to the Complainant and the Participating Firm if, in the opinion of the Ombudsman, the Complainant has suffered loss, damage or harm because of an act or omission of the Participating Firm or its Representative in the provision of a Financial Service".

3.2. The Terms of Reference, therefore, contemplate not only monetary compensation to a complainant but a recommendation for "other action" as a result of an act or omission which has led to damage, harm or a loss for a complainant. This could involve such things as rectifying errors on a complainant's account statements, assisting the client with the

---

[2] OBSI's Terms of Reference, online: <http://www.obsi.ca/images/document/Dec2010_English.pdf> at section 25.

[3] UK Financial Services Authority's Handbook, online: <http://fsahandbook.info/FSA/html/handbook/DISP/3/6> at sections 3.6.1 and 3.6.4 of Chapter 3.

[4] *Supra* note 2.

[5] International Ombudsman Association Code of Ethics, online: <http://www.ombudsassociation.org/sites/default/files/Code_Ethics_1-07.pdf>.

[6] Joint Forum of Financial Market Regulators, "The Financial Services OmbudsNetwork – A Framework for Collaboration" (August 10, 2007), at Guidelline No. 4, online: <http://www.olhi.ca/downloads/pdf/FrameworkforCollaboration-Joint%20Forum.pdf>.

[7] *Supra* note 2, at section 3(g).

tax authorities if the error led to tax issues with CRA, correcting damaged credit scores, or loss of privacy (for example). Wide scope is therefore contemplated in the nature of the recommendations that the Ombudsman can make and is broader than monetary compensation for financial or non-financial losses.[8]

4. Guiding Principle

4.1. FAIR Canada supports the overarching principle upon which OBSI's loss methodology calculations for investment complaints are based – that is, to determine a reasonable estimate of the financial position the investor would be in had the unsuitable investment advice not been given and acted upon. This is also the aim of ombudservices in other jurisdictions. For example, the UK's statutorily created Financial Ombudsman Service, aims "…to put the consumer in the position they would now be in, if the firm had acted correctly. In complaints about investment advice, this is likely to be the position the consumer would now be in, if they had received suitable investment advice."[9]

4.2. FAIR Canada agrees that if the only ground for complaint is that the investment declined in value, and thus is a complaint about investment performance, the investigation should be concluded and no compensation is warranted. The advisor's responsibility is to recommend suitable investments, not to guarantee performance.

THE PROCESS TO DETERMINE COMPENSATION

5. Step 1: Suitability and Know Your Client Information

5.1. Securities laws and regulations, as well as SRO rules and guidelines, require registrants to take reasonable steps to ensure, before making a recommendation to a client to buy or sell a security or accepting an instruction to buy or sell a security, that the purchase or sale of the security is "suitable" for the client. In order to determine that the recommendation is suitable, the registrant must have a comprehensive understanding of the client's circumstances (financial and personal), investment knowledge and experience, investment needs and objectives including investment time horizon, and risk tolerance. The registrant must ensure that the information is up to date prior to making a recommendation. This step is known as the "Know Your Client" or KYC determination. The registrant must also have a thorough understanding of the securities and their risks that they are recommending under the registrant's "Know Your Product" obligation.

---

[8] This is similar to other jurisdictions such as the UK which provides that the Ombudsman's determination may include a money award, an interest award, a costs award or a direction to the respondent. See FSA Handbook, Chapter 3, section 3.7.1. and section 229(3) of the Financial Services and Markets Act 2000, Chapter 8. A "direction" "may require the respondent to take such steps in relation to the complainant as the Ombudsman considers just and appropriate (whether or not a court could order those steps to be taken)" (Section 3.7.11 of Chapter 3 of the FSA Handbook, Dispute Resolution Complaints).

[9] Financial Ombudsman Service, "Calculating Redress in Investment Complaints" (February 2010), online: <http://www.financial-ombudsman.org.uk/publications/technical_notes/QG5.pdf>.

5.2. In order for a registrant to be in a position to make a suitable recommendation, he or she must follow a process to obtain the KYC information. While the KYC form is one tool used to assist in this process, the KYC form is simply one tool the advisor will use to fulfill their obligation to know their clients. A simple review of the KYC form or the New Account Application Form (if it contains the KYC information) will not be sufficient to determine whether an investment was suitable for a given client.

