



INVESTMENT DEALERS
ASSOCIATION OF CANADA

ASSOCIATION CANADIENNE DES
COURTIERS EN VALEURS MOBILIÈRES

SUSAN WOLBURGH JENAH
President and Chief Executive Officer

February 27, 2008

Mr. David Agnew, Ombudsman
The Ombudsman for Banking Services and Investments (OBSI),
PO Box 896, Station Adelaide,
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Dear David,

I am writing this letter as a follow-up to our meeting of January 7th in order to summarize and expand upon our prior discussion relating to OBSI's proposed Terms of Reference.

As you know, the IDA is the national self-regulatory organization of the securities industry whose membership includes more than 200 investment dealers. Our mandate is to protect investors, foster market integrity and enhance the efficiency and competitiveness of the Canadian capital markets.

The IDA was one of the initial sponsoring organizations that supported the extension of the role of the Banking Ombudsman to cover the securities sector. We fully support OBSI's role as the national independent dispute resolution service with a mandate to deal with unresolved complaints of customers of investment dealers and to recommend fair compensation be provided to complainants in appropriate circumstances. We have, for many years, required our members to be participating firms in OBSI and to cooperate with OBSI in the resolution of client complaints.

We view OBSI as an important partner to the IDA in carrying out our mandate. We are therefore supportive of OBSI's efforts to revise its Terms of Reference to strengthen the governance framework that applies to it and to more clearly articulate "the principal powers and duties of the Ombudsman, the duties of Participating Firms, the scope of the Ombudsman's mandate, and the process of the OBSI for receiving, considering, investigating and seeking a resolution of a Complaint against a Participating Firm."

As a national self regulatory organization, the role of the IDA is to establish and enforce sales, financial, business conduct and educational proficiency standards amongst Canadian investment dealers and their registered employees. OBSI's role is as an independent dispute resolution service. Our comments are intended to encourage greater clarity and transparency as to the intent and scope of the proposed changes to OBSI's Terms of Reference to ensure that our respective roles continue to be, and are perceived to be, complementary, mutually supportive and not overlapping.



Systemic issues concept

You have advised that the intent of adding the systemic issues concept to the OBSI Terms of Reference is to provide OBSI with the ability to provide restitution recommendations relating to systemic issues where an investigation into an individual complaint indicates that a wider problem may exist for other customers of the same financial services provider. You have indicated that your intention is not to assume a regulatory role, but rather, to ensure that OBSI's redress mechanisms work where systemic issues have caused losses for consumers. Based on this understanding, we have the following comments:

1. The definition of "systemic issues" set out in section 2(b) of the OBSI Terms of Reference should provide greater clarity as to the types of "matters" with respect to which OBSI expects to conduct systemic investigations; and
2. The process that OBSI will follow and, in particular, the consultations that will take place with the relevant regulators in determining which issues are determined to be "systemic issues", should be set out in the OBSI Terms of Reference document.

Definition of "systemic issues"

The background memo you provided in advance of our meeting indicated that the most comprehensive definition of "systemic issues" is found in Australia. In the case of the Australian Banking and Financial Services Ombudsman (BSFO), the term "systemic issues" is defined as: "...an issue which will have a material effect for individuals or small businesses beyond the parties to the dispute. Some examples of systemic issues are:

- (a) poor disclosure or communications;
- (b) administrative or technical errors;
- (c) product flaws; and
- (d) inaccurate interpretation of standard terms and conditions."

In its document entitled "The Financial Services OmbudsNetwork – A Framework for Collaboration", dated August, 2007, the Joint Forum of Financial Market Regulators recommended that:

"The terms of reference of the OmbudService should include the authority to identify and investigate systemic or widespread issues an OmbudService may find in the course of its work arising from complaints regarding an individual firm or more broadly in a sector." (Guideline No. 3, paragraph B.4, emphasis added).

OBSI's proposed Terms of Reference defines "Systemic Issue" as: "...a matter discovered in the course of considering a Complaint which may have caused a loss or inconvenience to one or more other Customers in a similar fashion to that experienced by the original Complainant".

