

January 28,2022

Professor Poonam Puri
Osgoode Hall Law School
4700 Keele Street
Toronto Ontario
M5P2P2

by email to: pp@poonampuri.ca

Dear Professor Puri,

**RE: Request for Comment on the Independent Evaluation of the Ombudsman
for Banking Services and Investments (“OBSI”) with respect to
Investment-Related Complaints**

The Association of Canadian Compliance Professionals (“ACCP”) is a national organization with members who are compliance professionals working with mutual fund dealers, exempt market dealers, mutual fund companies, insurance companies and MGAs, as well as industry service providers including legal, technology and independent consultants.

The ACCP welcomes the opportunity to provide our responses with respect to the questions contained in the Request for Comments dated November 4, 2021.

Our responses are as follows:

(1) Governance

OBSI’s governance structure should provide for fair and meaningful representation on its board of directors and board committees of different stakeholders, promote accountability of the Ombudsman, and allow OBSI to manage conflicts of interest.

- a) *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?*
- b) *To what extent does OBSI’s governance structure promote accountability of the*

Ombudsman?

- c) *To what extent does OBSI’s governance structure allow OBSI to effectively manage conflicts of interest?*
- d) *What, if any, changes would you recommend to OBSI’s governance structure and why?*

a) The ACCP notes that the current OBSI board only has one representative from each of the industry sectors and none of those representatives is from small or medium sized firms. We believe that this does not provide fair and meaningful representation to all stakeholders especially since small and medium firms have a far greater potential risk of financial hardship resulting from an OBSI recommendation than larger firms.

b) The ACCP is of the opinion that OBSI’s governance structure does not promote or provide for any real accountability of the Ombudsman. The current setup does not appear to allow board members to receive the information they would need to oversee the conduct and decision-making of OBSI staff when handling complaints. We understand the reasons for not wanting board members to become directly involved in handling complaints. However, if the board does not receive the relevant information about complaints and client or industry concerns about how they are handled, it would be similar to not allowing the board of an auto manufacturer to receive information about problems at the manufacturing plant.

c) The ACCP is of the opinion that the current governance structure in which the majority of directors are independent directors allows OBSI to manage conflicts of interest adequately.

d) The ACCP recommends that the OBSI board be expanded to include representatives from smaller and medium sized firms of each industry sector as this will provide for a more fair and meaningful representation of all stakeholders. We appreciate that it may be challenging for a larger board to function as efficiently as a smaller board, but we do feel it is necessary as we do not believe the current structure strikes an appropriate balance of stakeholder representation.

The ACCP also recommends that the OBSI board conduct a formal survey of firms at least annually to gather feedback on OBSI’s performance from the industry’s perspective. The survey should allow responses to be provided anonymously to eliminate any potential concerns that firms raising issues may be negatively impacted on a go forward basis. The board committee overseeing the survey should include at least one industry board member from a smaller firm as this will help the board to better understand and evaluate responses from such firms.

(2) Independence and Standard of Fairness

OBSI should provide impartial and objective dispute resolution services that are independent from the investment industry, and that are based on a standard that is fair to both Registered Firms and investors in the circumstances of each individual complaint. When determining what is fair, OBSI should take into account general principles of good financial services and business practice, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct.

- a) *To what extent is OBSI’s dispute resolution service impartial and objective? Are the standards used by OBSI fair to both parties?*
- b) *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?*
- c) *To what extent are OBSI’s decisions consistent?*
- d) *Is there anything else you would recommend to make OBSI more impartial, independent or objective?*

a) Some ACCP members have expressed concerns about OBSI’s impartiality and objectivity based on their experiences. These members state that they have experienced occasions where they believe OBSI has initially approached a complaint with a clear bias in favor of the complainant or in situations where the complainant and the respondent disagree on what is correct and OBSI’s default action is to accept the complainant’s position.

The ACCP does not consider the standards used by OBSI to always be fair to respondents. Specifically, we believe that respondents are often being held to standards beyond what is required by securities rules and regulations.

We also note, to the best of our knowledge, that OBSI has not published any standards of fairness that it may adhere to.

b) The ACCP acknowledges that, in determining fairness, OBSI considers matters beyond regulatory rules and regulations. We are of the opinion that fairness should be measured solely against applicable rules and regulations. Any fairness considerations beyond applicable rules and regulations are far too open to personal interpretation and bias. For example, ACCP members have cited occasions where investigators have made their own determination of a client’s knowledge, objective, and time horizon

despite it being contrary to what is stated in client signed forms where the client has specifically acknowledged that they have read and understand them.

c) ACCP members have indicated that OBSI decisions are generally consistent with OBSI’s standards, however, some members have experienced instances where they felt a decision appeared to have been influenced by the investigator’s personal sentiments or impacted by a lack of knowledge and/or experience with matters pertinent to the complaint.

d) Please refer to our comments in response b) above.

(3) Processes to perform functions on a timely and fair basis

OBSI should maintain its ability to perform its dispute resolution on a timely basis and deal with complaints without undue delay and should establish processes that are demonstrably fair to both parties.

