

January 26, 2016

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

To: Deborah Battell dbattell@gmail.com

I am pleased to submit comments as I believe OBSI is in need of major reforms.

OVERVIEW

OBSI is a cornerstone of investor protection. With an increasing number of Canadians living on fixed income, a decline in Defined Benefit Pension plans, a weak economy and a low return environment Canadians need an independent, trusted and respected dispute resolver as never before. The cost of litigation in Canada especially for smaller amounts is prohibitive.

OBSI is in a unique position with a central database. An Ombudsman can serve as a bulwark of financial consumer democracy in troubled times, protecting Canadians and helping industry, regulators and government to improve in the face of a tough economy and fiscal constraint. See <http://www.gouvernance.ca/publications/09-06.pdf> for a review of the Ombudsman as a producer of better governance. Consumer trust in OBSI is critical.

I recommend amending the OBSI ToFR to include a specific objective of providing feedback for continuous improvement of financial advice processes, practices and toolbox's complaint database can be used to identify systemic issues at the national, regional or dealer level. OBSI should report on a select sampling of issues in a generic/anonymous way so that lessons can be learned by the industry and the consumer will have another crucial education source. The database could, if used properly, provide an insight into long-term industry issues. For example, a weak NAAF form, a broken KYC process, deficient complaint handling processes etc.

Indeed the Consumers Council was so concerned about the industry risk profiling process it has written the Ontario Securities Commission and expressed the need to urge every investor, the investment industry, its regulators, and provincial and federal governments to read and respond to the research report produced on behalf of the Investor Advisory Panel of the Ontario Securities Commission entitled "Current Practices for Risk Profiling in Canada and Review of Global Best Practices." The report calls into question current methods to assess retail investment product suitability for consumers. The OSC IAP research concludes that the current Know Your Client approach to suitability in Ontario "has resulted in an eclectic approach to risk profile evaluations <http://www.consumerscouncil.com/news?blog=1&modeX=BlogID&modeXval=22688&BlogID=22688&title=Council-concerned-about-investor-risk-profiling-methods> OBSI should

be considering these weaknesses as it evaluates client complaints.

After a prolonged bumpy road , a large number of Name and Shames , critical media coverage and the rise of low ball settlements ,consumers need to see real reforms. All of this chaos reflected poorly on OBSI, regulators and industry.

The January 2012 World Bank Report "Resolving Disputes Between Consumers and Financial Businesses : Fundamentals for a financial ombudsman "http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Financial_Ombudsmen_Vol1_Fundamentals.pdf has this to say: A financial ombudsman provides an alternative to the courts; so the ombudsman should be (and also be seen to be) as independent and impartial as a judge – as well as having the necessary legal and technical expertise to resolve financial disputes authoritatively. " In order to obtain the confidence of consumers: • the financial ombudsman should not be appointed by the industry, nor by a body with a majority of industry members; and • the person appointed as financial ombudsman should not have worked in the financial industry nor for a financial industry association within the previous three years. The World Bank comment is particularly important because it raises the issue that dispute resolution needs to be "seen to be" independent to be effective.

Detailed Comments

Corporate governance: My main concerns are (a) no Director slot dedicated to the retail investor (b) term limits should be 4 years and (c) all independent directors should not have been previously employed in the financial services industry. The independent review frequency is far too long to support good governance. We recommend a minimum 3 year cycle given all the reforms under way. Many recent changes have not met with investor approval. The Board was well aware of the massive breaches of the lowly cycle time standard but refused to give OBSI staff the resources to clear the soaring backlog. It is due to a breakdown in corporate governance. The board was aware of out of control investigation times and the pain it was causing. Those "stuck" cases never had to happen . Are things better today?Well, now we have " low ball" offers.

As things stand today , OBSI is overseen by a Board of Directors of which a majority are Community Directors who have not been part of the financial industry or government for at least two years prior to their appointment. I recommend that Community directors not have any prior industry relationships and for the purposes of discerning eligibility for the non-industry members of the board of directors, the proposed requirements should be enhanced to specify that an independent director should not be a partner, director, officer, employee or a person acting in the capacity of, or the holder of a "Significant Interest" in or be dependent professionally upon a participating industry participant.

