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Via Email To: pp@poonampuri.ca

Professor Poonam Puri
Independent Evaluator (OBSI)

Dear Sirs/Mesdames:

Re: Request for Comment on the Independent Evaluation of the Ombudsman for Banking Services and Investments with respect to Investment-Related Companies ("Request for Comment")

Thank you for the opportunity to respond to the Request for Comment.

Adair Goldblatt Bieber LLP ("**AGB LLP**" or "**we**") is a leading civil litigation boutique located in Toronto, Canada, with a broad range of experience and expertise. Our lawyers are some of the most well-regarded trial and appellate counsel in Canada.

We are a vibrant firm, with an entrepreneurial culture, whose vision aligns with clients who want counsel that are precise, practical, adept, and innovative. Our clients are diverse. We are trusted by public corporations, private companies, professionals, public officials, regulatory bodies, public interest organizations, and individuals involved in complex litigation.

Our lawyers are routinely involved in a broad range of leading cases, including commercial litigation, professional discipline and liability claims, partnership disputes, directors' and officers' liability claims, civil claims for sexual assault and harassment, class actions, public inquests and inquiries, Charter litigation, product liability claims, employment disputes, and defamation claims.

Our comments are largely focused on providing responses in connection with our experience representing Exempt Market Dealers ("**EMDs**") and their Dealing Representatives and we have tried to articulate the feedback we have received from those clients.

Our response to select questions in the Request for Comment are set out below for your review and consideration.

(1) GOVERNANCE

a) To what extent does OBSI's governance structure allow OBSI to provide for fair and meaningful representation on its board of directors and board committees of different stakeholders?

OBSI's board has no representation for EMDs or portfolio managers ("**PMs**") and, based on its board composition, it is questionable whether it has the requisite knowledge and experience involving the exempt market where a significant amount of capital is raised in Canada annually.
If OBSI is to have effective and impartial oversight of EMDs and PMs, it behooves OBSI to have appropriate board members including those who represent small EMDs and PMs who form the vast majority of registrants in Canada. See also our response below in **Question 1(b)**.

b) To what extent does OBSI's governance structure promote accountability of the Ombudsman?

The Ombudsman for Banking and Investment Services seeks to resolve dispute between two very different groups; participating banks and investment firms.

We understand that (a) a majority of OBSI's directors are from the community and who have not been part of industry or government for at least two years; and (b) a minority of the directors are appointed from shortlists of nominees provided by industry bodies.

It is questionable whether the composition of the OBSI board should be serving two different constituencies since they are different. Perhaps there needs to be two governing bodies that each serve a particular constituency to have more appropriate representation.

Nevertheless, we believe that OBSI's board composition is inappropriate if it receives binding decision-making powers over investor complaints against registrants. What is particularly concerning is that a minority of OBSI directors are appointed from industry bodies. It raises the question if any director would ever be appointed representing EMDs. This is concerning since most registrants in Canada are EMDs and PMs. For example, upon our review of the National Registration Database, we understand the following data:

Registration Category	**Number of Firms**[1]
Portfolio Managers	873
Exempt Market Dealer	828
Investment Dealers	172
Mutual Fund Dealers	124

If binding decision-making power is to be granted to OBSI, the composition of its board should reflect each of the participants in the process; specifically, EMDs and PMs, will require greater representation, otherwise in our view the structure is flawed.

[1] Search methodology. We accessed the NRD website at: https://info.securities-administrators.ca/nrsmobile/NrsSearch.aspx. We searched the term "Firm" and under "Show detailed search" we click the Tab "Select one or more categories" and selected, for example, "Exempt Market Dealer". We depressed enter and it identified 828 entries. We assumed this is the number of registered Exempt Market Dealers in Canada as of the search date [January 30, 2022].

c) To what extent does OBSI's governance structure allow OBSI to effectively manage conflicts of interest?

OBSI is not a regulator, and its website states that it does not advocate for consumers or the industry. Our clients do not share this perspective.
Our clients believe that the absence of an investor representative or investor advocate changes the dynamic where OBSI staff effectively are the advocate or voice of an investor, while investigating a complaint, and then adjudicating such matter.

From our clients' perspective, the lack of separation between OBSI staff and its recommendations suggests there is a structural conflict of interest.

This structural defect will be more concerning if OBSI obtains binding decision-making powers.

d) What, if any, changes would you recommend to OBSI's governance structure and why?

See also our response in **Question 1(b**) above.

Simply, create two governance boards, one for banking and one for investment firms. Mandate required EMD and PM representation as part of OBSI's governance and re-examine OBSI's structure and mandate. OBSI's structure is less concerning if it is not granted binding decision-making powers.

(2) INDEPENDENCE AND STANDARD OF FAIRNESS

a) To what extent is OBSI's dispute resolution service impartial and objective? Are the standards used by OBSI fair to both parties?

OBSI's dispute resolution services are not always impartial, and our clients often feel that the process is tilted against them.

