// DAVID MCNABB LL.M (ADR), C. MED

July 23, 2011

Tyler Flemming
Director, Stakeholder Relations and Communications
Ombudsman for Banking Services and Investments

via email only publicaffairs@obsi.ca

Dear Tyler Flemming:

I am responding to the request for public comments regarding the OBSI process and principles discussed in the consultation paper published May 26 2011. I am a Deputy Ombudsman with the RBC group of companies and I provide a final appeal within RBC of unresolved investor complaints. The comments in this letter are my own personal opinion. RBC and my RBC Ombudsman office colleagues may or may not share any or all of my comments.

The good intentions of OBSI revealed in the consultation paper and in case interactions over the years cannot be disputed. At the same time, OBSI good intentions are not sufficient to resolve the inherent unresolved conflicts between its procedures and the rule of law and which conflicts also impoverish the investing enterprise in Canada. OBSI authorizes itself in private without any meaningful public appeal mechanism, to substitute its own decisions for those of investors and advisors in its suitability findings and this practice is untenable. A renewed mix of formal and informal OBSI dispute resolution procedures is required. Key topics for comment include the OBSI process of unsuitability, finding financial harm and the OBSI use of common indices and other securities in its preferred methodology for calculating losses. I will finish my comments with a general outline of suggested next steps in the design of investment dispute resolution services. I start with a brief background on myself for context of my comments offered.

My case experience gives me familiarity with OBSI iterated methods and methodologies. As an Ombudsman my practice is informed by the work of my peers and my own research and educational interests. How Ombudsman decision making practice is different and similar to the decision making practice used in legal systems including administrative regulatory and civil court systems is of particular interest to me since I do not make decisions for advisors or investors. I can’t compel advisors and investors to accept my case outcomes. I have written about my own practice as an Ombudsman to reality test my own thinking and I have lead and organized professional Ombudsman groups. I have lead and organized the scholarly research activities of

others here in Canada on the topic of Ombudsman. I have work practicum experience as an investigator with an investment securities regulator. I have a private practice in Mediation and Arbitration here in Canada and in the US. I have accredited many commercial mediators in Ontario who work in the shadow of the civil court system.

In my view certain key OBSI iterated methods and methodologies used in private lack public currency and are having a negative effect on the environment of public justice and the investing enterprise of investing in Canada. The root cause of the challenges I see with OBSI procedures is that OBSI informally and implicitly authorizes itself in private to substitute its own thinking and choices for the thinking and choices of investors and advisors in its case findings of suitability, financial harm and compensation. These concepts of suitability, financial harm and compensation are by definition very public concepts requiring the formality and protections of the legal system and the rule of law. In essence the informal OBSI procedures developed in its early years have iterated to point where its private investment dispute resolutions services conflict with the public rule of law.

In the Suitability Analysis section in Step 2, the paper glosses over and essentially omits reference to the reliance of OBSI suitability findings on subjective considerations revealing a conflict with the rule of law that cannot be resolved by OBSI good intentions and claims of expertise.

Generally the consultation paper reflects my actual experience as a witness to case handling by OBSI staff and leaders. In the OBSI process of validating investor understanding and knowledge OBSI regularly re-interprets an investor's experience and understanding and knowledge of investments and substitutes its own interpretation in its suitability findings. With no access to a meaningful public appeal of such findings this method of substituting its own claimed expertise and good intentions at a distance, glosses over an advisor's and investor's entitlement to the rule of law. The OBSI key principle on page 8 confirms this practice.

Substituting its own judgements has no authority. Essentially OBSI claims for itself the role of deciding suitability, with investors and advisors as witnesses in its process rather than as two parties in a negotiation with OBSI assisting. If the initial finding of suitability is not accepted, the downstream OBSI findings on financial harm and financial compensation will not likely be accepted.

With its close connection to the legal system and access to appeals, private arbitration can resolve specific case issues and questions of fact or law including those that rely on subjective interpretations when determining suitability.

The systemic and regular use of loss methodologies by OBSI which use common indices or other securities to represent suitable investments invite investors to use the OBSI process to systematically redress lost investment opportunities.

A logical extension of the informal and systematic OBSI use of common indices and other securities in its suitable performance comparisons when assessing losses, invites investors by extension to systematically use OBSI complaint service (and its limited resources) to redress perceived lost investment opportunities. It is the institutionalization of these loss methodologies in informal dispute resolution and their systematic effect in public that impoverishes the investment enterprise in Canada. In the OBSI process of determining financial harm, cash is the most logical, practical, and universally acceptable starting position for secondary trading in the capital markets of Canada.

The concerns with OBSI methods and loss methodologies can be remediated with the design of public currency in OBSI investment dispute resolution services.

The content and outcome of each case will change with each different advisory relationship and each set of unique circumstances. The medium is the message when it comes to investor and advisor acceptance of case outcomes. OBSI methods and methodologies –the medium- used in private introduce public effects-the message- when members of the public are involved. It is OBSI procedures that are the necessary area of focus for remediation. Canada needs investment dispute resolution services with public currency, where methods and methodologies used in private can be leveraged for the success of the investing enterprise between investors and advisers and not a substitute for the rule of law or a substitute for the personal judgements of investors and advisors. In my view the OBSI paper inaccurately gives the impression that its findings made in private can be validly authorized wholly by its good intentions, claimed subject matter expertise, scientific analysis and its substitute decision making at a distance. With no meaningful appeal mechanism for accountability for such private determinations of such public concepts as suitability, financial harm and loss assessments, a lack of explicit authorization and lack of accountability is untenable. All parties are entitled to the rule of law and a process found in good intentions is not exempt from ensuring access to such entitlements.

A lack of a stepped published OBSI procedure for dealing with case impasse further frustrates accountability for and fairness in OBSI case outcomes.

Next Steps

In my view it is time to consider adding the option of a formal public, legal adjudication process as an option to resolve narrow subjective issues and larger questions with all of

the procedural protections the law provides. This process is envisaged to be a public process like court where the investor and advisor names and case circumstances and outcomes are all published.

In the shadow of a formal public option, OBSI informal dispute resolution services can now operate effectively as alternative dispute resolution. The informal services could also include private arbitration of relevant narrow legal issues as necessary with a meaningful public appeal mechanism to the courts on issues of fact and law.

For sure there is an information asymmetry that will need to be addressed.

OBSI can become a resource to the investor in providing performance information and referral to online resources for investment descriptions that cannot be reasonably obtained from the advisor. OBSI might charge out the cost of preparing such information to the advisor and firm if it determines the advisor could not respond adequately to a reasonable request, and without escalating the matter to a complaint. In this way, the asymmetry of information can be resolved and responsibility is placed on the investor to consider suitability and unmet performance expectations in discussion with their advisor and whether or not there is a basis for a complaint against an advisor.

Sincerely,

David McNabb LL.M (ADR), C.Med

cc. Wendy Knight, RBC Ombudsman