The proposal to undertake investigations of systemic issues as outlined in the Terms of Reference is largely consistent with the recommendations of the Joint Forum in their Framework Document. However, you have indicated that you do not intend to broaden your investigation beyond the firm which was involved in the original complaint. We note, and agree with, OBSI's



intention to limit any investigation to other customers of the same firm in contrast to the language in the Joint Forum Paper which suggests that OBSI undertake investigations “more broadly in a sector”. We recommend that this intention be expressly reflected in the Terms of Reference.

In the event that OBSI uncovers an issue or course of conduct which appears to have broad industry-wide implications, we believe that OBSI should alert the applicable regulator so that the matter can be properly considered and appropriate regulatory action undertaken.

Section 9 of the Terms of Reference sets out certain matters which OBSI shall not investigate (generally commercial/business practices). However, the definition of “systemic issue” is very broad and could encompass any “matter” which may have caused “a loss or inconvenience” other than those matters specifically excluded under Section 9. We appreciate the difficulty of striking the right balance between an unduly restrictive v. overly broad definition of “systemic issue”. An alternative approach would be to articulate in the Terms of Reference specific examples of the sorts of matters you expect would give rise to systemic investigations in the normal course (as per the Australian approach cited above).

OBSI’s approach is to consider whether compensation ought to be provided based on what OBSI determines to be “fair” and not based on lengthy legal investigations and evidentiary hearings. Indeed, a recommendation that is fair in the circumstances is determined by considering the particular circumstances of an individual complainant and his/her financial services provider. In a “systemic issues” case with multiple unknown complainants, this fairness standard will be difficult to discharge except in the clearest of cases where the circumstances of each complainant are substantially identical. For example, in a case of “poor disclosure and communications”, the circumstances of each complainant may well be different and the ability to determine a fair outcome compromised. Your proposed definition of “systemic issue” appears to implicitly acknowledge this challenge by incorporating the limitation that systemic issues investigations will only be undertaken where it appears, based on an individual complaint, that other individuals may have been similarly affected by an act or omission of a financial services provider (emphasis added).

In summary, we suggest that the Terms of Reference could provide more clarity and guidance around the sorts of “systemic issues” that OBSI would propose to investigate under its proposed expanded mandate and should expressly state that such investigations will be limited to the firm/financial services provider which was involved in the original complaint, consistent with your stated intention.

OBSI process to identify “systemic issues”

Paragraph NS(a) of the Terms of Reference provides that the Participating Firm shall provide OBSI with the information necessary to assist the Ombudsman in determining whether an issue is “systemic”. We suggest that it may be challenging for OBSI to determine, in some instances, whether an issue ought to be considered “systemic” based only upon information and input received from the relevant Participating Firm.

We believe it would be constructive for OBSI to consult with the relevant regulator in appropriate cases (subject to legitimate customer confidentiality and privacy concerns) prior to



making a “systemic issue” determination. It would also be helpful to the relevant regulator (including the IDA), in discharging our responsibilities, to be made aware of the sorts of systemic issues OBSI is identifying. To facilitate this consultation / dialogue we would be pleased to work with OBSI on a protocol or information sharing agreement.

In this regard, we note that Guideline No. 6., paragraph B.3 of the Joint Forum Framework Document recommends that:

“The OmbudService should enter into an information protocol with the regulators of its member firms describing in a mutually acceptable fashion the nature and extent of information to be provided by the OmbudService to regulators, all having regard to consumer confidentiality and privacy. The protocol should be reviewed and updated to the satisfaction of both the OmbudService and regulators on a regular basis.”

In light of this recommendation, we suggest that the Memorandum of Understanding between the Financial Services Authority (the FAS) and the Financial Ombudsman Service Limited (the FOS Ltd) of April 6, 2007 may offer an interesting precedent for consideration. The MOU provides a framework for the FSA and the FOS to cooperate and communicate constructively to carry out their independent roles and separate functions. The agreement outlines cooperation and information sharing procedures for routine cases as well as for cases that raise issues which are likely to have implications for a number of consumers or firms (what they term ‘wider implications issues’). A ‘Wider Implications’ process provides procedures to help the FSA and FOS deal with and coordinate their approach to these issues where complaints may have wider regulatory implications for firms and consumers.

The “Fairness” Standard

The Joint Forum Framework document recommends, in Guideline No. 4 that the OmbudService should publish a clear fairness standard it will use to assess complaints. In determining what is fair, paragraph 23 of the Terms of Reference state that the Ombudsman “shall take into account general principles of good financial services and business practice, law, regulatory policies and guidance, professional body standards and any relevant code of practice or conduct...”.