As stated above, when OBSI receives a complaint, it acts as an investor advocate in its search for the truth. It takes what an investor has represented and shifts the burden of proof to require EMDs to provide evidence to the contrary.

There is little transparency of how OBSI tests the veracity of a complainant's allegations and there is an expectation that an EMD and Dealing Representative has books and records to rebut every allegation, even if it is unreasonable to do so in the circumstances. Often, an allegation made by an investor is presented as fact, with the expectation that an EMD and Dealing Representative must prove the contrary. This is concerning.

It is unclear how the process is fair to registrants if OBSI receives binding decision-making powers yet relies on hearsay evidence and does not allow registrants to cross examine investors, especially when large sums of money are involved (from our client's perspective, $350,000 or more is large sum of money, especially if an EMD has no or little professional liability insurance). This is effectively turning OBSI into a court, however, registrants are not afforded the full spectrum of rights one would expect in a court of law.

For example, we are aware of one circumstance where OBSI steadfastly supported a complainant's allegations, and when it was adjudicated in a parallel proceeding before a Commission panel, it was held that the investor's testimony lacked credibility, and was discounted. This is an example of how the process is unfair to registrants.

b) In determining fairness, to what extent does OBSI take into account good business practice and relevant laws, regulatory policies, guidelines, professional standards and codes of practice or conduct?

Our clients understand and believe that OBSI staff do not have the requisite knowledge and experience of having trained or worked in the exempt market. It is unclear that taking the Exempt Market Product Exam or Chief Compliance Officer's Course are fair proxies of knowledge and experience of the exempt market.

In 2014, the CSA mandated a dispute resolution service that required registrants to use OBSI. However, in the seven years since such time, our clients' believe that OBSI is still learning and does not have the requisite knowledge or experienced personnel, including management, to adequately and fairly consider relevant laws, regulatory policies, guidelines of the exempt market.

For example, we are aware that certain OBSI staff have a view that seniors should not invest in exempt market securities when there is no such law or view held by CSA members. These are suitability decisions that are based on the facts and circumstances of each individual investor and should not be based on agism.

As for professional standards and codes of conduct, EMDs and Dealing Representatives are not regulated by professional associations or codes of practice. EMDs and Dealing Representatives must: (a) act honestly, fair and in good faith towards their clients; (b) act in the best interest of their clients involving conflicts of interest; and (c) put their client's interest first for all other suitability matters. Accordingly, it creates confusion if OBSI imposes haphazard, non-statutory professional standards and codes of conduct into its decision-making process when EMDs/Dealing Representatives are not required to comply with such standards.

If a Dealing Representative has a professional designation, such matters are inappropriately considered by OBSI when they are best dealt with by the professional body that granted such designation. Such professional association has a body of decisions and understands industry standards and practices and is in the best position to deal with complaints involving a professional designation.

Accordingly, any consideration by OBSI of professional standards and codes of conduct should be outside its jurisdiction, especially if OBSI receives binding decision-making powers.

c) To what extent are OBSI's decisions consistent?

No comment.

d) Is there anything else you would recommend to make OBSI more impartial, independent or objective?

We are not aware of any actions OBSI has taken to better understand EMDs and Dealing Representatives and their businesses. For example, we are unaware of any training and education by EMDs or the Private Capital Markets Association of Canada for the benefit of OBSI staff, management or the Board so they better understand how transactions are done in the exempt market and all the paper and processes involved.

It appears OBSI offers limited training and education on its services to EMDs and its approach to complaints management. This is exacerbated for non-Ontario registrants since OBSI has no offices other than in Ontario. We understand the lack of a physical presence in Western Canada is concerning since there are many EMDs out West. According to the National Registration Database, 620 EMDs are registered as an exempt market dealer in a Western province.

However, of great concern is OBSI's failure to share its valuation methodology for pricing exempt market securities and the calculation of damages, and the perception that the difficulty inherent in pricing illiquid securities makes it more convenient for OBSI to deem 100% of an exempt market investment unsuitable. This is a significant issue that causes severe hardship to EMDs. It is also one that can easily be remedied by having OBSI publicly share such and post its valuation and damage calculation methodology. Moreover, greater confidence will be achieved if OBSI illustrates in concentration cases, an appropriate investment amount, rather than zero which furthers the problem of declaring an entire investment as unsuitable.

Simply, the feedback we have received is that EMDs and Dealing Representatives do not have confidence in OBSI's skill and knowledge to adjudicate complaints, their impartiality and knowledge of applicable securities law, particularly valuation/damages.

(3) <u>PROCESSES TO PERFORM FUNCTIONS ON A TIMELY AND FAIR BASIS</u>

a) To what extent is OBSI able to perform its dispute resolution duties on a timely basis?

We are of the view that OBSI is generally fair in performing its dispute resolution services on a timely basis. In particular, we understand OBSI does accommodate an EMD in providing a response at a date later than initially requested when other matters may prevent

an EMD from responding as requested. A lot of work is required to put together the many document requests and other matters by and EMD and a Dealing Representative in the face of a complaint.

b) Putting aside OBSI's decisions themselves, do you think OBSI has established processes that are demonstrably fair to both parties? Why or why not? Do both parties have an opportunity to be heard? Are there consistent and clear communications from staff?