This evaluation covers cases completed between November 1, 2018 and October 31, 2020. For a 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 performance against this term of the MOU, and OBSI’s ability to provide its services in the context of rapidly rising case volumes will be evaluated.

- a) *To what extent is OBSI able to perform its dispute resolution duties on a timely basis?*
- b) *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? Are there consistent and clear communications from staff?*
- c) *Is OBSI efficient as dispute resolution service?*
- d) *Why do you think some firms refuse to compensate consumers in the amount recommended by OBSI or at all when a positive recommendation is given by OBSI?*
- e) *How effective do you consider the “naming and shaming” system to be?*
- f) *Should the \$350,000 limit on OBSI’s compensation recommendations be increased?*
- g) *What powers do you think OBSI should have and, specifically, do you think OBSI should have authority to issue binding decisions? For more information, see Capital Markets Modernization Taskforce Final Report (January 2021), Recommendation 71, included at Appendix 2.*
- h) *What changes would you recommend, if any, to ensure OBSI performs its processes on a timely and fair basis?*

a) ACCP members acknowledge that OBSI performs its dispute resolution services on a timely basis.

b) “Fair to both parties” is undefined and each party’s understanding of fair is very subjective. Nevertheless, we believe that any processes beyond those consistent with regulatory rules and requirements are not fair considering firms have no defined standards of fairness from OBSI to look to for guidance

ACCP members have indicated that OBSI procedures do provide opportunities for both parties to be heard. Some ACCP members have stated that OBSI communications from staff are not always consistent and clear. They indicate that communications occasionally exhibit bias favoring the complainant or use a benchmark inconsistent with those used in similar prior OBSI investigations.

c) The ACCP has no comment as we have no basis for comparison due to our members inability to use any other dispute resolution services.

d) The ACCP believes there are several primary reasons that firms refuse to follow an OBSI recommendation. Specifically:

- strong disagreement with the recommendation;
- payment required by the recommendation would result in significant financial impairment to the firm; and
- discontinuation of the firm’s registration subject to OBSI membership has occurred or is imminent.

e) The ACCP believes that the “naming and shaming” process is a significant and effective deterrent to non-acceptance of an OBSI recommendation in most cases when the firm disagrees with an OBSI recommendation. However, “naming and shaming” will not be a deterrent to a firm facing financial impairment or imminent deregistration.

The ACCP suggests the “naming and shaming” process should also name the Approved Person when applicable and subject to any applicable privacy laws. We believe that this would be both fair and objective. In addition, this could potentially benefit complainants by speeding up settlement discussions as the Approved Person’s risk of being “named and shamed” may result in them more readily cooperating in any settlement discussions.

The ACCP also recommends that when a complaint is filed with the OBSI, it should not be immediately listed on the OBSI website as a current investigation. In many cases, the complaint may be found to have no merit, but the firm has already effectively endured a form of “naming and shaming” by virtue of it being posted on the OBSI website.

f) The ACCP does not support an increase in the \$350,000 limit on OBSI’s compensation recommendations.

g) The ACCP strongly believes that OBSI should not have the authority to issue binding decision as both parties should continue to have the unequivocal right to pursue matters either through a defined appeal process or through the courts. However, some form of binding arbitration voluntarily agreed to by both the complainant and the respondent might be acceptable.

h) The ACCP recommends that OBSI implement a formal independent review process that either party can request if they disagree with a proposed OBSI recommendation.

(4) Fees and costs

OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership.

- a) *To what extent does OBSI have a fair, transparent and appropriate process for setting fees and allocating costs among firms that use its service?*
- b) *To what extent does OBSI provide value for money?*
- c) *What, if anything, can OBSI do to improve the allocation of its fees and the value it provides to its participating firms?*

a) ACCP members have some concern regarding the transparency and appropriateness of the process for setting fees. Specifically, the percentage allocation of fees by member registration category does not appear to be consistent with the percentage of overall complaints by member registration category. We recommend that more consideration be given to aligning the two.

b) Overall value for money is negatively impacted by the lack of alignment between fees and OBSI usage as noted above.

c) Please refer to our recommendation in our response to 4 a).

(5) Resources

OBSI should have the appropriate resources to carry out its functions and to deal with each complaint thoroughly and competently.

- a) To what extent does OBSI have the needed resources to carry out its functions?*
- b) To what extent are OBSI’s staff qualified, experienced and capable of devoting the required time and effort to individual investigations?*
- c) Is there anything else you would recommend to improve OBSI’s performance in this regard?*

a) No comment as we have inadequate information to respond.

b) ACCP members have commented that some staff appear to lack pertinent industry knowledge and/or experience required for the investigation of certain complaints.

c) The ACCP suggests that OBSI make relevant industry experience an essential requirement for new staff hired to conduct complaint investigations.

The ACCP also suggests that OBSI establish a process whereby firms can discuss disputed complaint files with someone senior to the complaint investigator when the firm is concerned about the accuracy and completeness of facts and/or the overall direction in which the investigation is proceeding.

(6) Accessibility

OBSI should promote knowledge of its services, ensure that investors have convenient, well-identified means of access to its services, and provide its services at no cost to investors who have complaints.