This same paragraph further indicates that the Ombudsman may consult with the financial services industry “or elsewhere” to identify good financial services and business practice.

We suggest that the Terms of Reference ought to also encourage the Ombudsman to consult more broadly with the relevant regulator particularly when considering “regulatory policies and guidance, professional body standards” and “general principles of good financial services and business practice” in the context of a particular fairness determination.

Complaint handling requirements

We understand that OBSI’s intention in setting out complaint handling requirements in section 15 of the Terms of Reference was to ensure that a certain minimum set of standards is applied to all client complaints. The intention, while laudable, puts OBSI in the position of setting what are, in essence, regulatory requirements for the handling of client complaints by participating firms.



While we understand that not all relevant regulators have established such requirements, we believe a better approach would be to have the relevant regulators adopt and enforce complaint handling requirements, as appropriate.

As you know, the IDA has certain complaint handling requirements in place and has recently proposed a number of enhancements to those requirements. Our pending initiative to establish clear guidelines and expectations of our regulated firms in dealing with client complaints comes from the recognition that investor confidence in the financial services industry begins with the firm they have entrusted their business to. Fair and consistent treatment of client complaints within and across our member firms is key to earning and maintaining investor confidence.

Subjecting IDA Member firms to both the IDA and OBSI complaint handling requirements will result in needless duplication and confusion. Below are some examples of where the proposed OBSI complaint handling requirements differ from the pending complaint handling proposals of the IDA:

- 15.(a) - Requirement to appoint a senior official as the “final internal decision-maker”; under the IDA’s pending proposal, the Designated Complaints Officer will not necessarily be given the authority to make all final decisions.
- 15.(c) - Requirement to inform the customer at the time a complaint is made that the customer may pursue the complaint further with OBSI after 90 days; under the IDA’s proposals, the customer must be informed of all their options, not exclusively the OBSI option.
- 15.(f) - Requirement to write a letter to the customer within 90 days of complaint receipt; the IDA’s proposals do not mandate that a final substantive response be sent to the client within 90 days without exception. The IDA proposals contemplate that IDA member firms should endeavour to resolve client complaints within 90 days but provides for some flexibility where there are legitimate reasons for an extension. The proposed OBSI wording appears to mandate a final response after 90 days with no exceptions. We know, and appreciate, that OBSI included this language to conform to the IDA’s proposals. We would be happy to work with OBSI to modify the language in this paragraph of the Terms of Reference to achieve the intended result.

In summary, there are two ways to address the concerns identified above:

- (1) Remove the proposed complaint handling requirements from section 15 of the proposed revised OBSI Terms of Reference - this approach would underscore OBSI’s position that it is not seeking to become engaged in setting regulatory standards; or
- (2) Exempt participating firms from OBSI’s proposed complaint handling requirements in cases where they are already subject to regulatory complaint handling requirements.

Referrals to regulators and criminal authorities

We would recommend that the language that appears in the proposed OBSI Terms of Reference (including sections NS and 25) dealing with referrals to regulators and criminal authorities should be strengthened. In our view, all matters that involve a potential regulatory breach



(including failure to cooperate with OBSI which would be a breach of IDA By-law No. 37.3) or a criminal violation must be referred to the appropriate regulator or law enforcement agency. Therefore, sections NS and 25 of the proposed Terms of Reference, as well as any other relevant provisions, should read “must” rather than “may”.

Threshold for a compensation recommendation

The revised language in the proposed OBSI Terms of Reference (Section 20) proposes to change the threshold for making a client compensation recommendation from “damage or harm” to “loss or inconvenience”. We understand that the impetus for this change is to avoid generating “false expectations about compensation for general damages, pain and suffering and other awards”. We do not believe that the proposed “inconvenience” standard is clearer, will result in more realistic expectations or will be easier to administer than the existing standard of “damage or harm”. We therefore suggest that you preserve the existing standard.

Thank you for providing the IDA with additional time to share our comments with you. We hope that you find them helpful and we look forward to a continued strong and collaborative relationship between our two organizations.

Yours very truly,

Susan Wolburgh Jenah