See our answer in **Question 2(b)** above.

OBSI interviews and obtains documents from a complainant and EMD. However, it does not allow a party to directly hear the arguments made or evidence presented by the other side. This interferes with a fair process and impacts whether a firm accepts or refused to accept an OSBI recommendation adverse to a registrant.

The inability to directly hear a case made against a party impacts their ability to advance or defend their position. Cross examination is important in order to test the veracity of testimony and information and is important for natural justice.

This will be exacerbated if OBSI obtains binding decision-making powers.

c) Is OBSI efficient as a dispute resolution service?

No comment.

d) Why do you think some firms refuse to compensate consumers in the amount recommended by OBSI or at all when a positive recommendation is given by OBSI?

We understand that some firms refuse to compensate investors when recommended by OBSI since they do not believe the process was fair or the decision was based on the facts and law. This is compounded by the issues with valuation/damages calculation as discussed above.

In addition, a firm is unlikely to compensate an investor, despite a positive recommendation by OBSI, since its defence costs or the settlement amount is generally not covered by its errors and omission ("**E&O**") insurer.

In today's marketplace, there are few E&O insurers who offer coverage to EMDs and Dealing Representatives. In fact, some E&O insurers will only provide coverage if a Dealing Representatives is dually licensed as an insurance agent and/or mutual fund dealing representative. Accordingly, some EMDs and Dealing Representative may have no or insufficient coverage.

However, E&O insurers do not generally provide coverage for adverse OBSI recommendations. We understand E&O insurers lack confidence in the fairness of the OBSI process and would rather have a complaint heard in a court of law with more robust processes then pay in response to an adverse OBSI award. We note that an E&O insurer will provide coverage if the matter is heard in court, subject the terms and conditions of any insurance policy.

We also understand that some firms have refused to compensate investors since a decision may not clearly state how a registrant's conduct violated applicable securities law or provided a fair and complete valuation methodology.

Lastly, a firm may refuse to pay since the firm cannot afford to pay the settlement recommendation in the absence of insurance coverage, or a Dealing Representative refuse to pay their fair share.

e) How effective do you consider the "naming and shaming" system to be?

The "naming and shaming" system is one way to provide public awareness and censure of OBSI decision adverse to a registrant.

Instead of giving OBSI binding decision-making powers, a better remedy would require the matter to be reviewed by the Enforcement Branch of a CSA member in the face of an adverse OBSI recommendation. The Enforcement Branch would then work with their Registration Branch to investigate a matter and determine whether it is serious enough for it to impose Terms and Conditions or issue a Statement of Allegations against a registrant.

We submit that a review by the Enforcement Branch of a CSA member would be better than "naming and shaming" and less extreme than giving OBSI binding decision-making powers.

f) Should the $350,000 limit on OBSI's compensation recommendations be increased?

The $350,000 limit on OBSI's compensation recommendations should **not** be increased since there is no evidence that such limits are inadequate based on OBSI's own data.

$350,000 was an arbitrary limit imposed in 2014 when dispute resolution services were mandated under Registration Reform. If OBSI is given binding decision-making powers, there is a very real concern that $350,000 is actually too high and should be reduced.

For example, $35,000 is the limit in Ontario's Small Claims Court and $200,000 is the limit for claims made under Rule 76 of the Ontario's Rules of Civil Procedure known as the "Simplified Procedures". When viewed in this context, it becomes readily apparent that giving OBSI binding decision-making powers raises many issues and concerns *in addition to* the appropriateness of OBSI's current or proposed new monetary limit.

We believe reviewing OBSI's existing data about its actual or average settlement amounts and number of cases cannot be viewed as being representative of the future if OBSI was given binding decision-making powers. In such circumstances, we believe the number of claims will dramatically

increase, since any investor can file a complaint for free, frivolous or not, since they have nothing to lose. Registrants have everything to lose including the time, money and effort involved and, in the absence of any E&O insurance, being placed in a 'life and death' situation where an EMD may declare bankruptcy in the face of a single adverse binding OBSI decision.

For example, we understand that Dealing Representatives make most of the commission in any trade and the margins are very slim for EMD firms. The majority of EMDs in Canada are generally very small and are not sitting on large amounts of capital therefore a single adverse OBSI decision, in the absence of any E&O insurance could bankrupt an EMD.

See also our response to **Question 3(g)** below.

g) What powers do you think OBSI should have and, specifically, do you think OBSI should have authority to issue binding decisions? For more information, see Capital Markets Modernization Taskforce Final Report (January 2021), Recommendation 71, included at Appendix 2.

We believe OBSI's powers should **not** be expanded and should remain unchanged.

OBSI's services fit within a spectrum of dispute resolution options an investor can exercise, including bringing an action in a court of law.

