THE INVESTMENT FUNDS INSTITUTE OF CANADA
L'INSTITUT DES FONDS D'INVESTISSEMENT DU CANADA
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BY EMAIL: publicaffairs@obsi.ca

January 29, 2008

Terms of Reference Review
OBSI
PO Box 896, Station Adelaide
Toronto, ON
M5C 2K3

Attn: Peggy Anne Brown, Chair, Board of Directors

Dear Dr. Brown,

Re: Proposed Amendments – Terms of Reference

We are writing to provide the comments of Members of the Investment Funds Institute of Canada ("IFIC") with respect to the proposed revisions to the Ombudsman for Banking Services and Investments ("OBSI") Terms of Reference ("ToR") published on December 3, 2007.

Our industry is active in supporting efforts to improve and make more efficient the systems for complaint handling and dispute resolution in our industry. Rules and processes which are clear and fair to all parties are ultimately beneficial to both consumers and the industry in general.

We note that the changes you propose for OBSI's mandate create a high degree of overlap with the mandates of regulatory organizations. In effect, the result will be that investment funds gain an additional regulator with the ability to audit firm practices, make findings and direct restitution, without the procedural safeguards and due process required of statutory agencies. The success of OBSI's role derives from its ability to provide an impartial, non-legalistic avenue for disputes between Participating Firms ("Firms") and their customers. The proposed ToR revisions will have a significant and detrimental impact on this role.

The proposal to enable OBSI to investigate "potential Systemic Issues" and, further, to require a Firm to provide privileged and non-privileged information for use in an investigation, even when it is not the subject of a complaint, are substantial powers which duplicate, and even exceed, regulatory mandates. Our industry does not view it appropriate that OBSI, which is not held to the high standards of due process that are required of a statutory body, have such a mandate. We encourage you to work closely with the multiple regulatory agencies in considering revisions to your ToR such that they do not include regulatory powers.

The investment funds industry is subject to oversight by industry self regulatory organizations ("SROs") and the provincial securities commissions who all have distinct roles and responsibilities that relate to the regulation of complaint handling processes of our member firms. The Mutual Fund Dealers Association of Canada (the "MFDA"), the Investment Dealers Association of Canada (the "IDA"), the Autorité des marchés financiers (the "AMF") and the other members of the Canadian Securities Administrators support a robust system for reporting and investigation of complaints. We would also note the important distinctions between provinces in terms of the legislative authority for securities commissions to order restitution, an authority which alters the impact of regulatory decisions. In addition to these regimes, investment firms are members of OBSI, and subject to its complaint handling procedures.

As recommended by the Joint Forum's *Framework for Collaboration*, it is important that a formal process for policy coordination regarding dispute resolution be established, comprising all bodies with related responsibilities, including the SROs, securities regulators, OBSI and appropriate federal departments. Before your Board approves revisions to the ToR, it is critical that meaningful consultations across the various bodies occur with the objective of creating an improved alignment of standards. A key objective should be the standardization of regulatory requirements and processes so that investors benefit from a consistent level of protection that can be easily accessed, regardless of which regulatory jurisdiction the service provider may fall under.

Specific revisions which lead us to this conclusion are summarized below.

1. Changing OBSI's Mandate.

The proposed role for OBSI with respect to suspected Systemic Issues would effectively result in multiple and potentially conflicting roles played by OBSI. It would also be inconsistent with OBSI's mandate (expressed in section 3 of the *Terms of Reference*) to "serve as an independent and impartial arbiter of Complaints and … not act as an advocate for the Firm, the Complainant or any other person." The proposed mandate is duplicative of other organizations, and has no statutory underpinning, while the consumer advocacy role is directly in conflict with your principal powers and duties. The result is an unclear mandate which will confuse consumers and Firms and will not work in the interests of an efficient ombudservice.

This is not to suggest that OBSI's mandate, as currently established, would not accommodate improved collaboration between OBSI and Firms. Our industry welcomes and encourages an open and frank dialogue with OBSI in an effort to enhance and improve our clients' experience, the service we give them and the relationships we have with them. However, each individual Firm is in the best position to evaluate its internal mechanisms and operations and we do not believe there is sufficient evidence that OBSI's proposed expansion into regulatory matters is appropriate. We are concerned that this increased authority jeopardizes the success of OBSI's role as an impartial arbiter.