Until a few years ago ,OBSI used to publish Board minutes. This stopped suddenly without explanation. OBSI should implement recorded voting and public reporting of minutes in order to regain the trust of consumers.

Board composition : I wholeheartedly agree with the Consumer Council of Canada recommendation that there should be members of the board of directors of OBSI with a role and responsibility to bring to OBSI's governance independently sourced professional expertise, knowledge and perspectives on consumer rights and responsibilities and the factors that impact them . See also "Improving the Effectiveness of Consumer & Public Representatives On Delegated Administrative Authorities"
http://www.consumerscouncil.com/site/consumers_council_of_canada/assets/pdf/Improving_the_Effectiveness_of_Consumer_Reps_on_DAA_Boards.pdf This will help rebuild consumer trust.

Make decisions binding: OBSI is unable to require participating firms to pay the compensation it recommends in its decisions on cases. Instead, for cases where a reasonable settlement cannot be reached, its final recourse is to "name and shame" the firm involved – this has been demonstrated to be entirely ineffective. OBSI's recommendations re investment complaints should be binding on dealers and banks. In particular, there should be no exception to the fundamental principle that an arbiter who recommends or orders consumer redress be independent in fact and perception. I am of the firm conviction that making OBSI recommendations binding on dealers is in the best interests of all stakeholders . The status quo is incapable of leading to a well functioning dispute resolution system and providing the necessary level of investor protection and public confidence.

Low ball offers :

"Consumers and investors should not feel coerced to accept reduced offers rather than face the possibility of a firm refusal of OBSI's recommendation, resulting in no compensation at all . Addressing both refusals of recommendations and 'low-ball' settlements will be key priorities for the board in 2015."- OBSI Chair Fernand Belisle in 2014 Annual Report

It is my understanding that if a dealer is able to negotiate a settlement with a complainant lower than the OBSI recommendation then the dealer is immunized from Name and Shame and OBSI considers the file closed. According to media reports some of these settlements amount to 50 cents on the dollar or less. This is exploitation and abuse of the retail investor. I am trying to understand how OBSI changed from being an arbiter that determined fair compensation to the quasi mediation process that we see today. It seems to me that OBSI possibly slipped into an iterative process where, when the dealer objected to their finding, they tried to convince and to negotiate. Faced with a backlog, perhaps OBSI felt vulnerable and under pressure to demonstrate they could complete and close cases. So as industry refused, they weakened and allowed low- balling to happen. I firmly believe OBSI needs to return to being a dispute resolver NOT a mediator. OBSI restitution Recommendations should be based on principles and documented loss calculation standards. It is really important that you assess whether OBSI are fulfilling their role as an independent arbiter — and not assess whether they are

doing a good job mediating disputes .Accountability will also take a hit as statistics will show a high percentage of claims being " resolved successfully," but confidentiality agreements will prevent outsiders from ever learning how many or how few of those settlements coincide with OBSI's recommendations.

Definitize cycle time disclosure: Investment dealers must respond to complaints in 90 days. Banks must respond in 120 days per FCAC rules. Why is it that OBSI defines its response time in probabilistic terms? (80 % in 180 days) . Complainants need and deserve an upper cap on the expected time to resolution. Given that the dealer has already investigated the complaint , OBSI data gathering should be minimal. A 120 day standard would be an acceptable figure.

Compensation cap : The cap is of some concern to retail investors. The \$350,000 limit has been in place since 2002, in effect cutting it by the amount of inflation. This is particularly important as baby boomers enter retirement and seniors begin significant annual withdrawals from RIFF accounts.

Systemic Issues: Systemic issues are invisible to retail investors. OBSI do not reveal any information. OBSI now is to report evidence of a systemic issue to the JRC As things stand now, systemic issues appear to go into a swamp.

Hardship cases: OBSI should establish a fast track system to expedite such cases through the system.