Spectrum of Dispute Resolution

If an investor has a complaint, they would typically speak with their Dealing Representative and if unresolved, the registrant would have to open a file and provide its findings to an investor within 90 days. If an investor is not satisfied with the outcome, they have the right to file a complaint with OBSI to seek redress. This is a **free** option available to investors and managed by OBSI. If an investor is still not satisfied with the result, they have the option to pursue the matter in a court of law, which in Ontario is the Small Claims Court or the Superior Court of Justice.

To convert OBSI from a body that provides non-binding mediation services to effectively a court of law (without commensurate protections of due process and natural justice) is to fundamentally alter the landscape of dispute resolution in the Canadian capital markets.

We understand registrants believe that giving OBSI binding decision-making powers raises a number of issues and concerns as discussed below.

1. **Changing OBSI from Ombudsman to a Court of Law Without Fair Processes** – There is material difference between OBSI making non-binding recommendations to giving it binding decision-making authority. Simply, the stakes are a lot higher and how OBSI adjudicates will have to change.

   According to OBSI's website, it resolves complaints using an informal, non-legalistic approach. It does not have the power to compel the attendance of witnesses, take evidence on oath or test evidence by cross-examination. OBSI talks to both parties and interviews others who have

relevant information, but it does not conduct oral hearings. The OBSI website further states that its procedural mechanisms would not be necessary or helpful to its work as an ombudsman service.[2]

If OBSI is to given binding decision-making powers, natural justice requires a complete overhaul of OBSI, including its current practices described in the above paragraph. Registrants will now demand Rules of Procedure, including rules of evidence and the ability to cross-examine witnesses. It would be inconsistent that claimants in Small Claims Court have such rights involving matters involving sums less than $35,000 in Ontario, however, no such rights are given to registrants involving matters up to $350,000 [or such higher amount if OBSI's compensatory limit is increased]. In the absence of similar rights, constitutional arguments will likely be raised in future litigation against OBSI.

We note that giving OBSI binding decision-making powers is a bold and risky change to the capital markets and fraught with risk. It is also unclear whether OBSI's board, executive or staff have the requisite knowledge, training and experience to deal with such matters, in particular matters involving the private markets and EMDs.

2. **No Loss Calculation Methodology for Private Market Securities** – We are not aware of OBSI having a publicly available loss calculation methodology for private market securities. More so, if OBSI determines an investment is unsuitable, we understand registrants believe OBSI has a tendency to determine the entire investment was unsuitable rather than a specific percentage when concentration is at issue. Meaning, it is easier for OBSI to say 0% of an investor's private market investments are suitable than, for example 40%, if an investor has 50% invested in the private markets. In this example, rather than determining that 10% may not be suitable, some registrants are of the view that OBSI's bias is to deem the entire trade as unsuitable due to loss calculation challenges.

   We note that OBSI has a loss calculation methodology for public market securities, but it has not shared its methodology for private market securities which are generally illiquid securities.

   We understand that calculating losses for private market securities is difficult and issuers may not cooperate or have ceased to exist to provide any pricing information. However, the EMD should not be penalized in such circumstances where OBSI may deem the entire investment unsuitable in the absence of financial information since it is more convenient for them to do so.

   OBSI is currently requiring EMDs to buy back the investments from an aggrieved investor and hold them in inventory when they make a finding adverse to an EMD. EMDs do not hold securities and have no funds to make such purchases. Accordingly, this has caused problems for EMDs and their E&O carriers which has also led to refusals.

3. **With No 'Loser Pay' Cost Rule, Investors Are Incented to Make Making Frivolous Complaints** – The 'loser pay' cost rule means that the loser in litigation must pay the winner a portion of the winner's legal costs, in addition to any amount

[2] https://www.obsi.ca/en/how-we-work/obsi-and-the-legal-system.aspx

awarded. This makes sure that both sides have an economic stake or 'skin in the game' to reduce the risk of frivolous claims and encourages settlement. This is an appropriate alignment of interests in any judicial process and inherent in natural justice. Otherwise, an investor becomes a 'free-rider" at the expense of registrants, who would have to spend the time, money and effort to defend themselves, even in the face of a baseless complaint. This is unfair to registrants who have the burden to prove that an investment was suitable, while an investor needs to merely make the accusation, having no financial repercussions for doing so.

Registrants are sympathetic to investors who have lost money; however, an investment loss can be caused by a number of factors, including market conditions various investment risks, typically set out in an offering document, or malfeasance by an issuer. These have nothing to do with suitability and a registrant's responsibility, therefore, it is inappropriate to suggest that an investor who has suffered a loss has already paid such costs (the loss of their investment, in whole or in part) or may not have sufficient resources to seek redress if they are subject to the 'loser pay cost' rule.

If this view is accepted, it places a reverse onus on a registrant to prove one or more trades were suitable, at a significant cost to a registrant to defend itself, and the likely consequential increase in their insurance premiums as a result of defence costs incurred, assuming they have insurance.

A 'loser pay' cost system would level the playing field and is in the public interest serving both investors and registrants.

