INDEPENDENT EVALUATION
OF THE
OMBUDSMAN FOR BANKING SERVICES AND INVESTMENTS (OBSI)
INVESTMENTS MANDATE

June 13, 2022

OBSI OMBUDSMAN FOR BANKING SERVICES AND INVESTMENTS
OSBI OMBUDSMAN DES SERVICES BANCAIRES ET D'INVESTISSEMENT

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Executive Summary

About OBSI

The Ombudsman for Banking Services and Investments (**OBSI**) is a national, independent and not-for-profit organization that assists consumers and investment firms/banks to resolve financial disputes that they could not resolve on their own. OBSI offers its services in both official languages and is free to consumers. OBSI responds to inquiries from consumers, conducts investigations and shares insights with regulators, stakeholders and the broader public.

In accordance with OBSI's Terms of Reference and the *Memorandum of Understanding concerning oversight of the Ombudsman for Banking Services and Investments* (**MOU**) between the Canadian Securities Administrators (**CSA**) and OBSI, OBSI is required to submit itself to an independent evaluation of its operations and practices for investment-related complaints every five years. The MOU is attached as Appendix "**A**" to this report.

The last independent review of OBSI's investments mandate was in 2016 (the **2016 Review**), and the report prepared by Deborah Battell and Nikki Pender dated May 2016 (the **2016 Report**) is referenced throughout this report. OBSI's investments and banking mandates are being reviewed separately, and this report concerns the investments mandate only, along with broader operational issues, such as OBSI's governance, which cut across both mandates.

Background to the Evaluation

After an RFP process was undertaken, the Board of Directors of OBSI appointed Professor Poonam Puri to be the independent evaluator, a decision accepted by the CSA in consultation with the OBSI Joint Regulators Committee (**JRC**). Assisting Professor Puri is Dina Milivojevic. Bios can be found in Appendix "**B**" to this report.

The evaluation focuses on OBSI's investments mandate. The purpose of the review is to answer the following questions:

1. ***Obligations under the MOU****: Whether OBSI is fulfilling its obligations as outlined in the Memorandum of Understanding (MOU) between the Participating CSA Members and OBSI; and*
2. ***Operational Effectiveness****: Whether any operational, budget and/or procedural changes in OBSI would be desirable in order to improve OBSI's effectiveness in fulfilling the provisions of the MOU and/or recognized best practices for financial services ombudsmen.*

With respect to operational effectiveness, the report is required to set out analyses and conclusions including:

1. *A report on progress towards the recommendations from the previous independent reviews;*
2. *A high-level evaluation of OBSI's operations with reference to its terms of reference, internal policies and procedures, fairness statement, and loss calculation methodologies. A detailed assessment of loss calculation methodologies employed by OBSI is not required;*
3. *A high-level benchmarking exercise that compares OBSI to other financial services ombudsman schemes or equivalent in comparable international jurisdictions both*

operationally and with respect to OBSI's general organizational approaches to matters such as accessibility and transparency;
4. *An analysis of OBSI governance, including particular reference to stakeholder representation on OBSI's board of directors; and*
5. *An analysis of the reasons for settlements below amounts recommended by OBSI.*

The evaluation involves a review of:

1. *investment complaint case files completed between November 1, 2018 and October 31, 2020 (the **Review Period**);*
2. *current operating policies and procedures, including any changes made between November 1, 2015 and October 31, 2020 (the **Five-Year Period**); and*
3. *third party evaluations, financial audits and internal self-assessments completed during the Five-Year Period.*

The independent evaluation Terms of Reference are attached as Appendix "**C**" to this report. As the Terms of Reference have overlapping requirements (between parts (A) the MOU and (B) operational effectiveness) the elements have been combined into one set of factors that we used to assess OBSI. Similarly, developments since the 2016 Review and international comparisons are woven into the general text, although conclusions are drawn in the sections 14 and 15.

Evaluation Process

We undertook four main activities to complete this evaluation: file review, stakeholder and OBSI consultations, desk review and governance review. We summarize each below.

1. ***File Review*** – We reviewed 75 investments files, which were selected randomly and on an anonymized basis, with a proportionate sampling of each different outcome that is possible in OBSI files.

OBSI categorizes its cases based on complexity. We considered files at all three levels of complexity: A (most complex), B (medium complexity) and C (least complex). We reviewed 29 A files, 32 B files and 14 C files. We also reviewed 12 files that went through reconsideration (a process described below).

2. ***Stakeholder and OBSI Consultations*** – We conducted extensive interviews with 27 stakeholders, including banks, industry groups, consumer groups, the Consumer and Investor Advisory Council (**CIAC**) of OBSI, the board and senior leadership of OBSI, staff of OBSI (including investigators), and consumers who have had cases before OBSI. We met with every stakeholder who expressed an interest in meeting with us in connection with this review.

We also received 12 written submissions that were specific to OBSI's investments mandate and four that addressed both OBSI's investments and banking mandates in response to the Request for Comment. We also received research materials, small notes and other helpful materials from numerous individuals and organizations.

3. ***Desk Review*** – We conducted a significant review of OBSI's policies, procedures and other internal materials. These included:

1. policies, procedures and memos pertaining to various topics including accessibility, fee allocation, privacy, enterprise risk management, as well as OBSI's whistleblower policy;

2. training materials for investigators on various topics including suitability, loss calculations, account transfers, apportioning responsibility to a consumer for contributory negligence, fee disclosure, account transfers, etc.;
3. internal reports; and
4. consumer and firm survey reports.

4. ***Governance Review*** – We conducted a governance review of OBSI, including interviews with most of OBSI's directors and management, a review of governance policies and procedures, and consultation with external stakeholders.

Evaluation Framework

This evaluation has been conducted taking the following standards and requirements into account:

1. MOU between the CSA and OBSI;
2. International Network of Financial Services Ombudsman Schemes Network March 2018 *Guide to setting up a Financial Services Ombudsman Scheme* (the **INFO Network Guide**);
3. The World Bank's 2017 *Good Practices for Financial Consumer Protection*;
4. Report produced by David Thomas and Francis Frizon for the World Bank: *Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman*;
5. ISO 10003:2018 *Quality management — Customer satisfaction — Guidelines for dispute resolution external to organizations*; and
6. British and Irish Ombudsman Association: *Guide to Principles of Good Complaint Handling*.

Conclusions

Overall, we found that OBSI met and exceeded its obligations under the MOU. We were impressed by OBSI's handling of cases. In particular, we found that:

1. OBSI dealt with complaints in a timely manner;
2. investigators were able to identify key issues in a complaint and requested additional documents where necessary;
3. investigators were skilled at conducting interviews and assessing credibility;
4. investigators kept the parties apprised of progress in the investigation, were candid with the parties about the merits of the case, and explained their views well and as early as possible;
5. OBSI's reasons were fair, proportionate and explained in plain language; and
6. OBSI's conclusions flowed from the evidence.

That said, we make certain recommendations in this report for improvement as they relate to the six areas above.

As well, we note that OBSI has made significant improvements in its operations since the 2016 Review. During the Five-Year Period, OBSI undertook projects to improve its service delivery, upheld standards of fairness and impartiality and closed investigations in a timely manner. Of particular note, OBSI managed its highest ever case volumes during the COVID-19 pandemic without delays in completing investigations.

As with the 2016 reviewers, we found that OBSI's inability to universally secure redress for consumers through the name and shame system continues to limit its effectiveness, as it provides an economic incentive for both parties to settle for amounts below OBSI's recommendation. As a result, we believe that OBSI should be given authority to render decisions that are binding on the parties to its process. This is consistent with international best practices and would bring more legitimacy to the system.