We would encourage OBSI to focus on improving its communications to Firms, so that an involved Firm would have a better understanding of the reasons behind an OBSI decision. Improved communications, coupled with existing regulatory and other compliance mechanisms (for example, the self-reporting obligations of IDA and MFDA members), would serve to ensure that any concerns OBSI may have are brought to the attention of the Firms who can then determine if further steps should be taken.

The areas where the revised ToR overlaps with regulatory functions include:

i. The ability provided in New Section 10 to identify, investigate and require compensation to be paid for "Systemic Issues" which are defined as matters "discovered in the course of considering a Complaint which may have caused a loss or inconvenience to one or more other Customers in a similar fashion to that experienced by the original Complainant". This is a far-reaching power which gives OBSI the authority to determine that an issue is Systemic without evidentiary requirements and to require a type of "class action" proceeding without due process or recourse for the Firm. Systemic Issues are more appropriately dealt with in a court or before a securities commission or SRO and should not be included as part of OBSI's mandate.

ii. New Section 10(b)(ii) which requires Firms to "adopt measures to prevent a future occurrence of the issue" is the standard-setting function of a regulator. This provision should be removed.

iii. Additions to section 15(d) require Firms which are not the subject of a complaint to cooperate with OBSI in the provision of information on their practices in relation to a complaint made by a customer of another firm. These give OBSI the investigatory powers of a regulator, and, in the case of section 15(d)(ii), provide OBSI with the power to require the provision of information on general industry practices which may even be beyond the scope of a regulator or SRO. Enforcement in the case of non-cooperation with these new powers is provided through the addition of "failure to cooperate" in section 25 as a publishable event. OBSI has no statutory underpinning to take on these roles. The proposed additions to section 15(d) should be removed.

The areas where the revised ToR alter OBSI's role as an independent and impartial arbiter of complaints and move it to an advocacy role include:

iv. The addition of section 3(aa) which allows OBSI to "assist Complainants with the Complaint process, including helping them articulate their complaint where necessary", and the removal from section 3(g) of the clause preventing OBSI from providing general information about a Firm. These revisions together place OBSI more in the role of a consumer advocate than an impartial arbiter. OBSI should be concerned about the perception of a conflict of interest that would arise in the assessment of a complaint that it helped prepare. We recommend removing section 3(aa) and restoring the deleted wording of section 3(g).

v. The change of powers in section 3(d) from "investigation" to "evaluation" of Complaints further confuses OBSI's role from that of an independent mediator to one of an auditor or monitor of the activities of Firms. We recommend restoring the original wording of section 3(d).

vi. Deletion of the first line of section 24, which requires the Ombudsman to find a solution satisfactory to both parties, unquestionably moves OBSI in the direction of an advocate. The original wording should be restored.

2. Conflicts

The proposed revisions increase the potential for overlap, duplication and conflict with regulatory requirements. This adds to the confusion and dissatisfaction of consumers, and leads to a less efficient resolution process.

Specific examples include:

i. Section 15(c) conflicts with proposed MFDA Policy 3 with respect to timelines for internal handling of complaints. The MFDA is the self-regulatory organization for mutual fund dealers with delegated authority under the terms of its recognition order in most provinces to regulate mutual fund dealers. MFDA members are provided with a response time of 180 days. OBSI is proposing that it be allowed to intervene halfway through the internal complaint-handling processes of firms regulated by the MFDA. Section 15(c) should be revised to allow OBSI to enter the process on the earlier of (a) 181 days; and (b) the date the client receives a substantive response from the Firm.

ii. In addition to conflicting with the MFDA process, there are also balance/fairness aspects arising from attempting to force a 90-day response time on the industry. A 90-day threshold may result in severely undermining a Firm's internal processes, especially since many complaints are not simple enough to be resolved in such a period. It will be essential for OBSI to apply timeframes that are realizable, and to clarify and define the framework where there remain uncertainties.

iii. There are also procedural gaps in the proposed ToR which will need to be addressed if they are to be applied. For example, greater clarification is required as to when the clock starts running, and what constitutes a complaint. To illustrate – a consumer may vaguely communicate dissatisfaction during a telephone banking call, do nothing further for several months, and then decide to launch a formal complaint in writing. Verbal expressions of dissatisfaction introduce an element of subjectivity that may lead to confusion and miscommunication between the client and the Firm. Requiring complaints to be expressed in writing removes this element of subjectivity and alleviates the potential inability of the Firm to determine when the applicable time frame for addressing the complaint begins.

iv. The removal of "non-privileged" from section 15(e) broadens the range of information that can be requested by OBSI, and which a firm must provide, to include "privileged" as well as "non-privileged" information. If withheld, it would be the responsibility of the Firm to demonstrate to OBSI's satisfaction that its provision would place the Firm or Representative in breach of the law. This revision raises the risk that a firm will be compelled by OBSI to release information that is protected by statute.