4. **OBSI Staff Lack Education, Experience and Training in the Private Markets** – OBSI should not have the power to make binding decisions if its management and staff lack the experience and training in the private markets. Our clients' are of the view that having taken the Exempt Market Product Exam or Chief Compliance Officers' exam is insufficient education about the exempt market since these materials cover very limited subject matters. If OBSI staff and management, including the Board have never worked at an EMD, let alone made an investment through an EMD, it is very concerning to our clients that such individuals who have investigation powers may also be granted the power to make binding decisions.

   It is not uncommon for OBSI staff to require an EMD to educate them on applicable securities law which diminishes the confidence industry has in OBSI and moreover how OBSI's views align with those of CSA members who regulate such firms. Moreover, having mediation skills are quite different than adjudication skills that will result in binding decisions.

   Such concerns are magnified in light of the Client Focussed Reforms with the introduction of the best interest standard for conflicts of interest and the putting the client's interest first standard for suitability determinations. These concepts are very difficult to understand and interpret as they are new, and principles based. Our clients have concerns that binding OBSI decisions may not be reasoned and fair and based on applicable securities law or consistent with the guidance provided by CSA members.

Registrants are concerned that OBSI investigation staff, who typically are not lawyers, will be making decisions and handling a matter based on their own interpretations of law that are inconsistent with CSA member views or otherwise.

5. **Multiple Venues for the Same Misconduct** – Currently, there is confusion and overlap in jurisdictions when an investor files a complaint with OBSI and the same matter is (a) being investigated by a CSA member, (b) before a CSA member Tribunal or (c) an action is filed in Court. If the matter is before OBSI, whether it has binding decision-making powers or not, this overlap in jurisdiction needs to be clarified since there is concern over double jeopardy and limited registrant resources to deal with the same matter in multiple forums.

   Registrants also require clarification on how one decision from one forum impacts another. For example, if a matter is being investigated by a CSA member, or the matter is heard before a CSA member Tribunal and a decision is rendered, OBSI should have no power to continue its review due to *res judicata*.

6. **No EMD Representation on OBSI Board** – As discussed above, there is concern over the stewardship of OBSI since the OBSI Board has no representation from the private markets. It is difficult for private market participants to believe governance and fairness can be achieved for EMDs, when the OBSI Board has little experience or knowledge about operating and EMD and the capital raising process in the private markets.

7. The private markets are different from the public markets and how private placements are undertaken by IIROC regulated firms are not necessary the same as those by EMDs regulated by CSA members . If OBSI's decisions will be binding, the composition of the OBSI board needs to require one or more individuals to represent EMDs.

8. **OBSI's Inherent Conflicting Interests** – OBSI clearly represents itself as a forum where investors can seek redress in connection with any complaint. If a complaint is made and OBSI staff investigate a complaint and represent an unrepresented complainant, our clients feel strongly that there is an inherent conflict of interest when it is the very body that also adjudicates such matters. From the perspective of a registrant, this violates principals of fairness especially if there are limited avenues of appeal.

9. **Binding Decisions will Increase Complaints** – Providing binding decision-making authority will dramatically increase the number of complaints, create additional bureaucracy at OBSI and increase registrant fees. If an investor can seek financial redress at no cost to themselves, only to a registrant, and they have no 'skin in the game', they are incented to make a complaint anytime they lost money since they have nothing to lose and everything to gain. ***This also motivates complainants to characterize a complaint as one involving suitability even if there is malfeasance on the part of an issuer, or the business was unsuccessful due a number of risks, as set out in an issuer's offering document***. Sometimes a business goes

bankrupt for reasons other than malfeasance. ***Regardless, if an investor loses money in the face of a failed offering, the system is structured to incent aggrieved investors to file a complaint with OBSI and state that it is a suitability failure by a registrant.***

For example, in the face of a failed offering investors are looking for someone to compensate them for their loss. In such circumstances, an issuer typically seeks bankruptcy protection so, among other things, its officers and directors cannot be sued since all litigation is stayed during such proceedings. Investor complaints to CSA members and the RCMP are acknowledged but no information can be shared due to confidentiality. This makes many investors angry and increases distrust in the regulators. This is exacerbated when officers and directors of a failed issuer demand releases so they cannot be sued post-bankruptcy as a condition of making a settlement offer to investors, sometimes pennies on the dollar.

Often, the only entity that is trying to help investors and provide information is an EMD and Dealing Representative who are then blamed and made responsible for a failed offering. Therefore, investors have nothing to lose to frame a complaint as involving a suitability failure and within OBSI's jurisdiction since it is effectively their only possible form of free financial redress. Accordingly, our clients are very concerned that giving OBSI binding decision-making powers will increase the number of claims, which is not good for registrants or the capital markets generally.

10. **Impact on EMD Resources** – With increased complaints, there will be a corresponding increase in the burden on EMDs in responding to such matters. When an EMD receives a complaint, it sets in motion a huge document delivery exercise in response to a highly detailed OBSI request letter for books and records. If an investor has made numerous trades on different dates involving various issuers, the production process is significant.