We also found that there is room to improve the current Protocol for Handling Systemic Issues, as the current system defines "systemic issues" too narrowly and leaves consumers wondering what happens to systemic issues after they are identified.

On the whole, we wish to commend OBSI for its success over the Five-Year Period, and hope that the organization is given the opportunity to live up to its full potential through the granting of binding authority.

1. CONTEXT IN WHICH OBSI OPERATES

OBSI plays a crucial role in the Canadian capital markets, offering its services in both official languages, free of charge to consumers who have complaints against their investment firms. It is a useful alternative to the legal system, providing a quicker and less formal dispute resolution process than traditional civil litigation through the courts.

In assessing OBSI's performance, it is important to keep in mind that OBSI has a *specific* mandate and purpose, and that it is one institution among many in a complex and evolving system. In our discussions with stakeholders, we found that many of the criticisms we heard about OBSI were not based on what OBSI currently is, but what a particular stakeholder thought OBSI should be. The most common example were criticisms against OBSI based on its lack of binding authority. We also heard criticisms about OBSI helping complainants articulate their complaints, even though this is expressly permitted under OBSI's Terms of Reference, and is a fundamental function of a financial services ombudsman. While we understand that different groups may have different ideas about the ideal role of OBSI in the Canadian capital markets, we have assessed OBSI's performance against its current mandate.

Below we briefly summarize OBSI's history, the regulatory framework governing OBSI, its status as a financial services ombudsman and various initiatives to modernize the Canadian capital markets that may have an impact on OBSI and its efficacy in the near future.

1.1 History

OBSI was founded in 1996 as the Canadian Banking Ombudsman. It initially only reviewed complaints by small businesses against nine participating banks. In 1997, OBSI's mandate was expanded to cover unresolved consumer complaints against its participating banks. During this early period, OBSI provided assistance with unresolved complaints relating to banking, securities and insurance for participating banks.

In 2002, all members of the Investment Industry Regulatory Organization of Canada (**IIROC**) (then the Investment Dealers Association of Canada) and the Mutual Fund Dealers Association (**MFDA**) were required to join OBSI, and OBSI's mandate was further expanded to include 450 investment dealers, mutual fund dealers, and investment fund companies. To reflect this expanded mandate, OBSI changed its name from the "Canadian Banking Ombudsman" to the "Ombudsman for Banking Services and Investments". Many federally regulated trust and loan companies, as well as members of the Investment Funds Institute of Canada (**IFIC**), also joined OBSI during this period.

In 2012, the CSA proposed amendments to National Instrument 31-103 (**NI 31-103**) to require all registered dealers and advisors outside of Québec to use OBSI as their dispute resolution service. The amendments took effect in 2014, resulting in OBSI's membership more than doubling, to over 1,400 participating firms.

According to OBSI's annual report for 2020, OBSI had 1,248 participating firms on the investments side, comprised of:

1. 692 portfolio managers (**PMs**);
2. 248 exempt market dealers (**EMDs**);
3. 170 IIROC-regulated dealers;

4. 98 MFDA-regulated dealers;
5. 27 restricted portfolio managers;
6. 6 scholarship plan dealers;
7. 3 restricted dealers;
8. 2 investment fund managers;
9. 1 international dealer; and
10. 1 commodity trading manager.

1.2 Regulatory Framework

NI 31-103 makes OBSI the mandated dispute resolution service provider for all dealers and advisors outside of Québec. This does not mean that consumers are required to use OBSI's services when they have a dispute with their investment firms. It means that investment firms are required to ensure that OBSI's services are made available to their clients, at the firm's expense.

OBSI's securities mandate is governed by the MOU between OBSI and the CSA (an umbrella organization of Canada's provincial and territorial securities regulators). This MOU provides an oversight framework for the CSA and OBSI to cooperate and communicate constructively. The purpose of the oversight framework is to ensure that OBSI continues to meet various standards set by the CSA (including standards with respect to governance, independence, timeliness, fairness and transparency, among others, as described in greater detail throughout this report).

The MOU provides a framework for OBSI to share information with and report to the JRC, which is comprised of:

1. the CSA Designates, being representatives of the Alberta Securities Commission (**ASC**), the British Columbia Securities Commission (**BCSC**), the Ontario Securities Commission (**OSC**) and the Autorité des marchés financiers (**AMF**) or another member or members of the CSA selected from time to time; and
2. the two self-regulatory organizations (**SROs**), IIROC and MFDA.

The JRC provides oversight of OBSI, with a mandate to:

1. facilitate a holistic approach to information sharing;
2. monitor the dispute resolution process to promote investor protection and confidence in the external dispute resolution system;
3. support fairness, accessibility, and effectiveness of the dispute resolution process; and
4. facilitate regular communication and consultation among JRC members and OBSI.

Under the MOU, OBSI's board of directors is required to meet with the JRC at least once a year (or more frequently if requested by the CSA Designates) to discuss matters such as operating issues, governance and OBSI's effectiveness. In addition to the annual meetings with OBSI's board, the JRC meets with Sarah Bradley, the Ombudsman and Chief Executive Officer of OBSI, as well as other members of OBSI's staff, on a quarterly basis.

OBSI is also governed by its Terms of Reference, which outline the scope of its mandate, describe the principal powers and duties of OBSI, the duties of participating firms and OBSI's process for receiving, investigating and seeking resolution of customer complaints about their financial services firm. The Terms of Reference are an internal document prepared by OBSI. In 2018, OBSI updated the Terms of Reference with the assistance of an expert consultant and following a public consultation. OBSI's Terms of Reference are attached as Appendix "**D**" to this report.

1.3 What is OBSI?

1.3.1 OBSI's Status as a Financial Services Ombudsman

OBSI is the exclusive ombudsman providing dispute resolution services to Canadians with complaints against their investment firms. Section 1.1 of OBSI's Terms of Reference describes OBSI's purpose as follows:

> *OBSI seeks to resolve disputes between participating financial services firms and their customers if they are unable to resolve them on their own. OBSI is independent and impartial, operates in the public interest, and its services are free and accessible to consumers without the need for legal representation. As an alternative to the legal system, OBSI works efficiently and confidentially to find a fair outcome through a fair process.*

OBSI's current model as a flexible, independent and free dispute resolution service is incredibly valuable to the Canadian capital markets. Although some stakeholders disagreed about what OBSI's specific mandate should be, they overwhelmingly took the position that OBSI plays an important and essential role in the Canadian capital markets.

In addition to providing dispute resolution services to Canadians with complaints against their investment firms, OBSI also plays an important public interest role. Among other things, OBSI:

1. strengthens public awareness and ensures consumers have easy access to information about OBSI when they have a problem;
2. shares information and provides thought leadership on current issues, including through consumer and stakeholder engagement, a focus on financial literacy and publishing consumer bulletins on its website. For example, OBSI recently published consumer bulletins on the increased use of cryptocurrency scams and the risks of DIY investing; and
3. advances regulatory and policy changes that improve consumers' access to effective financial ombudsman services in Canada. For example, OBSI recently responded to the Financial Consumer Agency of Canada's (**FCAC**) request for comments on Strengthening Canada's External Complaint Handling System. In it, OBSI advocated for itself to be given binding authority to improve the public perception of its non-binding mandate as toothless.