    The access to privileged information permitted in section 15(e) also raises common law problems and contractual confidentiality issues in addition to privacy law. We question, for example, what the fallout would be from the failure of a Firm to satisfy OBSI that disclosure is not warranted. Questions of privilege are often complex and subtle. A Firm may not feel it prudent to speculate on what a court may conclude with respect to the disclosure of such information. A Firm may be advised by counsel not to disclose. The party who owns the privilege may be a third party and may not consent to disclosure. Would a firm be required to cooperate by sharing information that, if provided, could be commercially damaging to the company? Section 15 is not clear on how or if OBSI would be barred from compelling disclosure in these cases, and does not indicate what the Firm's recourse would be. What if OBSI compels disclosure and it is later determined that this was done in error? These questions are of additional significance when we consider how disputes between Firms and OBSI would be perceived by consumers, and what this would mean for timely settlements and the public's perception of OBSI. We are of the view that questions of privilege should remain the purview of the courts - and not be allowed to be decided by an ombudsman and most certainly not by an advocate or interested party. We recommend that "non-privileged" be re-inserted into section 15(e).

v. We request clarification regarding what would constitute a "failure to co-operate" under section 10(c), including confirmation that any non-cooperation by a Firm that is (i) grounded in an attempt to preserve legal rights (e.g., refusal to enter into a suspension agreement with respect to court proceedings), or (ii) based upon its belief that cooperation may be contrary to the Firm's fiduciary obligations or legal/regulatory requirements (e.g., disclosure of confidential or privileged information) does not constitute a "failure to co-operate".

3. Standards for Dispute Resolution

The proposed revisions mark a significant departure from what is conventionally understood to be the role of an ombudservice, and from the role contemplated for OBSI in its original ToR. The ISO 10003 guidelines for dispute resolution external to organizations list basic principles which ombudservices should follow. The proposed revisions pose challenges for at least two of these principles: the consent of complainants to participate and fairness to both parties:

i. Consent to participate: Participation of the complainants in dispute resolution offered by an organization should be voluntary. Consent to participate should be based on full knowledge and understanding of the process and possible outcomes. We would like clarification from OBSI regarding how consent to participate would be obtained on questions of Systemic Issues.

ii. Fairness: The organization should engage in dispute resolution with the intent of fairly and honestly resolving the dispute with the complainant. This is consistent with OBSI's powers and duties as described in section 3, i.e. that: "The Ombudsman shall at all times serve as an independent and impartial arbiter of Complaints and shall not act as an advocate for the Firm, the Complainant or any other person." This broad principle of fairness conflicts with the new proposed powers of OBSI as provided in the following provisions:

   a. Section 8(e) requires only the Complainant to agree to a halt in court proceedings for OBSI to begin consideration of a Complaint.
   b. Sections 20 and 24 broaden the definition of loss to include the undefined concept of "inconvenience".
   c. New Section 10 allows the Ombudsman to identify a Systemic Issue, and to take action against the Firm or Representative without evidentiary requirements for such action.
   d. Section 25 adds "failure to co-operate" as a condition for OBSI publishing the name of a Firm. This is unfair and prejudicial to the Firm and does not accord with the principles of due process.

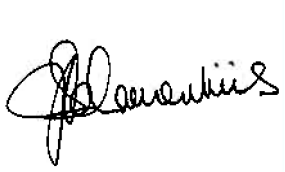
Summary

We are concerned that the above-noted departures from dispute resolution standards will undermine the long term credibility of OBSI and detract from the achievement of its original purpose. Before any revisions to the ToR are made, we encourage the establishment of a committee comprising the SROs, securities regulators, OBSI, appropriate federal departments and industry representatives to ensure that policy-making with respect to complaint handling is coordinated and produces a consistent and efficient framework for investors. We would be pleased to schedule a meeting with the OBSI Board to discuss our recommendations.

Thank you for providing us with an opportunity to comment. If you have any questions regarding this submission, please contact me directly by phone at 416-309-2300 or by email at jdelaurentiis@ific.ca or Jon Cockerline, Director, Policy – Dealer Issues by phone at 416-309-2327 or by email at jcockerline@ific.ca.

Yours truly,

THE INVESTMENT FUNDS INSTITUTE OF CANADA



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