RBC Dominion Securities

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Via Email

July 25, 2011

Tyler Fleming
Director, Stakeholder Relations and Communications
401 Bay St.
Suite 1505, P.O. Box 5
Toronto, On
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Dear Mr. Fleming:

Re: Consultation Paper- Suitability and Loss Assessment Process

We are writing on behalf of the following entities within RBC: RBC Dominion Securities Inc., RBC Direct Investing Inc., Phillips, Hager & North Investment Funds Ltd. and Royal Mutual Funds Inc. We appreciate the opportunity to provide our comments regarding the Ombudsman for Banking Services and Investment's (OBSI) Consultation Paper on the Suitability and Loss Assessment Process (the 'Paper'). We have participated in the industry working group organized by the Investment Industry Association of Canada (IIAC) and fully support the feedback provided in their letter.

General Comments

In our view, the Paper represents only one aspect of a much broader review that ought to be undertaken; one that examines the oversight and structure of the OBSI, with the aim of ensuring a viable and credible provider of dispute resolution services. While the OBSI's approach for determining loss and suitability as set out in the Paper generally appears to be reasonable and acceptable in nature, our experience shows that the stated approach is not consistently followed. For this reason, we continue to have significant concerns that the OBSI currently applies an inconsistent approach that fails to address existing problems as identified by the industry. As outlined in the letter dated September 14, 2010 from RBC Dominion Securities Inc. to Mr. Douglas Melville, we feel strongly that the following issues require immediate attention if the OBSI intends to adhere to their intended role as an effective mediator between Investment and Mutual Fund Dealers and their clients.

Specific Comments

(i) ***Lack of Transparency***

We strongly believe that the recommendation-making process of the OBSI lacks transparency. Loss calculations are of particular concern in this regard, as it has been our experience that numerous discussions and recalculations are often required following a recommended compensation for the OBSI to sufficiently clarify the factors involved in their calculation. The apparent inability and/or unwillingness of the OBSI to effectively communicate its methodology greatly undermines the confidence that our firms place in OBSI staff.

(ii) ***Re-Assessment of Investor KYC***

We take great issue with the OBSI's practice of retroactively revising the stated risk tolerance of a given client, particularly when this is based upon the OBSI's interview with the investor concerning his/her current feelings about a past investment that resulted in losses. We note that such interview is not conducted under oath, nor is the dealer granted the opportunity to address assertions made by the client. It is left to the OBSI investigator alone to assess the credibility of the client. This is clearly an absurd practice which renders immaterial not only all in-depth discussions between the investor and Approved Person, but also legal documents such as the Know-Your-Client (KYC) form, which are relied upon to fully construct the investment profile for all clients prior to the commencement of trading activity and throughout their relationship with a firm. If the OBSI determines that the KYC on record for a client did not in fact reflect his/her actual circumstances, the OBSI ought to clearly articulate the basis of this determination, which should be based solely upon information that was available at the time of such assessment.

(iii) ***Client Accountability is Unclear***

The Paper fails to sufficiently address the issue of client responsibility. We acknowledge that the Paper does set out factors that the OBSI claims to consider in determining whether a client ought to share in the responsibility for a loss; however, our experiences with OBSI illustrate that the OBSI's position, in practice, is that firms are often 100% responsible, without any responsibility attributed to the client in virtually any circumstance. In our past correspondence and discussions with the OBSI, the concepts of mitigation and ratification have been specifically rejected. As such, we are surprised to see them included in the Paper as factors being considered in making the assessment of client responsibility.

Finally, it is our strong belief that when assessing financial harm and compensation, it is unfair to ascribe 100% of the responsibility for losses upon the Approved Person and/or firm when there are disputed facts, the complainant has not been interviewed under oath, and/or the complainant's credibility has not been clearly established. Furthermore, this is particularly unreasonable where a fiduciary relationship does not exist between the Approved Persons and his/her clients. We also note that distinctions between duty of care and fiduciary duty are clearly recognized regulatory and legal principles, however, are not considered by the OBSI.

(iv) ***Failure to Act Impartially***

The OBSI consistently fails to act impartially as required under Section 3 of the Terms of Reference. Rather than adhering to the clearly defined role of an "independent and impartial arbiter of complaints",

the OBSI serves as a client advocate that makes final, unappealable judgments which are based on non-transparent processes and unsubstantiated interviews between subjective interviewers and complainants.