1.3.2 OBSI is not a Court, a Regulator or an SRO

As stated above, OBSI is one institution among many in a complex and evolving system. Rather than filing a claim with OBSI, consumers have the option to seek legal redress through the courts. This is often a time-consuming and expensive process which requires the assistance of legal counsel to navigate. Many consumers in the files we reviewed lost relatively small amounts which would not be worth the cost of hiring legal counsel or even paying the costs associated with commencing a claim in Small Claims Court. The fact that OBSI is different from a court is what makes it valuable to the system. If OBSI's processes become overly formal, then consumers, investment firms, regulators and the system as a whole will lose what they value in OBSI – access to justice, increased investor confidence and access to information provided by a financial ombudsman service.

During our stakeholder discussions, we heard from a range of stakeholders that OBSI should adopt more robust processes. We heard suggestions for a range of process changes, including an external appeals process, cross-examination of parties, the addition of expert reports and discovery, among others. Though this term was not necessarily used, we see these process

changes as making OBSI more "court-like". Industry-oriented stakeholders tended to discuss these changes in the context of binding authority, arguing that firms would need more confidence in OBSI if binding authority were granted, and therefore more robust processes would be needed.

Certain individual suggestions for particular process changes have merit. We address possible reforms to the system, both in the event that binding authority is or is not granted by the regulators, throughout this report. Overall, however, we caution against reforms which take OBSI away from what it was designed to be. Reforms which make OBSI overly complex, overly legalistic and overly burdensome for consumers will only detract from the existing benefits of OBSI to the system.

Indeed, it is a fundamental tenet of financial ombudsmanship that consumers should have access to a quick and informal procedure without being obliged to use a legal representative. This leads to greater consumer confidence in the financial system. It also benefits firms and banks because consumers are more likely to buy financial products, the cost of resolving disputes with consumers is kept to a minimum, and unscrupulous competitors who act inappropriately are held to account. Finally, the state benefits because redress can be provided at a minimum cost and feedback from the ombudsman can help improve future regulation.[1] As a result, we believe that OBSI should continue to be free and convenient for consumers.

It is also important to underscore that OBSI serves a distinct role from the provincial and territorial securities regulators and the SROs. Although OBSI performs certain functions to assist the regulators and SROs (such as reporting on trends in complaints received), OBSI is ultimately not responsible for regulating the securities markets in Canada. That is the job of:

1. the various provincial and territorial securities regulators, which regulate the provincial and territorial capital markets;
2. IIROC, which regulates investment dealers in Canada;[2] and
3. MFDA, which regulates mutual fund dealers in Canada.[3]

Consumers whose firms are regulated by IIROC have an alternative process – IIROC's binding arbitration process – available to them. The process is distinct from OBSI's dispute resolution process in that, among other things:

1. IIROC's arbitration process is binding and has a $500,000 award limit, while OBSI's process is not binding and has a $350,000 recommendation limit;
2. IIROC's arbitration process is not free to the consumer, while OBSI's process is; and
3. IIROC's arbitration process is more formal and court-like than OBSI's process, involving more procedural components and an actual arbitration hearing where both parties, their counsel and any witnesses are present and make legal submissions. OBSI's process is described in greater detail in section 3.1 below.

[1] Report produced by David Thomas and Francis Frizon for the World Bank: *Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman*, pg. 11, available at https://documents1.worldbank.org/curated/en/169791468233091885/pdf/699160v10ESW0P0en0Vol10Fundamentals.pdf.

[2] IIROC FAQ, available at https://www.iiroc.ca/about-iiroc/iiroc-faq#:~:text=back%20to%20top-,What%20does%20IIROC%20regulate%3F,wish%20to%20operate%20in%20Canada.

[3] MFDA – Opening Your Investment Account, available at https://mfda.ca/wp-content/uploads/ClientInfoSheet.pdf.

We understand that IIROC's arbitration process is seldom used. In 2020, for example, no new cases were opened and two cases were resolved through IIROC's arbitration process.

Consumers from Québec have available to them AMF's free (for the consumer) but voluntary (for both the firm and investor) mediation process. However, the parties can only proceed to mediation if it is recommended by the AMF after a review/investigation.

Only OBSI offers free dispute resolution where the firm is required to fully cooperate and participate. However, it is not within OBSI's mandate to impose regulatory sanctions (such as revoking a firm's licence or imposing a regulatory fine). It is similarly not within OBSI's jurisdiction to give itself binding decision-making authority, or to make other significant changes to its mandate. Those decisions must be made by the regulators that oversee OBSI and give it standing by mandating firms to participate in its service.

1.3.3 Concurring Complaints

A couple of stakeholders commented that there can be a number of overlapping and somewhat duplicative opportunities for an investor to make a complaint. For example, an investor can lodge concurrent complaints with OBSI, the relevant regulator or SRO, and the court. These stakeholders argue that this is unfair, because the firm has to spend time and money responding to all of these complaints.

Under OBSI's Terms of Reference, one of the preconditions for OBSI's involvement in a complaint is that OBSI must be satisfied that the complainant is not pursuing concurrent proceedings in any court or arbitration tribunal to adjudicate the subject matter of the complaint. Sections 5.7 and 5.8 of OBSI's Terms of Reference provide that OBSI will not automatically consider a regulatory proceeding, hearing or mediation to be a concurrent proceeding, nor does it automatically consider a class proceeding to be a concurrent proceeding unless the complainant is a representative plaintiff rather than a member of the class. Section 6.3 of OBSI's Terms of Reference provide it with discretion on this point.

We consider these provisions to appropriately balance the rights of investors and financial services firms. Many self-regulatory disciplinary hearings involve firms or advisors that are the subject of complaints brought to OBSI. However, the primary purpose of those hearings is not to provide compensation to the affected investors – it is to impose the appropriate regulatory sanctions focused on deterrence. As a result, we do not consider concurrent regulatory proceedings to improperly overlap with OBSI's process, which aims to make the consumer whole, where appropriate.

With respect to class action proceedings, we note that being a member of a class does not require a complainant to actively pursue litigation. In addition, class action lawsuits are not guaranteed to be certified, and typically take years to resolve with class members eventually receiving cents on the dollar.

OBSI's current, non-binding process is designed to not limit the rights of complainants to pursue legal action if they do not agree with OBSI's final decision. At the same time, concurrent proceedings are not appropriate. We consider OBSI's Terms of Reference to deal with these situations in an appropriate and fair manner.

1.4 Related Reviews and Initiatives to Modernize the Canadian Capital Markets

Previous independent reviews of OBSI's investments mandate occurred in 2007, 2011 (the **2011 Review**) and 2016. In addition, various related reviews and initiatives to modernize the Canadian capital markets are currently underway. Certain of these initiatives which have the potential to impact OBSI are described below.

1.4.1 Previous Independent Reviews

The 2011 Review told two stories, one of successful internal progress and development, and one of a "storm of criticism" externally from stakeholders.

The 2016 Review largely told the story of OBSI's improvement from the 2011 Review, and made recommendations to allow OBSI to become a fully-fledged ombuds service in line with international standards. Chief among these recommendations was that OBSI be enabled to secure redress for customers, preferably by empowering OBSI to make awards that are binding on the firm, and on the customer if they accept the award, accompanied by an internal review process.

The 2016 Review made various other strategic recommendations aimed at increasing OBSI's strategic approach to ombudsmanship and its public policy function. Among other things, the reviewers recommended that OBSI use the intelligence gained from cases to provide additional services to participating firms and guidance to customers, and include a public policy function within its stakeholder relations team to prepare formal submissions on relevant regulatory or legislative proposals or requests for comment.