    For example, for <u>each trade</u> a firm's Compliance Team will have multiple interviews with its Dealing Representative and obtain all documents and notes they have in their possession. This will have to be reviewed and compiled. A firm's Compliance Team will have to obtain all client documents, including all: (a) Know-Your-Client ("**KYC**") forms and the many attached schedules (including any net financial asset spreadsheet, suitability case, signed relationship disclosure form, acknowledgement forms etc.); (b) subscription agreement(s) and the many attached schedules (including Risk Acknowledgement Forms, investor Questionnaires/Attestations etc.); and (c) the issuer's offering document and any amendments and marketing materials and all other related books and records.

    This is a huge undertaking by an EMD where such information may be in hard copy or on-line and may be stored in different back-office administration systems. This is compounded with Compliance staff turn-over and with changing regulation and firm practices as they evolved since 2009 when the EMD registration category was created under Registration Reform.

    Locating due diligence or know-your product ("**KYP**") information by an EMD is also involved. It is not just a single report since certain EMDs have extensive due diligence processes, involving legal and corporate finance teams, various notes and reports that occurred over a period of time that are kept by various Departments within a large EMD.

We are providing a very short summary of this process to make the point that a Document Production Request by OBSI is extremely involved. EMD Staff time in compiling, organizing and understanding each trade and having multiple communications via e-mail and telephone with OBSI Staff is a serious and resource intensive undertaking. An EMD may also have to engage legal counsel which adds to the time, money and effort involved which will become required if OBSI is given binding decision-making powers.

This process and effort are magnified if a client has made multiple trades (for example 10 private market investments in order to achieve diversification) over a period of years. The paperwork is immense and must then all be organized and uploaded to OBSI's secure server.

Therefore, if OBSI is given binding decision-making powers and investors can make a complaint for free, there is a high likelihood the number of complaints will dramatically increase, which will place a disproportionate burden solely on registrants which is contrary to the public interest and does not strike the right balance between investor protection and fair and efficient capital markets.

Lastly, the above circumstances will be magnified in the face of a failed offering. For example, in the exempt market, a failed offering is not simply a reduction in the market price of a security. It is typically a total failure of the issuer who will likely seek bankruptcy protection.

In such circumstances, if aggrieved investors can simply make a complaint with OBSI to seek potential redress for free, there will be hundreds if not thousands of complaints in the face of a failed offering. Recent examples include OmniArch Capital Corporation and SecureCare Capital Inc. A failed offering will likely involve many EMDs who sold the offering and impact all their investors.

Any proposal to provide OBSI with binding decision-making powers will incent investors to make a suitability complaint and, from our clients' perspective, threatening to completely overwhelm EMDs, Dealing Representatives and OBSI staff. this is an important consideration that must be thought through if OBSI is given binding decision-making powers.

11. **Increase Registrant Fees** – Giving OBSI the power to make binding decisions will increase its cost of operations. With the various operation and process changes OBSI will have to make, as discussed herein, OBSI will have to dramatically increase its budget which costs are currently borne by registrants. These needs to be further considered and will directly impact the cost of capital since they will be borne by registrants.

12. **No Effective Appeal Rights to an Adverse OBSI Decision** - There is a concern that OBSI's decisions are effectively unappealable which provides too much power in one entity that is outside the jurisdiction of a CSA member.

    The Ontario Taskforce recommended that an appeal by a dispute resolution service ("**DRS**") such as OBSI, be permitted in limited circumstances involving a question of law,\ or where a DRS failed to act in accordance with its policies and procedures, its mandate or the terms and conditions imposed as part of the oversight regime.

Our clients do not find this appeal right effective or practical and adverse decisions should have a right of appeal for questions of fact, questions of law and mixed fact and law.

We believe that such appeal rights are important for the public interest since the rule of law and natural justice require a party to have a right to be heard, by an independent and impartial body, based on law.

We note that an intermediate appeal right could also be to a CSA member where it would be heard before a Tribunal rather than a Court.

13. **Impact on E&O Insurance Coverage** – We understand there are only a few insurance companies that provide E&O insurance coverage for firms solely registered as EMDs in the Canadian market. With existing or increased limits and binding OBSI decisions, EMDs are very concerned that they will have no professional liability insurance coverage since no insurer will underwrite the risk of covering legal defence costs and/or damages.

    If there is no coverage, an adverse binding OBSI decision may bankrupt an EMD and provide no redress for investors. This is not in the public interest and is a significant commercial concern that cannot be ignored. **The assumption that an EMD can transfer its risk to an insurance company and investors will be paid is a false premise. We strongly encourage you to investigate this matter since without any coverage or inadequate coverage, it turns every OBSI review into a 'life or death' situation for an EMD.** This will discourage or cause EMDs to leave the market which impacts the financing of small and medium sized enterprises and the economy of a province. Again, giving OBSI the power to make binding decisions does not strike the right balance between investor protection and fair and efficient capital markets and is not in the public interest.

