

OSC Investor Advisory Panel
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Request for Comment on the Independent Evaluation of the Ombudsman for Banking Services and Investments with respect to Investment-Related Complaints

The Investor Advisory Panel (“IAP” or “Panel”) is an independent body formed by the Ontario Securities Commission in August 2010. It is charged with providing input on the Commission’s policy initiatives, including proposed rules and policies, the annual Statement of Priorities, concept papers and specific issues. Its mandate is to represent the views of investors and make recommendations to the Commission on matters affecting investors.

As such we are pleased to contribute our views to the independent evaluation currently underway of the Ombudsman for Banking Services and Investments (OBSI) with respect to investment-related complaints.

Panel Response

The Panel has stated repeatedly that investors must have access to timely, independent and binding restitution. The G20 High-Level Principles on Financial Consumer Protection states as one of its principles complaints handling and redress: *“Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient.”* This is not the case in Canada today. OBSI was created to act as an arbiter of investor complaints. OBSI ought to be a key pillar in a complaint handling and redress system that is a necessary part of investor protection, however it has been hamstrung by a fundamental gap in its mandate: its decisions are not binding. This has undermined its role in the eyes of the industry – and the very firms that are supposed to be participants in this process.

The Panel has repeatedly expressed grave concerns over the industry’s refusal to accept OBSI’s findings and recommendations—concerns that are exacerbated by ongoing reports of incidents of firms “lowballing” OBSI compensation recommendations.

In cases where firms refuse to pay altogether, OBSI’s “name and shame” approach has been equally ineffective – firms don’t fear the consequences and continue to flout decisions. The current system requires investors to put considerable time, resources and effort into the complaints process. The Panel would ask why would anyone want to engage in an onerous and challenging process with a regulator whose decisions are not binding?

We believe that OBSI can and should play a vital role in providing investors with a single, national independent complaints handling and redress service – however, it cannot do so without the authority to make binding decisions as opposed to recommendations (that may ultimately be ignored by the industry).

To that end, the Panel has 6 key recommendations for the independent evaluator:

OBSI must be given the power to provide binding decisions – this single change would be a game changer for OBSI and would allow it to play an effective and critical role in the dispute resolution system in Canada.

Mediation vs. arbiter – Our understanding is that many, if not most, complaints are settled by a form of mediation. However, OBSI’s Terms of Reference state that its role is as an arbiter of complaints. Specifically: *"The Ombudsman shall at all times serve as an independent and impartial arbiter of Complaints and shall not act as an advocate for Participating Firms, Complainants or any other person."*

The Panel urges the reviewer to assess whether OBSI is fulfilling its stated purposes as an arbiter of complaints or whether it has shifted wrongly into the role of a quasi-mediator facilitating or permitting firms to engage in negotiations with clients regarding settlements (rather than restitution). Since OBSI’s mandate is to act as an independent and impartial arbiter then in our view it has clearly drifted off course and investors are paying the price, with industry choosing too often to ignore the OBSI recommendation and offering instead low-ball settlements. These settlements should be viewed as failures by the firms to accept OBSI recommendations and treated as 'name and shame' cases.

Expand OBSI’s oversight – The rise of regulatory arbitrage is of concern to Panel members. We see more and more firms outside the purview of securities and banking regulators offering investment products to consumers. OBSI should be given the authority to deal with complaints that involve not just banking and investment but insurance as well. It is unfair and prejudicial to investors to ask them to engage in two separate redress processes for complaints involving different categories of investment products or services obtained from the same dealer. As insurance products become a larger part of the retail investing landscape, these regulatory silos must be addressed within OBSI’s mandate.

Enhance governance structure – The Panel believes it is time for a complete review of the governance structure at OBSI. There is no retail representation across the organization or in its governance structures – and that must change. OBSI must ensure there is a retail investor perspective brought to all its policymaking and in its governance. In addition, OBSI must have a governance structure that operates transparently and is appropriate for an organization able to make binding decisions.

Call on regulators to act – While there are other issues, some operational, that we think OBSI itself needs to address, change or improve, we think that Assessors need to focus their recommendations on the role of Canada's regulators. Ultimately, it is Canada's regulators that must address OBSI's inability to discharge its responsibilities to Canadian investors.

Unless regulators finally agree to give OBSI the powers it needs, it cannot give investors what they need and deserve: fair and independent resolution of their complaints.

Adjust the compensation cap – OBSI's compensation cap sits at \$350,000 – a figure which hasn't been revised in several years. We recommend OBSI adjust the historical limit in line with past and future cost of living requirements.