Regulatory arbitrage :As I understand it, OBSI will not investigate fully any complaint involving insurance products (e.g. Segregated funds), referring these issues to a relatively unknown (to many retail investors) entity ,the unregulated Ombudservice for Life and Health Insurance (OLHI) , even if they form a part of a larger portfolio that is the subject of a complaint to OBSI. In order to look at things fairly the whole portfolio has to be examined to get an understanding of the financial plan/objectives/risk tolerance and to determine if it is suitable or not. It is illogical to just look at select securities in isolation and not evaluate if the parts come together to make a well designed portfolio or a fiasco. The investment dealer complaint process is confusing and stressful enough without having investors deal with two Ombuds services This is just the opposite from the goals of a single point of contact for retail financial consumers and consistent practices and is inconsistent with the FAIRNESS STATEMENT. Split access is never in the investor's best interests.

Consumer Advisory Panel :I believe this Consumer Advisory Panel should be funded as is the case with the OSC IAP and incorporated into the ToFR . This would be reassuring to consumers.

The bank overhang issue: While investment dealers must use OBSI by regulation, banks have choices. I am deeply concerned that the stress of having to handle complaints about banks that can unilaterally resign from OBSI with short notice may

subconsciously impact the integrity of OBSI restitution recommendations .This stress creates an unhealthy tension among staff,that may , quite naturally, be worried about job security. In 2014, just \$151,793 in compensation went to banking clients. Just 14% of banking complaints resulted in monetary compensation.The average settlement was a modest \$4,897 for banking clients .

Independence and standard of fairness

OBSI is dependent on the rule making of the industry and thus cannot be considered truly independent . When OBSI fairness principles arise so does friction with industry. In this context OBSI could be considered beholden to industry control of the regulatory process. The CSA should explicitly support OBSI's fairness principle(s) as they are consistent with " dealing, fairly , honestly and in good faith" .

Eliminate 2-stage review by internal Ombudsman For instance , bank -owned dealers nudge complainants to their own " internal ombudsman " thereby potentially blocking a number of investor complaints from ever reaching OBSI.

I think this can be harmful to complainants :

Dealers should make their best offer at the outset

The internal ombudsman is not independent despite the assertion

The SRO's have no jurisdiction over this entity

The limitation time clock is not stopped

The complainant is not told that the clock continues to tick on

A rejection or another low ball offer could drain the investor's will to proceed to OBSI

The UK Financial Conduct Authority prohibits a two-stage dispute resolution process but Canadian regulators do not.

Clarification needed by regulators : Some areas require a position by regulators. These include dealer accountability in cases where there is Off book , Personal financial dealings or Outside Business Activity.

Name and Shame : I do not consider Name and Shame as an effective deterrent. Too many dealers are shameless given their observed behaviors. If IIROC and the MFDA automatically launched an investigation that might make a difference in behaviour. We have also been told that OBSI do not Name and Shame if a victim agrees to accept a lower than recommended offer, so naturally they offer low ball offers. This practice undermines the one tool OBSI has to inspire dealer acceptance. I recommend OBSI publish all cases of low ball settlements .

Link to law enforcement : Victims have expressed concern that they are not permitted to turn files over to police if they feel the files indicate fraud or other criminal activity. OBSI should amend its rules to permit this as a basic human right.

Check the wording of SRO brochures : For instance, improved clarity in the IIROC Investor Complaint brochure would be useful to complainants:

1. There should be a plain language sentence that says that a victim can access OBSI after receipt of the firm's response or 90 days whichever comes first. People should know they do not have to wait if there is a delay beyond 90 days. This was at the heart of the demand by investor advocates for a cap on the dealer investigation period since prolonging a investigation was a ruse used by dealers to destroy the will of victims.

2. There should be a definitive sentence that says it is not mandatory to consider the use of an "internal " ombudsman if the service is offered by the dealer. We continue to find that victims are streamed into these internal "ombudsman" who have no oversight from any regulator and whose responses may be influenced by non -regulatory factors such as litigation risk, class actions risk and reputational risk. We note that the UK FCA does not permit a two stage review process by dealers which makes a lot of sense given the huge conflicts of interest and adversarial relationship.

I grant permission for public posting of this Comment letter.

Art Ross

Retail investor