

INVESTOR ADVISORY PANEL

January 31, 2022

Prof. Poonam Puri
c/o Ombudsman for Banking Services and Investments
20 Queen Street West, Suite 2400
Toronto, Ontario M5H 3R3

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

On behalf of the Ontario Securities Commission's Investor Advisory Panel (IAP), I wish to thank you for this opportunity to comment on the independent evaluation of the Ombudsman for Banking Services and Investments.

The IAP is an initiative by the OSC to bring investor concerns and voices into its rule development and policymaking process. While we typically focus on investment products and services, we note there are many crossovers and commonalities in the handling of investment and banking disputes in Canada. Consequently, in this letter we propose to address common elements in both investment- and banking-related complaints, particularly regarding the accessibility, transparency, and authority of OBSI.

We also acknowledge that some issues raised here are beyond the control of OBSI. Nonetheless, in our view it is important to address these matters publicly so that necessary reforms may more readily be championed by OBSI and by policymakers seeking to improve outcomes for Canadian consumers.

General comments

In the past, we have called for reforms in the investment sector's external complaint handling system, including urging securities regulators to make that system more accessible, functional, and transparent, and more focused on yielding better outcomes. In our view, this requires:

- mandating use of OBSI as the single, fully integrated dispute resolution service for banking-related complaints as well as investment-related ones;
- granting OBSI authority to render decisions that are binding on respondent banks and investment firms; and
- recognizing that the fairness and integrity of dispute resolution in Canada's financial system depends on OBSI being able to examine and provide full compensation for all wrongdoing evident in the circumstances of each complaint.

We believe the policy decision to allow private for-profit alternate dispute resolution services in banking-related complaints was ill-advised and has proven to serve consumers poorly. By its nature, a private for-profit dispute resolution service is rife with potential conflicts of interest, and inevitably gives rise to concerns that banks will be favoured over complainants. This can only erode public confidence in the fairness of our financial system as a whole. It is important, therefore, that your review of OBSI should be conducted with this context in mind and should not be confined narrowly to an evaluation of OBSI's own operations.

Further, we encourage you to evaluate the need for OBSI to have binding authority as a means to maintain the integrity of the dispute resolution system. Previous reviews of OBSI revealed the extent to which consumers have been short-changed by low-balling of settlements as well as outright refusals to pay, and these practices undoubtedly also have had – and continue to have – a corrosive effect on public confidence. Your predecessor concluded that binding authority is needed to rectify this, and we urge you to consider it as well.

In a similar vein, we recently encouraged the Department of Finance Canada to implement its proposed guiding principles for external complaint bodies (ECBs) in the banking sector. Those proposed principles were:

- Accessibility
- Accountability
- Impartiality and independence
- Timeliness and efficiency, and
- Impactful decisions

But we also stressed the need to add Fairness and Integrity as key guiding principles because of the asymmetry that exists when consumers lodge complaints against banks or investment firms.

Complainants typically have limited resources and/or low levels of financial literacy, while large financial institutions have substantial resources to defend themselves, including significant expertise in the subject matter of the complaint. This asymmetry cannot be neutralized simply by making ECBs independent and impartial. Fundamentally, a process that affords asymmetrically capable parties the same means and opportunity to present their case really favours the better resourced party – in this instance, the financial institution.

The asymmetry is compounded by OBSI's administrative practice of applying its limitation period to screen all complaints for timeliness. We believe OBSI's impartiality would be better preserved if this practice were abandoned, since complainants often lack the knowledge and sophistication needed to determine that they've been misadvised, misled, or otherwise disadvantaged. It may dawn only slowly on them that they have something to complain about, and then they typically need time to discover and sort through the avenues available to pursue redress, including OBSI.

Consequently, the limitation period should be considered only where the financial institution raises timeliness as an issue, and they should bear the burden of establishing that the complaint has been commenced beyond a “reasonable” time (see further discussion of this point under “Limitation Period” below).