1.4.2 Capital Markets Modernization Taskforce

In Ontario, the Capital Markets Modernization Taskforce (the **Taskforce**) was established in February 2020 to review and make recommendations to modernize Ontario's capital markets regulation. The Taskforce released its report in January 2021 and concluded (at page 105) that "[a] binding, reputable and efficient [dispute resolution service] framework in Ontario would be a significant improvement to the retail investor protection framework." The Taskforce recommended that the OSC be given the statutory authority to designate a dispute resolution service with binding powers, and that the OSC either:

1. create a made-in-Ontario solution with the power to issue binding decisions; or
2. improve OBSI by imposing requirements to further enhance OBSI's governance structure, public transparency, and professionalism, as a condition for being given binding authority.

The Taskforce also recommended (at page 106) that the compensation limit for either option be $500,000. OBSI submitted a public response to welcome the recommendations of the Taskforce that it be given binding authority and that the limit for compensation be increased, and committed to working with securities regulators towards these goals.

In October 2021, the Ontario Government published the consultation draft of the *Capital Markets Act*. The proposed legislation does not give the OSC the authority to designate a dispute resolution service with binding authority, or address OBSI at all.

1.4.3 CSA Initiatives

The JRC stated in its Annual Report for 2020 that the CSA had "renewed its focus on strengthening OBSI as an independent dispute resolution service in order to secure fair, efficient and conclusive redress for investor losses where warranted." In this regard, a CSA working group is pursuing a project to strengthen OBSI's power to secure redress. The working group has worked towards developing, among other things, the legal and regulatory frameworks necessary to make OBSI decisions binding and the potential need for an appeal mechanism. OBSI was invited to join many of the working group's meetings to provide information and context.

1.4.4 Financial Consumer Agency of Canada Review and Concurrent Reviews of OBSI Banking/ADRBO

The FCAC, which oversees OBSI's banking mandate, conducted a review in 2018/2019 and published its report titled *Industry Review: The Operations of External Complaints Bodies* in 2020 (the **FCAC Report**). The review considered the complaint handling and effectiveness of both OBSI's banking mandate and ADRBO. It consisted of many of the same steps we have undertaken, including file review, desk review and interviews. Overall, the FCAC review found that OBSI met and even exceeded most requirements, having adopted international best practices for external dispute resolution services. FCAC noted that there was "room for improvement" in some areas including timeliness, in particular with respect to the transfer of information about complaints from banks to OBSI.

In addition, as mentioned above, we are conducting concurrent reviews of ADRBO and OBSI's banking mandate. The resulting reports will be released separately from this report by OBSI and ADRBO, respectively.

1.4.5 Department of Finance Consultation on Strengthening Canada's External Complaints Handling System

In July 2021, the Department of Finance announced its consultation on Canada's external complaints handling system. The review considered ADRBO and OBSI's banking mandate, as well as the findings of the FCAC Report. The consultation closed in October 2021. The Department of Finance has advised that it will analyze the feedback collected and will consider how to further strengthen the external complaint handling system in banking.

1.4.6 New SRO Framework

On August 3, 2021, the CSA announced plans to combine IIROC and MFDA into one SRO to oversee both investment and mutual fund dealers. In the CSA's Position Paper 25-404 *New Self-Regulatory Organization Framework*, the CSA lists (at pages 2-3) various objectives for combining the two SROs, with some of the primary goals being to enhance investor protection, increase efficiency and reduce industry costs.

In the Position Paper, the CSA sets out (at pages 25-26) various opportunities for leveraging ongoing related projects, including the CSA OBSI Working Group's continuing efforts to make OBSI decisions binding and to assess the need for an appeal or review mechanism. The CSA also encourages the JRC, as part of its oversight role for OBSI, to review:

1. the merits of (i) restricting the scope of matters the member firm's internal ombudsperson can address, as well as (ii) educating investors on their ability to access OBSI's services without using an internal member firm ombudsperson; and
2. OBSI complaint data to assess if the new SRO should include "complaint handling" as a separate category in the new SRO's complaint reporting system to better identify when clients are dissatisfied with a member firm's complaint handling process.

To summarize, the Canadian financial markets are in a state of flux. Any of these initiatives to modernize the system has the potential to impact OBSI and its effectiveness in the future.

1.4.7 CSA / IIROC / MFDA Joint Notice

On December 7, 2017, the CSA, IIROC and MFDA released a joint notice,[4] which was reissued on October 14, 2021 under GN-3700-21-003 as part of IIROC's Guidance Notices update, regarding some registered firms' complaint handling systems and participation in OBSI's process. Among other things, the notice advised that some use an "internal ombudsman" as part of their complaint handling system. In some cases, the regulators observed that clients were not being given the clear option of using OBSI's services in the timeframes contemplated by NI 31-103 and applicable SRO rules, with the effect that they were being diverted to an internal ombudsman while the time limits for submitting the complaint to OBSI or commencing a civil action continue to run.

[4] Canadian Securities Administrators and the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada Joint Notice dated October 14, 2021, available at https://www.iiroc.ca/news-and-publications/notices-and-guidance/canadian-securities-administrators-and-investment-industry-regulatory-organization-canada-and-mutual-0.

2. GOVERNANCE REVIEW

OBSI's governance structure should provide for fair and meaningful representation on its Board of Directors and board committees of different stakeholders, promote accountability of the Ombudsman, and allow OBSI to manage conflicts of interest.

MOU, s. 3(a)

We conducted a governance review of OBSI, including interviews with most of OBSI's directors, a review of governance policies and procedures, and consultation with external stakeholders. This section of the report contains our findings, as well as recommendations for improvement.

Overall, we found that the board demonstrated strong adherence to principles of good governance. In particular, we found that the board was characterized by strong decision-making processes, robust director nomination and board evaluation policies, demonstrable success on diversity, effective oversight of management, and active management of conflicts of interest.

One area that yielded considerable discussion was the relationship between OBSI and CIAC. Another was how to best provide fair and meaningful representation of different stakeholder views on the board. Both of these issues are described in further detail below. We have also made recommendations about the composition of OBSI's board. Overall, we are of the view that OBSI should move away from having certain board members nominated by a particular SRO or industry group, and should instead focus on amending its skills matrix to include relevant experience with the industry sectors and stakeholder groups OBSI serves. This focus on appointing individuals with the skills necessary to properly fulfill their role as directors, rather than "representatives" to voice the concerns of a particular group, is in line with governance best practices.

2.1 Size, Composition and Representation on the Board

At the completion of our review, the board sits at ten members, with outgoing Chair Jim Emmerton having recently left the board, and new Chair Maureen Jensen having recently joined. There are three industry directors (being each of the MFDA, Canadian Bankers Association (**CBA**) and IIROC nominees) and seven community directors, one of whom is the Consumer Interest Director. The Consumer Interest Director position was added to the board in 2020, in part in response to a recommendation from the 2016 Review.

The 2016 Review (which included an analysis of the board) noted that, at ten directors, "[t]he governance structure appears large." We asked directors about the size of the board and found that there were no concerns. Despite being relatively large, there was a sense that the board functioned well and that a reduction of its size was unnecessary. We agree. In particular, we heard comments that, with two committees (Audit & Finance and Governance & Human Resources) traditionally split five/five or six/four among the directors, the work allocation is appropriate. Moreover, we heard that a larger-sized board allows for diversity (and in particular geographical diversity).

2.1.1 Director Recruitment and Nomination Process

OBSI's board maintains a comprehensive and robust Director Recruitment Policy. The document contains a diversity statement and sets out the diversity metrics by which a candidate will be considered: skills/experience, geography, gender, and community, consumer and social engagement. We would recommend that the board consider adding other metrics in their diversity deliberations, including indigenous ancestry, membership in a visible minority community and disability. This is in line with emerging best practices and is, for example, the standard set for federally-incorporated businesses under the *Canada Business Corporations Act*.