Alternative Structure – Give Investors the Right to Appeal to a CSA Member

We believe creating an entity that adjudicates capital markets complaints is best left with: (a) the Enforcement Branch of CSA members and then heard by Commissioners who sit on a Tribunal; or (b) a court of law. This would be preferred than giving OBSI binding decision-making powers for many reasons, including the concerns discussed above.

A single Tribunal would have Commissioners with the requisite knowledge, education and experience to appropriately adjudicate such matters with proper rules of procedure and be bound by *stare decisis*. This would address registrant concerns that OBSI lacks knowledge, education and experience about the private markets. Moreover, it would require adjudication using appropriate interpretations of applicable securities law, such as the KYC requirement, suitability requirement including the new best interest standard and investment concentration limits.

Arguably, CSA members could appoint Commissioners who would specifically hear investor complaints, similar to the appointment of a Small Claims Court Judge who can be appointed on a full or part-time basis, depending on caseload.

In Ontario, the OSC's functions are now being split between policy making and adjudication with the creation of a Tribunal. **Our clients are very concerned that creating what is tantamount to an 'OBSI Court' with no connection to the judicial system or CSA member has effectively created a new island and is not in the public interest with appropriate due process for binding decisions.** Our clients believe that OBSI's views on selling securities in the private markets are not necessarily the same as certain CSA members which then leads to uncertainty since registrants will not understand their regulatory obligations.

Simply, our clients firmly believe that **maintaining the status quo works** and if there is a need for further change, then there should be an appeal right to the Enforcement Branch of a CSA member and both an investor and registrant should be subject to rules of procedure, including the 'loser pay cost rule', and *stare decisis*.

h) What changes would you recommend, if any, to ensure OBSI performs its processes on a timely and fair basis?

No comment.

(4) FEES AND COSTS

a) To what extent does OBSI have a fair, transparent and appropriate process for setting fees and allocating costs among firms that use its service?

OBSI should provide industry with a list of the number of EMDs, and the number of Dealing Representatives associated with each firm since this data is important for understanding the exempt market and EMDs and OBSI's fee schedule.

Registrants are very concerned that such fees will increase if OBSI is given binding decision-making powers and accordingly, if this occurs, our clients believe investors who file a complaint should be required to pay a fee and not have the entire expense borne by industry, absent Government funding. **Having investors pay their fair share would discourage frivolous complaints otherwise our clients believe the fee structure is biased against registrants and not in the public interest.**

b) To what extent does OBSI provide value for money?

No comment.

c) What, if anything, can OBSI do to improve the allocation of its fees and the value it provides to its participating firms?

See our response at **Question 4(a)** above.

(5) RESOURCES

a) To what extent does OBSI have the needed resources to carry out its functions?

No comment.

b) To what extent are OBSI's staff qualified, experienced and capable of devoting the required time and effort to individual investigations?

See answer in **Question 3(g) 4** above.

c) Is there anything you would recommend to improve OBSI's performance in this regard?

No comment.

(6) **ACCESSIBILITY**

No comment.

(7) SYSTEMS AND CONTROLS

a) Does OBSI have effective and adequate internal controls to ensure the confidentiality of its investigative and dispute resolution services? Why or why not?

No comment.

b) Does OBSI have effective and adequate internal controls to ensure the integrity of its investigative and dispute resolution services? Why or why not?

Internal Controls

Change of Mandate by OBSI After Scope Agreed Upon

We are aware of circumstances were the terms of reference for an OBSI investigation was limited to an EMD's due diligence practices and this was agreed upon with an OBSI investigator. It involved a large number of products and took some time to organize, compile and upload to OBSI.

Shortly afterward, another OBSI investigator further communicated that it was changing the scope of its investigation, based on the same complaint without any additional information. OBSI was requesting KYC information for multiple trades, which was not the basis of the complaint. Our client was of the view that the explanation was wholly inadequate.

OBSI should not have the right to change the nature of the complaint without proper evidence to support same since it is more comfortable dealing with KYC reviews. Our clients are not aware of any OBSI corporate finance expertise to review the nature and extent of any EMD's due diligence review of a product offering and OBSI has provided no guidance regarding same. Accordingly, our clients question whether OBSI can do an effective investigation if it does not understand the KYP side of the suitability equation, which is important to understand KYC and suitability.

c) Does OBSI have effective and adequate internal controls to ensure the competence of its investigative and dispute resolution services? Why or why not?

See our answer in **Question 7(b)** above.

d) Is there anything you would recommend to improve OBSI's systems and controls?

No comment.

(8) CORE METHODOLOGIES

a) Does OBSI meet the requirements outlined above? Why or why not?

No comment.

b) Does OBSI provide adequate reasons for its decisions? Why or why not?

The adequacy of OBSI's reasons is critical for all parties to accept an OBSI recommendation.
In order to better understand refusals, registrants should be required to clearly state the grounds for a refusal, so it is transparent on its face, and provides OBSI and the CSA with contextual feedback.

