



PUBLIC INTEREST ADVOCACY CENTRE

LE CENTRE POUR LA DEFENSE DE L'INTERET PUBLIC

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July 25, 2011

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

BY E-MAIL

Dear Mr. Stevenson:

Re: Consultation Paper - Suitability and Loss Assessment Process

The Public Interest Advocacy Centre (PIAC) is pleased to enclose its comments on the OBSI "Consultation Paper - Suitability and Loss Assessment Process".

Yours truly,

John Lawford
Counsel

**Comments on the OBSI Consultation Paper
Suitability and Loss Assessment Process**



**Written by
John Lawford**

July 25, 2011

OBSI Fights a Rearguard Action While Facing the Front

I - The Context

The Ombudsman for Banking Services and Investments (OBSI) presently is embroiled in conflict with the very banks and investment dealers it purports to mediate on behalf of with the public. The Royal Bank of Canada has indicated that it will no longer use the OBSI for banking services dispute resolution. The Minister of Finance has countered with regulations requiring banks to belong to a dispute resolution service. Unfortunately, the regulations require only that banks avail themselves of an independent dispute resolution service, not the OBSI *per se*. This works against consumers, as OBSI was intended to be a fair, independent, costless method for investors to seek redress when financial advisors or their banks did not act in accordance with good banking principles, acceptable investment principles or the law. The *quid pro quo* for this consumer empowerment was that the banks and investment houses would not be subject to a federal regulatory body, but instead could design and run the OBSI.

Now some investment companies are threatening a similar defection from OBSI on the basis that the OBSI's suitability and loss assessment criteria are inadequate, opaque or not consistently applied. They balk at paying recommended settlements near the OBSI compensation limit of \$350,000 per customer, despite the fact that consumer loss can be several times that amount and the average OBSI award is typically only a small fraction of this amount.

The Public Interest Advocacy Centre (PIAC) is well-acquainted with the benefits of consumer ombudsman schemes, even when run by the industry, as the barriers to legal action by individual consumers usually are too high for most people to surmount. Therefore, despite the shortcomings of such schemes compared to a government-run

regulatory or compensation tribunal, we are supportive of these structures as a workable compromise that provide consumers with some redress and protection.

PIAC believes the OBSI should be the sole ombudsman service in banking and investments, that all banks and investment advisors should be subject to it and that it be permitted to assess when wrong has been done (suitability) or loss sustained and the measure of that loss, without interference from the industry. We have reviewed the suitability and loss calculation methodology and we make the following comments from the conviction that compared to what the law should require of investment advisors, that the OBSI approach is not only defensible but is a decided benefit to firms that could be facing much more substantial awards and a tidal wave of civil litigation. OBSI and its methods are *quid pro quo* for a lightly regulated industry that awards its stakeholders very handsomely. However, a properly run ombuds-service can also benefit the industry in reducing costs while providing fair and efficient redress for investors. We believe an overly lawyerly review of methodologies for suitability or loss assessment loses sight of this overall systemic benefit.

II - Suitability

The principle of suitability and the OBSI's assessment of it are completely defensible in their present form against any criticisms, if for no other reason than that bar is already frankly set far too low. Rather than "suitability" most relationships between advisors and clients exhibit more than a few elements of a fiduciary duty; clients simply do not understand the investment products sold to them and rely to varying degrees (and often completely) on the recommendations of their advisors. In this light, a statutorily-modified fiduciary duty such as that on investment advisors under the United States Investment Advisor's Act or even a "prudent investor" rule requiring some portfolio diversification would be a step in the right direction. Any dilution of the already very weak suitability assessment as applied by OBSI (and which is, frankly, at times is a stand-in for an explicit prudent investor rule) would be a move in a completely wrong direction and would risk further destabilization of the investment market as wronged clients were forced to the courts (which, despite the cost, length of proceedings, procedural difficulties and complexity at least have a negligence model for poor advice and a standard of care).

III - Loss Calculation Methodology

The OBSI's "make the client whole" approach (place the client in a position as if he or she were appropriately invested) is consistent with its generous reading of suitability criteria while avoiding the upper end of awards that a court system would produce. In short, it is a fair middle ground in a legal area that has many potential duties and standards of care as well as no end of complicated assessments of liability on various scales. We note as well that the OBSI takes into account an appropriate level of "investor responsibility" - leading to consideration of mitigation and loss apportionment - but is flexible when that assessment is not appropriate to the client (in situations approaching fiduciary duty). This approach is defensible and appropriate as consumer protection and in the context of an overall ombuds-service.

Our only suggested improvement would be development of non-binding policy determinations to alert the industry to a likely range of awards when certain common cases are presented to OBSI for adjudication.

IV - Liability of Advisors not Firms Inappropriate

PIAC notes with no little surprise and consternation that it appears to be common practice for investment firms that have been affected by an OBSI order to require the investment advisor ultimately responsible for advising the client to shoulder the burden of paying any OBSI award. Such a practice clearly leads to conflict within the firm and a fight-it-to-the-death mentality. In addition, we have learned that errors and omissions insurance carried by individual investment advisors may or may not cover an OBSI award.

This situation is clearly inappropriate. In PIAC's experience, an ombudsman model which stands in for regulation or court cases cannot function properly where the firms creating the systemic risk do not bear the consequences of their systemic behaviour. For example, it would be ludicrous for telecom companies to require customer service call centre employees to shoulder even the modest awards made by the Commissioner for Complaints for Telecommunications Services, an ombudsman service that is modeled fairly substantially on the OBSI model.

V - Conclusion

The OBSI's practices and policies regarding suitability assessment and loss calculation are sound and practical. These practices are eminently defensible and sensible approaches as part of a larger goal of non-confrontational dispute resolution within a large industry that has an increasingly large effect upon individuals as "investors".

PIAC views the present public examination of these practices as unseemly and wholly unnecessary. Such considerations and questions could easily have been settled amongst the industry and OBSI within the governance structures of OBSI.

We view the present exercise as only a thinly disguised effort at industry bullying of an otherwise highly effective consumer protection ombudsman in an area that sorely needs it. If the substantive goal of these complaints from industry about OBSI is abolition or crippling of the OBSI, we hereby signal to that industry our determination to fight such a result with the Minister of Finance.