The Governance & Human Resources Committee of the board leads the recruitment process. Community director nominees are solicited from current board members and through public advertisements. The board's skills needs and diversity considerations are key to the selection process. For the industry directors, the Committee contacts the relevant membership body, which then sends names of candidates for consideration. For the Consumer Interest Director, the policy states that the Committee consults with consumer advocacy groups to create a short-list. CIAC is consulted during the recruitment process for the Consumer Interest Director.

2.1.2 Representation of Stakeholders

The Request for Proposals requested an analysis of whether the OBSI board had fair and meaningful representation of its stakeholders.

Typically, there are ten directors on OBSI's board. Three of these ten are industry directors nominated by MFDA, IIROC and CBA respectively. One is a Consumer Interest Director (a role which, as described below, was formally added to the board in 2020). The rest are 'community/independent' directors. Community directors who have worked in industry have a two-year cooling off period before serving as directors. Regardless of their area of expertise, each director acts honestly and in good faith with a view to the best interests of OBSI and exercises the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, as per section 6.2(a) of OBSI's corporate by-laws and the board's Charter of Expectations.

Members of the board felt that OBSI's governance structure adequately represented the organization's stakeholders. During our external consultations, we received suggestions for reforms to the board. We address some of those below.

2.1.3 Industry Representation

We heard from some industry representatives that OBSI lacked representation on its board from all the industries/sectors that participate in OBSI's service. Specifically, we heard that the board lacks representation of EMDs and PMs, and that, absent these voices, OBSI is not receiving the full breadth of required industry insights.

OBSI has approximately 692 PM participating firms and approximately 248 EMD participating firms. This is more than the number of IIROC-regulated dealers (approximately 170) and MFDA-regulated dealers (approximately 98), who each already have a representative on OBSI's board. However, PMs and EMDs represent a small fraction by amount of assets, number of clients, or number of registered individuals compared to IIROC- and MFDA-regulated dealers (there are over 100,000 registered IIROC and MFDA representatives, compared to approximately 5,500

EMD and PM representatives in Canada). Because of this, EMDs and PMs have relatively low complaint volumes and pay a very small proportion of OBSI's annual fees.

We were asked to consider recommending that an EMD/PM representative be formally added to OBSI's board. We are instead recommending that OBSI consider: (1) amending its skills matrix to include relevant experience in one or more of the industry sectors; and (2) amending its by-laws to remove the requirement that the three industry directors be nominated by IIROC, MFDA and CBA, respectively, and instead seeking nominations for the industry directors from industry stakeholders and through public advertisements. The industry directors should be selected on the basis of their skills and experience in one or more of the industry sectors that OBSI serves.

We believe this would be preferable to the current approach, as it would leave open the idea of rotation of board participation among all the different sectors. We also think this recommendation makes sense in light of the upcoming combination of IIROC and MFDA into one SRO responsible for overseeing both investment and mutual fund dealers, among others. Finally, this focus on appointing individuals with the skills necessary to properly fulfill their role as directors, rather than "representatives" to voice the concerns of a particular group, is in line with governance best practices.

We also believe that OBSI's board should consider engaging in annual industry roundtables with EMDs, PMs and others to help provide for a detailed and meaningful dialogue between OBSI and its participating firms. OBSI can use these roundtables as opportunities to get qualitative feedback from participating firms that is specific to their business. For example, a roundtable with EMDs may elicit different feedback than one with MFDA members.

2.1.4 Consumer Representation

In our discussions with consumer groups, we heard that the board lacked adequate consumer representation. In the 2016 Review, it was recommended that OBSI add a consumer representative on the board, and one was added in 2020. The addition of the Consumer Interest Director was generally accepted as a good step and an effective position for the board, including by board members themselves. The current Consumer Interest Director, Wanda Morris, is a former member of CIAC, though this is not required for the position.

OBSI's board has always considered hearing the consumer voice to be very important. Even prior to the formal creation of the Consumer Interest Director role, OBSI's board always had one or two directors who had previously served on CIAC (most recently Jim Emmerton and Laura Tamblyn Watts), despite the absence of a formal Consumer Interest Director role.

In our review, we considered whether there should be three Consumer Interest Directors on the board, matching three-for-three between industry directors and consumer directors. Consumer advocates generally thought this would balance the board, which they considered industry-heavy. On the other hand, we heard that the matching three-for-three could risk creating partisan "camps", which would go against the current comity on the board, where most decisions are made by consensus after thoughtful deliberation and directors take views generally with the best interests of OBSI, not individual stakeholder groups, into account.

As outlined above, we believe that OBSI should transition towards having a board with no specific categorical requirements regarding the number of industry and community directors, and that appointments should be made solely on the basis of the amended board skills matrix. OBSI should consider whether appointing board members solely on the basis of the amended skills matrix

could provide for fair and meaningful representation on its board and committees of different stakeholders. It is crucial for OBSI's board to have clear lines of sight into issues and perspectives relevant to all of its stakeholders. Although industry and consumer stakeholders often have very different perspectives, they all have the same interest in efficient dispute resolution and an effective and trusted financial services sector.

We believe that a system that bases its appointments on the amended skills matrix is the best way to achieve this. This type of system would emphasize the importance of OBSI's impartiality and independence (and its perceived impartiality and independence among stakeholders), and would remove any inference that directors might use their position to represent a particular stakeholder group. This type of system would also have the benefit of allowing for more flexibility in appointments, depending on OBSI's needs at a given time.

We also believe that OBSI's board should consider engaging in annual roundtables with consumers and investors to help the board receive input and perspectives from these stakeholders in an effective manner.

2.1.5 CIAC

CIAC was formed in 2010 with a mandate to provide OBSI's board with the perspectives of consumers and advise on governance and operational matters with a consumers' lens. CIAC proactively raises issues with OBSI, alerting leadership to the challenges that consumers face in using the services of OBSI members and in dealing with OBSI itself. It also provides expert advice on a range of relevant topics, including social policy, equality and accessibility matters and client experience issues.

Members are appointed from across Canada. The 2020 call for applications requested candidates with interest and experience in consumer advocacy. Candidates apply to CIAC through the Governance & Human Rights Committee of OBSI's board. CIAC meets at least quarterly. During the Five-Year Period, CIAC had significant accomplishments, including:

1. working with the OBSI board to appoint OBSI's first formal Consumer Interest Director;
2. providing commentary on a range of policies and procedures, including OBSI's statement for investigation timeliness standards;
3. contributing to OBSI's response to the Capital Markets Modernization Taskforce consultation and OBSI's Seniors Report, among other projects;
4. recommending improvements to OBSI's website, published materials and its communication of loss calculations; and
5. reviewing OBSI's complaints process.

In addition, CIAC participates in the board's annual strategic planning process.

CIAC is governed by a Statement of Expectations, most recently approved by the board in 2019. Much of the Statement of Expectations is procedural and uncontroversial, but there is a section which came up in our consultations that is of note.

> ***Right to an Independent Opinion*** *– As CIAC is an advisory body to the Board of Directors of OBSI, it is expected that any formal reports or position papers produced by CIAC will be provided to the Board for consideration, action and publication as the Board sees fit. Any materials developed by the CIAC for the Board will remain confidential. Material that is identified for publication will be*

reviewed and approved by the CIAC Liaison, the Ombudsman and CEO, and the Board Chair. Nevertheless, it is recognized and acknowledged that members of CIAC may be activists with a right to a personal voice, provided that members will not use any confidential information or information obtained solely as a result of their membership on CIAC in the expression of their personal opinions and positions.