We stress, however, that even the most impartial processes are apt to produce unfair and unsatisfactory outcomes in the absence of a mandate directing the ECB to take steps necessary for achieving fairness while maintaining public confidence in the financial system’s integrity. For OBSI, this would entail providing complainants with information and support necessary to better articulate their concerns and fully elicit the merit of their complaints, if any.

At the same time, if public confidence in the integrity of the financial system is to be maintained, OBSI must be able to meet expectations that erroneous advice or inappropriate conduct will be fully identified and scrutinized, and that full compensation will be provided where harm has resulted. This calls for re-consideration of whether OBSI should be mandated to examine systemic issues. The question, in essence, is whether disputes can be resolved in a truly fair and comprehensive manner if OBSI must frame its analysis on something less than full context. We encourage you to address this question as part of your evaluation.

Subject to the broad comments stated above, we believe OBSI’s record of achievement and its structure as an independent, not-for-profit ECB make it uniquely qualified to maintain public confidence in Canada’s financial system through optimization of dispute resolution outcomes. We hope you will recommend that they be given the mandate and tools needed for the task.

Specific comments

Turning to the specific issues raised in the consultation document, we wish to offer the following comments:

Question	Comment
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3	Governance
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The current provision for one member of OBSI’s Board to be selected to function as a “consumer interest” director does not, in our view, sufficiently offset the effect of other directors being nominees of IIROC, the MFDA and the Canadian Bankers Association. A more balanced and appropriate Board dynamic will be achieved only if all the independent directors are required to possess a deep understanding of consumer perspectives and investor protection issues. This understanding should be reinforced through annual training on those issues and perspectives for all OBSI directors, including the industry nominees, and it should be integrated into the skills matrix used by OBSI in its Board selection process along with considerations of inclusion, diversity, required expertise in industry operations, and geographic representation.

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Accessibility, Impartiality, Fairness, Timeliness and Adequacy of Communications

a) Limitation Period:

To help ensure that harm is rectified through compensation, and thereby to promote fairness and public confidence in our financial system, OBSI should refrain from using a specific limitation period. Consumers should be permitted to make complaints within a “reasonable” time, as determined under guidelines taking into account many factors that contribute to the time it takes for an investor or bank customer to make a complaint. These factors should include such things as poor financial literacy, lack of awareness of material facts, language barriers, health difficulties or other intervening factors.

b) Naming and Shaming:

We believe OBSI requires binding authority, as stated above. However, we also feel that naming and shaming remains a powerful deterrent tool in most cases. It should be retained as a mechanism for OBSI to shed light on wrongdoing by firms when they fail to promptly comply with OBSI’s compensation directives. We also recommend that OBSI publish the names of any individuals who have been found to have caused harm. We cite the common use of naming and shaming by most professional bodies in Canada as a highly effective deterrent, and we are confident that robust procedural safeguards can be put in place to ensure fairness to the individuals and firms involved.

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Transparency and Consumer Awareness

OBSI’s website appears to be clear and well-designed, with the complaint process sufficiently front and centre. However, the utility of the website makes little difference if consumers are largely unaware of OBSI’s existence or purpose, which is the case.

We believe OBSI works hard to raise public awareness via social media and through news coverage where possible. Still, with limited resources OBSI will remain heavily dependent on participating member firms to let complainants know about its services – a sub-optimal and potentially unreliable process once discord arises between the consumer and the firm.

A consumer-centric solution to this problem could be achieved through the creation of an integrated single portal for intake of all complaints about financial services of every type (investments, banking, insurance, pensions, etc.), with intake staff trained to shepherd complainants to whoever has jurisdiction over the matter at issue (i.e., securities commission, SRO, banking or insurance regulator, OBSI, or some other agency). This would greatly relieve consumers from having to navigate the fragmented labyrinth of Canada's financial system just to find the "right" place for their complaint, and it would allow agencies to save money by operating a pooled intake facility. We encourage you to consider this concept as part of your review.

Again, thank you for the opportunity to comment on OBSI's evaluation. Please let us know if you require any clarification or wish to discuss these matters further.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil Gross".

Neil Gross, chair
Investor Advisory Panel