- a) To what extent does OBSI promote knowledge of its services? What else could OBSI do to make consumers aware of its services?*
- b) To what extent do participating firms adequately make consumers aware of OBSI’s services? What more could be done, if anything?*
- c) To what extent is OBSI’s public guidance an effective tool for those navigating its services?*

- d) *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?*
- e) *Is OBSI’s social media (LinkedIn, Twitter, Facebook, etc.) effective*
- f) *Is there anything else you would recommend to make OBSI more accessible?*

a) The ACCP believes that OBSI’s current level of promoting its services to investors is sufficient and there is no need to do more.

b) The ACCP believes that the current mandatory disclosures of OBSI services to consumers by participating firms is fulsome and sufficient. No additional disclosures are required.

c) The ACCP has no comment.

d) The ACCP has no comment.

e) The ACCP has no comment.

f) The ACCP suggests that OBSI take steps to increase the likelihood that a complainant’s internet searches will direct them to OBSI’s website and contact information.

(7) Systems and controls

OBSI should have effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes.

- a) *Does OBSI have effective and adequate internal controls to ensure the confidentiality of its investigative and dispute resolution services? Why or why not?*
- b) *Does OBSI have effective and adequate internal controls to ensure the integrity of its investigative and dispute resolution services? Why or why not?*
- c) *Does OBSI have effective and adequate internal controls to ensure the competence of its investigative and dispute resolution services? Why or why not?*

d) Is there anything you would recommend to improve OBSI's systems and controls?

a) One ACCP member has expressed concerns about the effectiveness of OBSI's internal controls with respect to confidentiality as they have received copies of correspondence intended for other dealers on at least two occasions.

b) The ACCP has no comment.

c) The ACCP has no comment.

d) The ACCP has no comment.

(8) Core Methodologies

OBSI should have appropriate and transparent processes for developing its core methodologies for dispute resolution.

- a) Does OBSI meet the requirements outlined above? Why or why not?*
- b) Does OBSI provide adequate reasons for its decisions? Why or why not?*
- c) What changes would you recommend, if any, to ensure OBSI has appropriate and transparent processes in place?*

a) The ACCP has no comment as we have insufficient information about OBSI's core methodologies for dispute resolution for us to reasonably do so.

b) The ACCP finds OBSI's reasons for its decisions to be detailed but lacking any connection and/or references to published core methodologies.

c) The ACCP suggests that OBSI take steps to clearly state and publish its core methodologies for dispute resolution.

(9) Information sharing

OBSI should share information and cooperate with the Participating CSA Members through the CSA Designates in order to facilitate effective oversight under this MOU.

- a) *Does OBSI adequately share information with the participating CSA Members?*
- b) *Does OBSI adequately cooperate with participating CSA members?*
- c) *What recommendations do you have, if any, for facilitating effective communication and cooperation among OBSI and the Participating CSA Members*

- a) The ACCP has no comment.
- b) The ACCP has no comment.
- c) The ACCP has no comment.

(10) Transparency

OBSI should undertake public consultations in respect of material changes to its operations or services, including material changes to its Terms of Reference or By-Laws.

- a) *Does OBSI engage in public consultations with respect to material changes to its operations or services?*
- b) *Is there anything else you would recommend to make OBSI more transparent or accountable?*

- a) The ACCP is aware that OBSI has previously undertaken public consultations with respect to its Terms of Reference, but we do not recall any other public consultations.
- b) The ACCP recommends that any public consultations include all stakeholders.

(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 equivalent in

comparable international jurisdictions both operationally and with respect to OBSI’s general organizational approaches to matters such as accessibility and transparency.

- a) To what extent does OBSI meet recognized best practices for financial services ombudsmen?*
- b) 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?*
- c) 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.*

a) The ACCP has no comment as it has insufficient information about best practices for financial services ombudsmen for us to reasonably do so.

b) The ACCP has no comment as it has insufficient information about other financial service ombudsmen for us to reasonably do so.

c) The ACCP has no comment as it has no experience with other financial service ombudsmen.

(12) Progress

One of the purposes of this evaluation is to report on OBSI’s progress since the last evaluation was conducted in 2016.

- a) 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.)?*
- b) Is there anything else that you have not mentioned that you would like the independent evaluators to know?*

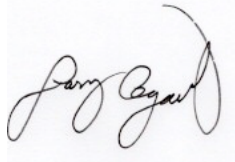
- a) ACCP members have not noticed any material changes in the way OBSI has handled complaints since 2016.
- b) The ACCP was surprised to see the release of OBSI’s 2022 – 2026 Strategic Plan on January 11, 2022, prior to the expected delivery of the independent reviewer’s reports by March 31, 2022, as it would expect these reports to materially impact the 2022 – 2026 Strategic Plan.

Thank you for the opportunity to provide our comments. Please contact Manny DaSilva with any questions you may have.

Regards,



Manny DaSilva,
Chair, Association of Canadian Compliance Professionals



Gary Legault
Vice Chair, Association of Canadian Compliance Professionals