During our conversation with CIAC, it became clear that they wish to have a stronger, more independent voice. We took this to mean that they wish to be more like the Ontario Securities Commission's Investor Advisory Panel (the **OSC's IAP**), which is operationally independent from the OSC and engages in broader and more public advocacy as a result.

We heard from other stakeholders that the OSC's IAP itself can effectively advocate for issues that CIAC would wish to advocate for. These stakeholders argue that CIAC was not designed as an IAP-style body but is purely a board advisory committee.

In seeking more authority and independence, CIAC faces two main design challenges. The first, as mentioned above, is that it is constituted as an advisory committee. The second is that OBSI is not a regulator. The OSC's IAP has a robust mandate in part because it is borne of a regulatory body which has rule-making power, compliance power and enforcement power, all infused with public interest jurisdiction. OBSI status as a financial services ombudsman is more limited in scope, and therefore CIAC's status as an advisory committee to OBSI is more limited in scope.

It is clear from our meetings that the relationship between OBSI and CIAC needs to be clarified. We believe the biggest issue between OBSI's board and CIAC is that they have different views about the role that OBSI should take in the Canadian capital markets. Specifically, it appears that CIAC wants OBSI to act as more of a consumer advocate, and OBSI's board does not feel that it is appropriate for OBSI to do so given its mandate. In addition, we heard that CIAC is not using its time with OBSI's board in a constructive way, raising the same issues (such as OBSI's lack of binding authority) repeatedly at multiple meetings. This had led to an impasse in communications between OBSI's board and CIAC, and has limited the efficacy of CIAC more generally.

CIAC's purpose is to assist OBSI's board, and it serves at the discretion of OBSI's board. We believe that CIAC could provide more value to OBSI's board if the parties' respective roles and responsibilities were clarified in the Statement of Expectations. Specifically, the Statement of Expectations should more clearly set out CIAC's role as an advisory committee and expressly state that OBSI's board is not required to accept a recommendation made by CIAC. OBSI's board and CIAC could also work together to define the role CIAC will play at OBSI's board meetings, and should consider formalizing the arrangement. For example, CIAC could present to the OBSI board on a particular consumer issue at every other board meeting. Setting out this level of detail in the Statement of Expectations may allow both OBSI's board and CIAC to have a common understanding about their respective roles and responsibilities, and may improve the communications between the parties and the value that CIAC ultimately provides to OBSI.

However, it is ultimately up to OBSI's board to determine whether CIAC is serving its purpose in assisting the board, and whether its continued existence is required for the OBSI board to adequately and effectively understand the views of consumers and investors, particularly if OBSI chooses to implement the updated governance structure recommended below.

Recommendation

OBSI's board should undertake a strategic review of its governance structure to determine how best to ensure that key stakeholder interests are most effectively considered in board oversight and decision-making.

In particular, OBSI's board should:

- add other metrics to the Governance & Human Resources Committee's diversity deliberations for recruitment purposes, including indigenous ancestry, membership in a visible minority community and disability;
- transition towards having a board with no specific categorical requirements regarding the number of industry and community directors and amend its bylaws to remove the requirement that industry directors be nominated by IIROC, MFDA and CBA, respectively;
- amend and update its skills matrix and use it as the basis for recruitment to ensure that directors have the skills and competencies needed to effectively oversee OBSI. The skills matrix should include experience in the range of relevant industry sectors discussed in this section, as well as important consumer and investor perspectives; geographic and linguistic diversity; and a diversity of backgrounds should also be explicitly accounted for;
- establish roundtables with industry and consumers, including advocacy groups for both, to receive their perspectives and opinions on key issues of importance to OBSI and current developments and trends; and
- in light of the above, carefully consider whether it is necessary or desirable to continue having a CIAC, given that the recommended governance structure described above would see an OBSI board that has balance in industry and investor backgrounds and where the OBSI board would receive input from industry and consumer stakeholders through other means.

2.2 Holding the CEO & Ombudsman Accountable

One of the board's primary responsibilities is to hold the CEO & Ombudsman and the senior management team accountable. Based on our interviews with directors, we found that the oversight process was robust. The board conducts quarterly reviews of the CEO & Ombudsman and has frank discussions with her on a quarterly basis to discern her views on how the organization is operating and to share the views of directors as to the same. The CEO & Ombudsman provides detailed written reports to the board covering a range of topics related to the operational performance of the organization. We have reviewed a representative sample of these reports and found them to be thorough and comprehensive.

We note that the board was complimentary of the performance of the incumbent CEO & Ombudsman and her leadership team.

2.3 Board Structure and Process

2.3.1 Committee Structure

We heard from directors that the board's structure served the interests of good governance for the organization. As mentioned above, the board has two committees: Finance & Audit and Governance & Human Resources.

2.3.2 Decision-making

Directors felt that the board generally functioned well and that it was effectively discharging its responsibilities. The chair of the board makes efforts to ensure all directors have their voice heard. The board does take votes, but it has a consensus-based decision-making process, where directors discuss issues, provide their views and typically come to a consensus about a decision. This is not atypical for boards of directors in a wide range of organizations. The quality of decision-making was no doubt aided by a strong attendance record. Between 2017 and 2020, there were only three instances of a director missing a board meeting.

2.3.3 Addressing Conflicts of Interest

Consumer groups raised conflict of interest concerns with industry directors, specifically when their former or current employers are engaged in files with OBSI. It was noted by CIAC that some directors might receive pensions from OBSI member firms and banks.

Each year, OBSI's directors sign an acknowledgment of OBSI's director code of conduct, which addresses how to deal with conflicts of interest. Directors who declare a conflict are permitted to present their views and are then asked to leave the boardroom for the rest of the board to discuss and decide on the matter.

In the Director Recruitment Policy, OBSI stipulates that no more than one industry director can be a director, officer or employee of a particular financial services provider or affiliate. We are of the view that OBSI actively and appropriately handles conflicts of interest.

3. FILE REVIEW

As mentioned above, we reviewed 75 randomly selected files as part of this independent evaluation. Many of our observations are woven into this report (for example, detailed discussions around timeliness are found in section 6.1 below). This section contains overall conclusions and some specific observations. We also provide a brief overview of OBSI's complaint-handling process, as outlined in its Terms of Reference and its Code of Practice, which is available on its website. We used these documents as guidelines in assessing OBSI's performance.

We reviewed 75 investments files, which were selected randomly and on an anonymized basis, with a proportionate sampling of each different outcome that is possible in OBSI files. The breakdown is reflected in the table below.

Table 1: Breakdown of Investments Files Reviewed

Case dismissed—out of mandate (general)	5
Case dismissed—out of mandate (6-year limitation period)	5
Case dismissed—general	25
Investigation terminated—client failed to respond	1
Investigation terminated—client voluntarily withdrew	5
Settlement—before investigation	5
Settlement—non-monetary	5
Settlement or recommendation—equal to or less than initial firm offer	9
Settlement or recommendation—greater than initially offered by firm	5
Settlement or recommendation—no offer initially made by firm	8
Recommendation—firm denied	2

OBSI categorizes its cases based on complexity. We considered files at all three levels of complexity: A (most complex), B (medium complexity) and C (least complex). We reviewed 29 A files, 32 B files and 14 C files. We also reviewed 12 files that went through reconsideration (a process explored below).