5.3. Given regulatory requirements for determining suitability, it is entirely appropriate that OBSI look beyond the KYC form and review other evidence in order to determine the client's actual KYC information applicable at the time the investment was made. There may be situations where the KYC information was not accurately recorded; where the client was financially unsophisticated and did not understand the form, but signed it nonetheless; where the client completed the KYC form without any assistance or guidance from the registrant; where the KYC form was not signed by the client; or where the KYC form was changed to meet the risk of an investment prior to the investment being purchased without any change in the client's circumstances that would justify such a change to the KYC form. Therefore, other relevant evidence (such as a registrant's contemporaneous notes, the client's contemporaneous notes, tax return information (income information), account statements, correspondence, and information provided to the client and interviews with the parties) is a necessary and appropriate part of OBSI's investigation. Other jurisdictions such as the UK take a similar approach.[10]

6. Step 2: Determining Suitability of the Investment

6.1. When assessing whether an investment was suitable for a particular client, it is necessary to look at the features of the investment, what the registrant knew or should have known at the time the recommendation was made, and the client's actual KYC information. The Consultation Paper states "When assessing suitability, we determine the risks and characteristics of the investor's investments and strategies at the time they were recommended and at appropriate intervals, and compare them to the investor's KYC information. Investments and strategies are suitable when they are consistent with the investor's KYC information." Strategies, according to the Consultation Paper, can include active trading strategies, the use of margin or leverage.

6.2. With respect to mutual funds, OBSI states "[w]ith very few exceptions, when assessing mutual funds, we use the investment objectives, investment strategies (including asset allocation), and risk ratings published in the mutual fund company's simplified prospectus."[11] While a good source for this information, FAIR Canada suggests that all

[10] See the UK's Financial Ombudsevice online technical resources assessing the suitability of investments, online: <http://www.financial-ombudsman.org.uk/publications/technical_notes/assessing-suitability-of-investment.htm#4> at page 6.

[11] Ombudsman for Banking Services and Investments, Consultation Paper: Suitability and Loss Assessment Process (May 26, 2011), online: <http://www.obsi.ca/images/document/up-2011_Consultation_Paper__Suitability_and_Loss_Assessment_Process_EN.pdf>, at p. 7.

relevant evidence, including the advisor's or firm's analysis, should be reviewed in order to determine the investment characteristics and risks of the recommended mutual fund.

6.3. FAIR Canada would also like to note that, going forward, OSBI should not rely solely on the Fund Facts document to assess the investment characteristics and risk of the mutual fund since Fund Facts will only provide information on a five-point scale, which indicates the volatility risk of the recommended mutual fund. Please see FAIR Canada's letter to the Ontario Securities Commission requesting a review of issues raised on disclosure of investment risk.[12] The risk tolerance of an investor is not the same as the risk classification on Fund Facts. For example, not all medium risk mutual funds would be suitable for an investor with a moderate risk tolerance.

Disclosure Does Not Validate an Unsuitable Recommendation

6.4. We agree with OBSI that disclosure of the risks and characteristics of a recommended investment does not make it suitable for the investor if the investment is not in agreement with the investor's objectives and risk tolerance. Disclosing information or providing investment literature for an investment that is otherwise not suitable for an investor does not make it suitable nor does it override the advisor's obligation to recommend suitable investments.

6.5. We also agree with OBSI's key principle that investors should be able to rely on their advisor and firm to make suitable investment recommendations without having to independently verify their suitability. Many investors develop a long-term relationship with their advisor, place unconditional confidence and trust in their advisor, and come to rely on the advisor's advice in deciding where to place their money.[13] Many investors believe that the advisor will act in their best interests[14] and not simply present a recommendation that is "suitable". Given this level of reliance and trust, it would not be reasonable to place an obligation on the investor to seek out independent information in order to verify that the recommendation is suitable. Investors should not be expected to "second guess" the suitability of recommendations provided by their advisor.

6.6. OBSI qualifies this principle by stating that "…we will consider an investor's level of investment knowledge and sophistication and their ability to make an informed assessment about their advisor's recommendations."[15] FAIR Canada recommends that, given the reliance and trust placed in the advisor by the investor (in the vast majority of cases), these considerations would be more properly dealt with when apportioning

[12] FAIR Canada's letter can be viewed at <http://faircanada.ca/wp-content/uploads/2011/01/FAIR-Canada-letter-re-Investment-Risk-Classification-Methodology.pdf> and the OSC's response at <http://faircanada.ca/wp-content/uploads/2011/07/FAIR-Response-Letter-Re-Risk-Classification-Methodology-07-13-2011-21.pdf>.
[13] OSC Investor Advisory Panel, "Re: Draft Statement of Priorities" (April 27, 2011), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category1-Comments/com_20110427_11-765_ananda.pdf>.
[14] *Supra* note 13.
[15] *Supra* note 11 at page 8.

financial harm rather than when making the initial determination of whether the recommendation itself was suitable.