(v) ***Notional Portfolios***

As has been previously brought to your attention by the IIAC in a letter sent to Mr. Douglas Melville, dated July 20, 2010, the concept of "Notional Portfolios" as utilized by the OBSI is often extremely problematic, as it is difficult, if not impossible, to determine how a client may or may not have invested without the benefit of hindsight. Numerous factors, such as changes in personal circumstances, market conditions, availability of investment products, the nature of the relationship between the investor and the advisor (e.g. discount broker/advisory/discretionary) and the relative credibility of the parties involved, all serve to complicate any effort at reconstructing an if/then scenario where different choices are made retroactively to determine where an investment portfolio might have otherwise been. It is for these reasons courts have generally rejected loss of opportunity cost claims that are based upon notional portfolios as they are not reflective of actual trading or investing history of clients.

Similarly, the use of indices as benchmarks for portfolio performance results is not appropriate in practice. Securities that were suitable for a client might not be available within the index utilized, and the securities within that index may not be suitable for the client at the time the investment choice was made, or at any time during the timeframe applicable to their investment. This results, in part, due to the fact that a benchmark is not adjusted to reflect the asset allocation that is suitable for the given client. Further, the use of indices as benchmarks presents the issue of selection bias, confuses suitability with performance, fails to account for fees that would otherwise be applicable to a client (particularly where considered over a period of a number of years), and assumes consistency on the part of the client that may not reflect actual investing history.

There are instances, as stated in the Paper, where "Notional Portfolios" can be properly employed; however, we believe these instances to be very specific and limited. The OBSI, in our experience, uses this approach in almost all cases, ignoring the inherent limitations and to the exclusion of, potentially, more appropriate methods.

(vi) ***Determining Financial Harm - Calculations***

In the examples of financial harm calculations provided on page 10 of the consultation paper, the third bullet presents a situation where the client would have gained $15,000 instead of $10,000, had they been suitably invested, and therefore assesses the financial harm to be $5,000. In this situation, the OBSI is effectively forcing dealers guarantee a theoretical gain. This is an unreasonable position that effectively removes speculation from the act of investment and is functionally impossible.

(vii) ***Lack of regard for legal principles***

We acknowledge that the OBSI is not a court or a regulator and that it is not, nor was ever intended to be, bound by specific case law. However, in our view, this does not give the OBSI license to disregard settled legal principles. In our view, the OBSI should consider as a matter of course whether any particular complaint would be likely to fail due to the expiration of an applicable limitation period; it has been our experience that the OBSI, rather, will expressly ignore the expiration of a limitation period. Moreover, the OBSI process itself involves a credibility determination on the part of the investigator based upon an unsworn interview of the client, without the dealer having any meaningful opportunity to respond. Also,

as discussed above, the OBSI in practice ascribes very little responsibility to clients to mitigate their losses. Finally, once a recommendation for compensation is made, the dealer is left without any form of appeal process to allow an impartial body to examine the fairness of such recommendation; if the dealer lacks confidence in the rationale underlying the recommendation, the only recourse left to the dealer is to refuse and face the prejudicial public relations consequence. If the goal is to investigate complaints and to, where warranted, compensate clients in a manner that is fair and reasonable, then we are of the view that "fair and reasonable" must at the very least, consider what would be available to the client in law.

Concluding Remarks

While we appreciate the opportunity to provide comments on the OBSI's suitability and loss assessment process, we believe this is pre-mature until such time as the oversight, governance and transparency issues of the OBSI are meaningfully addressed. It further greatly concerns us that the OBSI has put forward in the Paper a "standard process" that, in our experience, has not been consistently followed.

We would be pleased to discuss our comments further with you. If you have questions or require further information, please do not hesitate to contact the undersigned.

Sincerely,

Russell Purre

cc: Greg Nowakowski, Chief Compliance Officer, RBC Direct Investing Inc.
Larry Neilsen, Vice President, Phillips, Hager & North Investment Funds Ltd.
Ann David, Chief Compliance Officer, Royal Mutual Funds Inc.