3.1 OBSI's Complaint-Handling Process

3.1.1 Intake

Consumers can submit complaints to OBSI through its website, by email or by telephone. When a consumer contacts OBSI with an unresolved complaint about a firm, the complaint goes through OBSI's intake process. During the intake process, a case assessment officer (who is different from the investigator who ultimately investigates the claim, if it is determined to be within OBSI's mandate) determines whether the complaint is within or outside of OBSI's mandate. In determining whether a complaint is within OBSI's mandate, the case assessment officer will confirm, among other things, that:

1. one of the following has happened: (1) 90 days have passed since the consumer complained to the firm and the firm has not provided a final response; or (2) the firm has provided a final response and the consumer is dissatisfied with that response;
2. the consumer has not waited more than 180 days to escalate the complaint to OBSI after receiving a final written response from the firm;
3. the complaint is against a participating firm and pertains to the provision of a financial service;
4. the complaint has been made within OBSI's six-year limitation period;
5. the consumer has not commenced concurrent legal proceedings, or the parties have not already entered into a settlement; and
6. the complaint does not materially relate to a firm's risk management policies and practices, as OBSI does not provide recommendations on these matters.

If the complaint is determined to be out of mandate, the consumer is informed of the reasons why. If the complaint is determined to be in mandate, the consumer is asked to provide a signed consent form and documents relevant to the claim. A request is also made of the firm to provide all of its relevant documentation, including the closing letter it sent to the consumer.

Often, OBSI needs to review the relevant documents in order to determine whether a complaint is within OBSI's mandate (for example, where documentation is required to determine whether the complaint was made within OBSI's six-year limitation period). In these cases, the document request precedes the out of mandate determination.

If a complaint is assessed as being out of mandate, written notice is sent to the consumer within 30 days of OBSI receiving all information relevant to assessing the complaint. If a complaint is determined to be within OBSI's mandate, or if the mandate question requires investigation before it can be determined, the complaint is assigned to an investigator. Almost all of OBSI's investigators have expertise in complaint-handling across multiple sectors. However, to the extent possible, OBSI tries to assign cases to investigators based on their particular backgrounds and areas of expertise.

3.1.2 Investigation

During the investigation stage, among other things, the investigator reviews the documents received from the parties, interviews the parties on a one-on-one basis, conducts research and analysis, has further discussions with parties and completes loss calculations. All of this is done under the supervision of a manager, who is kept apprised of and provides guidance on the issues engaged by the claim, the investigator's plan for investigating the claim and the investigator's ultimate conclusions regarding liability and quantum of compensation.

If the investigator, in consultation with the manager on the file, determines that compensation is not warranted, the investigator informs the client and the firm of the decision via a closing letter setting out the reasons why and the case is closed.

If the investigator, in consultation with the manager on the file, determines that compensation is warranted, the process moves onto the facilitated settlement / recommendation stage.

3.1.3 Facilitated Settlement / Recommendation

During this stage, various outcomes are possible:

1. if the firm and the consumer agree on the amount of compensation owed to the consumer, the case is closed without OBSI sending an investigation report;
2. if the firm and the consumer do not agree on the amount of compensation owed to the consumer, an investigation report is drafted and peer reviewed. The investigator provides a draft investigation report to both parties for their comment. The investigator, in consultation with the manager on the file, considers whether any of the parties' comments affect his or her initial conclusions, and finalizes the investigation report providing OBSI's compensation recommendation;
3. if the firm and the consumer accept the recommendation, the case is closed;
4. if the consumer does not accept the recommendation, the consumer can continue to pursue the complaint through OBSI's reconsideration process and/or other forums (*e.g.*, formal litigation); and
5. if the firm does not accept the recommendation, OBSI publicizes the name of the firm, the investigation findings and the outcome of the case.

Nearly all investments complaints where compensation is recommended are currently resolved through the facilitated settlement process that takes place in advance of the final recommendation.

OBSI strives to (and does in fact) close most investments cases within 90 days from the date that OBSI has all of the information required to investigate the complaint and the case is assigned to an investigator. It closes almost all investment cases within 120 days from this date.

3.1.4 Reconsideration

If a consumer is dissatisfied with OBSI's decision, the consumer can request a reconsideration of the decision within 30 days from the date of the closing letter. Where a consumer requests reconsideration, one of OBSI's five reconsideration officers will:

1. acknowledge receipt of the reconsideration request within five business days;
2. review the information provided by the consumer and, if necessary, contact the consumer to obtain further information; and
3. inform the consumer of the final decision and explain the reasons in writing within 45 days of being assigned the request.

Reconsideration officers are all senior investigators with expertise in OBSI's processes, and have not had any prior involvement in the file. Generally, OBSI only changes its original decision if:

1. the reconsideration officer finds that the investigator overlooked material information, failed to address material issues raised by the consumer, or made a material error in analyzing information; or
2. OBSI receives previously unavailable information that would lead it to make a different recommendation.

3.2 File Review Observations

3.2.1 File Review Process and Overall Observations

OBSI provided us with 75 anonymized, randomized investment files. For each file, we reviewed extensive documentation, including all the documentation provided by the consumer and the investment firm to OBSI. These included, for example, the consumer's initial complaint to the firm and their complaint to OBSI, the firm's response to the consumer's complaint and know your client (KYC) documentation, among others. We also reviewed OBSI's internal investigation documents, including investigation plans, interview notes, correspondence with the parties and closing letters. To the extent that we had questions, we were able to ask OBSI's CEO and management for clarification.

Since OBSI receives a higher number of "suitability" complaints than any other investment complaints each year, we reviewed a majority of suitability files. Suitability complaints are defined as those where investors complain that they received poor advice, their investments or investment strategies were unsuitable and/or that their investments did not perform as they expected. We also reviewed a smaller number of service complaints and complaints that a firm misrepresented or provided inaccurate disclosure about a product, among others.

Based on our file review, we concluded that OBSI followed good processes. Subject to certain recommendations for improvement made in this report, we found that:

1. OBSI dealt with complaints in a timely manner;
2. investigators were able to identify key issues in a complaint;
3. investigators were skilled at conducting interviews and assessing credibility;
4. investigators requested additional information, where necessary, and kept the parties apprised of progress in the investigation;
5. investigators were candid with the parties about the merits of the case and explained their views well and as early as possible;
6. OBSI's reasons were fair, proportionate and explained in plain language; and
7. OBSI's conclusions flowed from the evidence.

3.2.2 OBSI's Limitation Period

OBSI currently has a six-year limitation period. This means that OBSI will only consider a complaint if the consumer raised the complaint with the firm within six years after the consumer knew or ought to have known about the problem.

We reviewed five files where the file was deemed out of mandate due to the expiry of the limitation period. In most, the case clearly fell out of the six-year limit. However, we do know that some cases are in the grey zone, where it is truly arguable whether the consumer is within the limitation period. In light of this, changing the limitation period or how it is applied was of interest to consumer groups during our stakeholder consultations.

We do not believe that the limitation period should be removed and replaced with a pure standard of "reasonable time", as was suggested by one stakeholder, where reasonableness could in the circumstances be much greater than six years. While this has some merit and we considered it

carefully, there is a strong policy rationale for limitation periods which should be respected, namely, to "provide certainty and finality" for respondents.[5]

We reviewed the guidance that OBSI investigators receive and found it to be comprehensive and easy to understand. In particular, the guidance contains a detailed analysis of the subjective standard of OBSI's limitation period, including examples to help illustrate situations that investigators could face.

