

August 12, 2013

**DISTRIBUTED BY EMAIL:** [governance@obsi.ca](mailto:governance@obsi.ca)

Mr. Tyler Fleming  
Director, Stakeholder Relations and Communication  
Ombudsman for Banking Services and Investments  
401 Bay Street, Suite 1505, P.O. Box 5  
Toronto, ON  
M5H 2Y4

Dear Mr. Fleming,

**Re: Consultation on Proposed Changes to OBSI's Terms of Reference (the "Proposed Changes")**

FundEX Investments Inc. ("FundEX") was founded in 1995 and is a wholly owned subsidiary of Industrial Alliance Insurance and Financial Services Inc. It has grown to become Canada's largest flat-fee mutual fund and exempt market dealer with over 600 independent advisors nationwide and over \$12 billion in assets under administration.

FundEX appreciates OBSI as a service for settling disputes between investors and financial service providers and applauds its efforts in seeking to improve its dispute resolution process. It is in this spirit that FundEX provides OBSI with its comments, and concerns, regarding the Proposed Changes.

**Section 9: Firm responsibility for actions of their representatives**

OBSI claims that the case law surrounding the theory of vicarious liability is clear. We respectfully disagree with this assessment and encourage OBSI to recognize that, although recent years have witnessed a dramatic broadening of the scope of vicarious liability principles with respect to the investment industry, the waters in this area of the law are still quite murky. The doctrine of vicarious liability may be simple to state, but case law clearly demonstrates the difficulties associated with the practical application of the theory and further illustrates that other considerations play a pre-eminent role in the determination of liability. Deciding whether or not to impose vicarious liability on a participating firm is a highly fact-specific exercise that depends to a great degree on the strength of the causal link between the advisor and the wrongful conduct in question. To this end, in certain situations, OBSI might be better served to leave liability attribution to the courts, which will take a more holistic view of the issues presented and contemplate the various nuances of the fact scenario, including policy considerations, the contractual relationship of the participating firm and its advisors, contributory negligence of other parties and the advisor's outside business interests and chance of profit.

For OBSI to take the stance that participating firms, rather than advisors, are solely accountable to investors for their conduct appears to be inconsistent with our current regulatory landscape. In a climate where regulatory bodies are seeking to hold advisors more accountable for their actions, OBSI's mandate would

result in the misapplication of responsibility exclusively to the firm, resulting in little deterrent to advisors in preventing wrongful conduct.

### **Section 11: Self-imposed limitation period**

The time limit on complaints should more closely resemble the statutory limitation period in most provinces, which is two (2) years. Incongruent application of limitation periods does not provide sufficient and certain notice to potential parties to allow them to bring about a timely claim, crossclaim or counterclaim, if necessary, thereby potentially denying them an opportunity to seek fair and appropriate resolution.

### **Section 18(c): Tolling agreement**

FundEX cautions OBSI against the implementation of a *one size fits* all blanket tolling agreement, for in some instances it may be tactical to allow parties to consider the unique features of their particular circumstances and decide on procedures to most equitably govern resolution of the dispute, and to draft accordingly, rather than applying standard tolling provisions to all complaint matters.

Moreover, to reduce complainant confusion and avoid procedural misrepresentation, OBSI should endeavour to utilize precise and transparent language in their tolling agreement to appropriately delineate the administrative procedures associated with its system of dispute resolution from those of the courts.

### **Section 20(c): Escalation process**

While FundEX agrees with the basic concept and spirit of OBSI's Proposed Changes to its escalation process, it advances the argument that, to prevent the unfair and biased portrayal of any party to a dispute, all facts and facets of the complaint should be accurately presented to the public. It is further incumbent on all parties to ensure the legitimacy and validity of all facts reported.

Thank you for the opportunity to comment on OBSI's Proposed Changes. We look forward to our involvement in future consultation on this topic and would be pleased to discuss our recommendations in greater detail.

Respectfully yours,

FUNDEX INVESTMENTS INC.



By: David Chapman  
President