6.7. We agree that if it is determined that the investments and/or strategies were unsuitable for the investor, it is then necessary to determine the amount of financial harm suffered and compensation.

7. Step 3: Determining Financial Harm and Compensation

Overall Objective

7.1. FAIR Canada agrees with the overall objective of OBSI's approach, which is to determine a reasonable estimate of the financial position the investor would be in had the unsuitable investment advice not been given and acted upon. This is likely to be the position the investor would be in had they received suitable investment advice.

Options for Loss Calculations

7.2. OBSI states in its Consultation Paper at page 9 that a Key Principle is:

> If the investments and/or strategies the advisor recommended were unsuitable for the investor, we typically calculate the performance of the unsuitable investments and then the position the investor would have been in had they been suitably invested. If the investor's actual unsuitable investments performed worse than suitable investments would have, the difference is the investor's financial harm. Where the investor incurs financial harm, we determine whether the investor should bear some responsibility for the harm before making a final determination regarding the amount we believe the firm should compensate the investor.

FAIR Canada agrees with this approach to determining losses. With respect to mitigation and apportionment of financial harm, FAIR Canada will provide its comments in a separate section below.

7.3. The appropriate method for calculating an investor's losses will depend on the situation. For example, a situation where the investor would not have invested but would have kept their money in a deposit account will require a different method than if the investor would have invested in a suitable investment that was originally discussed as an alternative to the unsuitable investment that was recommended and followed.

The Use of Benchmarks or Indices

7.4. OBSI states at page 11 that if it is not possible or practical to compare the unsuitable investment to a suitable investment that was recommended to the investor by the advisor, but it is clear that the investor would have made a change to their investments, it will use common indices or other securities such as the S&P TSX Composite Index or the S&P 500. These indices may represent reasonable representations of medium-risk growth portfolios.

7.5. FAIR Canada agrees with Kenmar Associates' submission that if a notional portfolio is used, consideration should be given to portfolio rebalancing over the time frame under dispute and that the median fee of an index fund or costs and fees associated with an index EFT should be applied since the raw indexes do not have any costs or fees associated with them and one cannot invest in them. This would be a more fair approach both for the firm and the investor.

7.6. In its guide to calculating redress in investment complaints, the UK's Financial Ombudsman Service states:

> In other cases, however, there may be no conclusive evidence as to what suitable investment would have been arranged, if the consumer had not taken out the *unsuitable* investment. In these cases, unless the circumstances indicate otherwise, we usually award redress on a notional capital return, equivalent to Bank of England base rates during the relevant period +1%.[16]

The UK appears to prefer to utilize the method outlined in Option 3 of the Consultation Paper in such situations rather than Option 5.

7.7. FAIR Canada believes that whether it will be more "fair and reasonable" to calculate losses based on an index fund or a fixed income type of investment (or some other investment) will depend on all the facts and circumstances of the particular complaint.

Interest Option

7.8. OBSI will utilize the interest option if it cannot reasonably determine how an investor would have suitably invested. It will calculate interest at a reasonable rate on the amount invested, for example compensation for the amount of investment losses plus interest using 90-day Canadian Treasury Bill rates. (Option 3 – Page 11 of Consultation Paper). FAIR Canada agrees that this is a reasonable approach.

8. Mitigation and Apportionment Appropriate in Some Situations

8.1. FAIR Canada agrees that, in certain fact situations, the investor may have a duty to mitigate losses when they become aware of them and FAIR Canada believes that the factors listed at page 12 of the Consultation Paper, while not exhaustive, are factors to be taken into consideration in determining if a duty to mitigate arose on the facts of a particular case.

8.2. For example, if the decision to purchase the investment was made by the investor, the advisor recommended against such a purchase and clearly explained why, and the investor nonetheless insisted on executing the trade, then the investor bears responsibility for the purchase of the unsuitable investment.