- **We understand there is a view that registrants should have the right to have their refusal letter posted alongside OBSI's 'name and shame' decision for complete transparency for all parties.**

We understand that an EMD may refuse to accept an OBSI settlement recommendation due to the unreliability of what OBSI is stating are facts [*i.e.,* information that was not subject to cross-examination and the rules of evidence] and the absence of detailed legal analysis where facts are applied to the law.

Our clients are concerned about the adequacy of OBSI's reasons since they believe:

- OBSI's views do not necessarily following industry practice or CSA member guidance/practice which then makes it more difficult to accept any OBSI settlement recommendation; and

- **OBSI appears to be recharacterizing an investor Risk Profile that is High Risk or Medium-High Risk to Medium Risk or Low to Medium Risk which changes the entire suitability of the investment.** Many EMDs sell high risk securities of non-reporting issuers when sold pursuant to available prospectus exemptions. This recharacterization is subject to interpretation, however, on its face, our clients believe this looks like a convenient way for OBSI to avoid any partial loss calculation involving damages of illiquid securities, when the entire investment would be deemed unsuitable. Our clients believe this is very concerning and suggests that OBSI's challenges in calculating partial damages for illiquid securities may be driving a convenient result that is inherently biased against registrants.

We are unaware of any OBSI guidance for drafting its reasons, however, such information should be publicly available to increase the transparency and openness of OBSI's decision-making. In particular, OBSI should be taking a more pro-active approach in working with industry to understand why their recommendations are not being accepted, and develop guidance, methodologies and practices so EMDs and other registrants and OBSI can have greater openness and trust in the process and ultimately any OBSI decision.

c) What changes would you recommend, if any, to ensure OBSI has appropriate and transparent processes in place?

See our response in **Question 8(b)** above.

(9) INFORMATION SHARING

a) Does OBSI adequately share information with the participating CSA Members?

No comment.

b) Does OBSI adequately cooperate with participating CSA members?

No comment.

c) What recommendations do you have, if any, for facilitating effective communication and cooperation among OBSI and the Participating CSA Members

Our clients are concerned about having the same matter reviewed by OBSI while also being reviewed by a Commission/Tribunal or while the matters is before a Court.

The rules of procedures at a Tribunal Hearing or a court of law are more robust compared to the investigation and decision-making powers and standards of OBSI. Our clients and their E&O insurers prefer that a matter be heard before a Commission/Tribunal or in court, then by OBSI which affords registrants lesser protections [*e.g.,* they have no right to cross examine witnesses].

Accordingly, if a matter is before a Commission, Tribunal or Court, OBSI should be required to stand down until the matter is resolved. If a decision is reached on a matter by a Commission, Tribunal or Court, then OBSI should not be allowed to continue its investigation or render a decision. This approach strikes the right balance between investor protection and fair and efficient capital markets.

10. TRANSPARENCY

No comments.

11. COMPARISON WITH OTHER OMBUDSMAN SERVICES

No comment.

12. PROGRESS

a) If you have made or responded to more than one complaint through the OBSI complaint process, have you noticed any change over time in the way the complaints were handled (e.g., accessibility, fairness, timeliness, transparency of the process, communications from OBSI staff, etc.)?

No comment.

b) Is there anything else that you have not mentioned that you would like the independent evaluators to know?

Our clients are concerned that any adverse OBSI recommendation only identifies the EMD and not the Dealing Representative involved.

We understand that EMDs must become members of OBSI in accordance with applicable securities law and Dealing Representatives are not required to join. We are aware that the 'naming and shaming' only involves registered firms while any registered dealing representative or advisor is not identified.

Our clients believe that a Dealing Representative should be identified along with the EMD for full transparency and accountability and should be part of a Dealing Representative's disclosure record and filed with or linked to the National Registration Database.

There is a concern that certain Dealing Representatives may believe an OBSI investigation involves the EMD and to a lesser extent themselves, therefore, they may be less inclined to settle with OBSI. We understand that an agency agreement between an EMD and Dealing Representative may cover such matters, but issues may arise where an EMD wants to settle but the Dealing Representative does not want to pay their fair share. Disputes may also arise as to the allocation of responsibility between an EMD and Dealing Representative. This also contributes to firm refusals.

Accordingly, our clients believe Dealing Representatives should also be members of OBSI, which would clarify the above matters including for E&O insurers since our clients believe claims should also be made on the Dealing Representative's E&O policy and not just the registered firm. This impacts premiums and deductibles and assumes there may be some coverage for OBSI investigations, which may include defence costs only, but it depends on the policy.

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In conclusion, our clients are of the view that the status quo with OBSI should be maintained and are fundamentally against OBSI receiving binding decision-making powers. This would effectively make OBSI a court of law, without corresponding due process and rules of process for registrants. This does not strike the right balance between investor protection and fair and efficient capital markets and is not in the public interest.

We thank you for the opportunity to share our comments. If you have any issues or concerns, please do not hesitate to contact the writer below.

Best regards,

Simon Bieber
Partner