8.3. A consumer's ability to obtain compensation may be properly reduced or rejected if they are reckless, careless or fail to take reasonable steps to mitigate their losses. FAIR Canada

[16] *Supra* note 9 at p. 1.

cautions that all of the facts and circumstances need to be taken into account when determining whether there has been a failure to mitigate losses. Applying an objective standard of the reasonable person who "should have known" that they should sell the investment in order to prevent or limit further losses should not be applied. Instead, a subjective standard should be used, based on the particular client with an appreciation of all the facts of the particular case including such factors as: the investor's age, degree of reliance on the advisor, and understanding of the account statements provided; what the advisor told the client at different points in time; and the investor's ability to identify and articulate a problem and take steps in light of this knowledge. All the facts and circumstances as to why an investor did not sell a losing investment in order to mitigate his or her losses must be considered by the Ombudsman in order to come to a fair determination.

8.4. With respect to the seventh bulleted factor on page 12, FAIR Canada argues that it is incorrect to suggest that an "investor ratified a purchase by continuing to hold an unsuitable investment after they knew it was not suitable". It may be appropriate to determine that, at a certain point in time, the investor clearly had a duty to mitigate their loss by selling the investment, but, similar to the principle that disclosure does not validate an unsuitable recommendation, continuing to hold an unsuitable investment should not be sufficient to ratify a purchase.

8.5. FAIR Canada recommends that OBSI consult with other leading jurisdictions such as the UK's Financial Ombudsman Service and Australia's Financial Ombudsman Service to evaluate other jurisdictions' approaches to the issue of mitigation in the loss assessment process compared with OBSI's. In "calculating redress in investment complaints"[17] there is no discussion of mitigation if the consumer still has the unsuitable investment and the calculation will be the difference between how the unsuitable investment actually performed and how the alternative suitable investment would have performed, to the date the firm pays the redress.

8.6. FAIR Canada supports the items that Kenmar Associates cites in Attachment I of their submission dated June 3, 2011 in determining an appropriate mitigation date.[18]

Mitigating Losses Example

8.7. In the example provided at pages 13 and 14 of the Consultation Paper, the investor was sold unsuitable high-risk investments when they only had a medium risk tolerance. The investor was unable to recognize that the investments were unsuitable. The investor became concerned about the degree of fluctuations they saw in their account and raised concerns with the advisor who assured them that the investments were suitable. "[I]f the degree of fluctuation is so great that it causes or should have caused the investor to question the advisor's assurance (for example, by seeking another opinion or otherwise

[17] Supra, note 9.

[18] Kenmar Associates, "OBSI Consultation Paper – Suitability and Loss Assessment Process" (June 3, 2011), online: <http://www.obsi.ca/images/document/Kenmar_Associates___Comment_Letter_June_2011.pdf >.

checking into the suitability of their investments), we may determine that at a certain point in time (i.e. the mitigation date) the investor should have done something about the unsuitable investments and the investor should not be compensated for financial harm incurred after the mitigation date."[19]

8.8. FAIR Canada believes that, given the amount of trust and reliance placed on advisors by investors, it is not reasonable to expect, and it would be a rare occurrence, where an investor would "second-guess" the advisor's assurances. Determination of a mitigation date based on a time at which an investor should have "second-guessed" their advisor should only be applied in the clearest of cases, where it should have been obvious to that particular investor, given their knowledge and experience, that they should have taken action to verify the suitability of the investment. In the rare situation where an investor does seek a second opinion, it will take time for the investor to consult with someone else and for that third party to make a determination that the investment is unsuitable. Any mitigation date must take this into account.

Apportioning Financial Harm

8.9. FAIR Canada does not disagree that OBSI needs to "…consider whether an investor had knowledge of an unsuitable investment or strategy early on or from the time of the recommendation, or was otherwise sufficiently knowledgeable to have known of the problem, and did not take reasonable steps to question and/or resolve it to limit potential financial harm"[20]; this approach is similar to contributory negligence. This needs to be distinguished from the situation where there is no early knowledge but the investor eventually has knowledge that the investment is unsuitable and has a duty to mitigate.

Apportioning Financial Harm Example

8.10. In the apportioning financial harm example provided in the Consultation Paper at page 13, the advisor fails in his or her responsibilities under existing regulatory requirements to disclose the costs that the client may pay during the course of holding an investment, including the sales charge options available to the client. If the advisor had fulfilled his or her responsibilities, a deferred sales charge (DSC) based purchase would not have been chosen since the investor's time horizon was three years. The investor purchased a DSC mutual fund in the past and knew of the implications of early redemptions and OBSI therefore places a responsibility on the investor to have objected or questioned the advisor about the DSC options. OBSI would, therefore, apportion partial responsibility to the investor for the DSC fees they incurred.

8.11. FAIR Canada believes that this approach allows the advisor and his or her firm to escape responsibility for the failure in his or her own responsibilities under securities laws and regulations. Presuming the advisor knew of the three year time horizon, the advisor should never have recommended and purchased the mutual fund on a DSC basis,

[19] *Supra* note 11 at page 14.
[20] *Supra* note 11 at page 13.

especially without discussing the sales charges with the investor first. Moreover, the investor could have presumed, having communicated the three year time horizon, that the advisor would appropriately account for this and not sell the investor the mutual fund on a DSC basis. FAIR Canada would not, on the facts of the example provided, agree that it is fair and reasonable to apportion partial responsibility to the consumer and reduce the amount of recommended compensation.

8.12. FAIR Canada also believes this may be an example of a situation where the incentive for the advisor to maximize their own compensation has led them to act contrary to the interests of their client.

9. Final Compensation Assessment

9.1 OBSI indicates that in some situations it may recommend that the firm also pay the investor interest on the compensable losses. FAIR Canada agrees that interest may also factor into a fair compensation calculation given the circumstances. FAIR Canada believes it would be helpful if OBSI were to provide further details on how it determines when interest will or will not be payable and when it will calculate interest on the actual loss amount (Option 2) versus interest on the amount unsuitably invested (Option 3).

10. Non-Financial Losses

10.1. Section B.7. of Guideline No. 5 of A Framework for Collaboration[21] provides that a recommendation may include that the firm take a particular course of action to resolve the matter, which may include compensation for non-financial loss.[22] Losses or harm can include non-financial losses such as emotional, psychological and physical health of the investor that can be impacted. When investors experience significant loss due to the acts or omissions of the advisor or the firm, this can lead to non-monetary harm such as mental distress, medical issues or inability to function properly at work. Certain groups such as the elderly may be more susceptible to being impacted by non-financial losses.

10.2. OBSI has issued a document "OBSI's Approach to Non-Financial Loss"[23] which sets out what types of non-financial losses they may recommend compensation for. The document sets out that OBSI may recommend compensation for distress or inconvenience, loss of reputation, damage to credit ratings or loss of privacy. This may occur even if no direct financial loss has occurred.

10.3. OBSI explains that they will not compensate if the inconvenience or distress is that which "may be expected as a normal part of doing business or for the time and effort required to make a complaint, unless it exceeds what we believe to be reasonable under the circumstances." OBSI also states that they will not look at health issues, such as stress or

[21] *Supra* note 6.
[22] *Supra* note 6.
[23] Ombudsman for Banking Services and Investments, OBSI's Approach to Non-Financial Loss (September 2007), online: <https://www.obsi.ca//images/document/up-NFL_Approach_Sept_07_Fin.pdf>.

other medical conditions, when assessing non-financial losses. Nor do they consider claims for pain and suffering. The usual recommended compensation for non-financial loss ranges from $100 to $5,000, but in most cases is less than $1,000.

10.4. Consideration will be given to whether the non-financial loss was prolonged, significant, as a result of unnecessary financial hardship, or whether the complaint process itself was unnecessarily difficult or prolonged as well as whether the client contributed to the non-financial loss.

10.5. FAIR Canada recommends that OBSI consider broadening the scope of its non-financial losses to include pain and suffering (in addition to distress or inconvenience and damage to reputation or loss of privacy which it does compensate for). The UK Ombudsman has the ability to make awards to compensate for "any other loss, or any damage, of a specified kind"[24]. Such awards do provide compensation in situations of pain and suffering, for distress, inconvenience or other non-financial loss.[25] In most cases an award is of an amount less than £300 (approximately C$460) but in a small number of exceptional cases the amounts are greater than £1,000 (approximately C$1,530). Cases involving pain and suffering are said to be likely to lead to higher compensation amounts.

FAIR Canada supports the comments on the approach to suitability and loss assessment made in the submission of the Small Investor Protection Association (SIPA).

We thank you for considering our comments and views in this letter. We welcome its public posting and would be pleased to discuss our submission with you at your convenience.

Sincerely,

Canadian Foundation for Advancement of Investor Rights

[24] See section 229(3) of the Financial Services and Markets Act 2000.
[25] Supra note 3 at section 3.7.2.