Most of the consumer complaints we reviewed were made both within the OBSI limitation period as well as within the civil limitation period. Thus, if consumers got an unsatisfactory result in the OBSI process, they could still seek compensation through civil litigation. The closing letters provided to consumers contain language explaining the civil limitation period. However, we found that the information was not detailed enough. Specifically, while the closing letter rightly identifies that there are limitation periods, it does not always state exactly what that period is or contain "ought to have known" language that can make a limitation period shorter than a layperson consumer might expect. We recommend that OBSI add more information about limitation periods to the closing letters. While OBSI's internal guidance note on limitation periods cautions against providing information on limitation periods because it would constitute "legal advice", we believe that OBSI can and should be transparent in its closing letters about its conclusions with respect to the limitation period in a particular case, especially when OBSI has concluded that the case should be dismissed because the limitation period has expired.

Recommendation

OBSI should add more information about limitation periods to the closing letter sent to consumers. Specifically, OBSI should include:

1. information about the limitation periods in each province; and
2. language indicating the "ought to have known" standard for limitation periods.

3.2.3 Investigation Plans

Almost all files we reviewed had an investigation plan. This document, broadly, is prepared by the investigator ahead of the investigation and outlines the complaint, the firm's preliminary response, the parties' arguments and their strengths and weaknesses, the core issues to be determined and occasionally preliminary assessments of the case.

OBSI currently has two templates for its investigation plans. The template that is used for a given case depends on the complexity and subject matter of the case and the seniority of the investigator. Based on those same considerations, some investigation plans are treated as living documents, updated with notes and observations throughout the process, while others are not. OBSI allows for some flexibility with its investigation plans to allow them to be appropriately scaled for the nature of the case and to promote efficiency.

[5] Katherine T. Di Tomaso, Limitations Act Chapters, 1. Definitions/Basic Limitation Period, Sections 1 - 5 AND Ultimate Limitation Periods/No Limitation Periods/General Rules/Transition, Sections 15 - 24 in *Civil Procedure and Practice in Ontario*, Noel Semple (ed.), Canadian Legal Information Institute, 2021 CanLIIDocs 2093, https://canlii.ca/t/tbjv.

3.2.4 Interviews and Assessing Credibility

Based on our file review, it appears that OBSI conducts interviews in most, but not all cases that are determined to be within OBSI's mandate. OBSI determines whether to conduct an interview based on its fundamental goal of being efficient and employing only those investigative steps that are necessary to determine the facts and recommend a fair outcome. As a result, we saw cases where interviews were conducted with both parties, and some where the OBSI investigator determined that only an interview with the consumer was necessary to reach a fair outcome.

Though there is a limit to analyzing the qualities of an interview through the investigators' notes, we generally found that interviews were conducted well. Investigators asked probing questions, challenged the evidence and noted inconsistencies where they existed. They were frank with the parties about their assessment of the case, managing expectations and noting where they were having difficulty accepting an argument from a party.

Importantly, we observed that investigators explained the Terms of Reference and the investigation process well to consumers during the interview. Many files seemed to utilize template introductory remarks, where the investigator would explain OBSI's role, what they could and could not do, and what the investigation process would be. At the end, the investigators went over any questions the consumer had and explained next steps for the process. The interview appeared to be a key method for transmitting information about the process to the consumers.

We also observed that there were many cases where a credibility assessment was necessary. OBSI has a detailed guidance note for its investigators on assessing credibility. In the files we reviewed, we were impressed with the investigators' skills at assessing the parties' credibility. Investigators told us that they generally rely on the first accounts of both parties, *i.e.*, the accounts closest to the events in question. When there are inconsistencies, the investigators probe them and ultimately have to choose between the consumer and the firm in a he/she said-he/she said situation. In these files, we noticed investigators used whatever documentary evidence they did have to test the credibility of the parties, probing inconsistencies and confirming stories against documentation.

In our interviews with investigators, they noted that credibility assessments can be difficult over the phone, which is how interviews are conducted. Ultimately, one investigator said, it is a "judgment call", but others emphasized that there needs to be a "why" as to the conclusion. We believe that utilizing videoconferencing services will greatly enhance the ability of the investigators to determine credibility. While it may ultimately still be a "judgment call", at least investigators will get the chance to observe non-verbal communication from consumers and firm representatives.

Recommendation

OBSI should conduct consumer and firm interviews over a videoconferencing platform, allowing for a stronger credibility assessment.

3.2.5 Closing Letters

At the conclusion of an investigation, OBSI provides a closing letter to the consumer and the investment firm. Since the 2016 Review, OBSI has invested significant time, focus and training on its plain language initiative for its closing letters. We heard positive feedback from a number

of stakeholders on the quality of OBSI's closing letters, and note that certain of OBSI's industry stakeholders have since adopted similar styles in their communications.

We were very impressed with the quality of OBSI's closing letters. They contain plain-language information clearly setting out the complaint, the issues, OBSI's decision on each issue, and the reasons (including the documentary or other evidence) relied on to reach those decisions. They are clear, well-reasoned and easy to understand. They also contain information about the reconsideration process and alert consumers to their rights (*e.g.*, to bring litigation) and the existence of a limitation period.

3.2.6 Reconsideration

After the 2016 Review, OBSI implemented a new reconsideration process for investments and banking. Designed as an appeal of sorts, it allows senior investigators who have not seen a file before in any way to consider the concerns raised by the consumer challenging the outcome of the investigation. If OBSI is given binding authority which includes a right of appeal for the parties, the reconsideration process will likely no longer be required. Accordingly, all of the comments below are made in the context of the current system, and likely will not apply in the event that binding authority is granted.

Reconsideration officers are senior investigators who have expertise in OBSI's processes and the matters that OBSI handles. Senior Investigator-3s (**SI-3s**), the most senior investigators, can become reconsideration officers in addition to their work as SI-3s, but they cannot have any involvement with any file that comes before them for reconsideration. Managers are not involved in reconsideration matters. Instead, the process is overseen by a deputy ombudsman. While removing the managers from the process is a strong step to ensure no prior opinions or thoughts about a case, deputy ombudsmen do review files at a high level with managers, so there is a possibility that they may have heard the fact pattern already.

We put a great deal of thought into the reconsideration program at OBSI. We reviewed multiple files which went through reconsideration and discussed the process with OBSI's stakeholders, senior management and investigators.

In our file review, we noticed that most reconsiderations did not involve interviews with the parties. Largely, reconsideration officers tended to rely on the interview notes (if interviews were conducted) and other documents produced for or created during the original investigation. We do not feel that interviews need to be conducted in every reconsideration, so this was not a concern. We note that we only reviewed one case where reconsideration was successful.

However, the reconsideration decision letters did not contain adequate information for the parties. Often, the letter presented to the parties contained little information beyond the decision—most reconsiderations upheld the original decision. These closing letters should contain additional information for the parties. Including more information will show the parties what the reconsideration officer did in their review and why they came to their conclusion. This will increase confidence in OBSI and the financial markets.

Recommendation

OBSI's reconsideration closing letters should contain additional information with respect to the process the reconsideration officer undertook and more detailed reasons for either upholding or overturning the original decision.

In our stakeholder consultations, we heard that the reconsideration process lacks legitimacy. One stakeholder noted that it could not be legitimate so long as “OBSI is reviewing OBSI”. Another described it as OBSI “reviewing its own notes.” At the same time, we are cognizant of arguments that for OBSI to remain free and efficient for consumers, a degree of informality should be maintained and that a more formal external appeal process would create burden for consumers and would tilt the playing field in favour of the firms, which have more resources.

We considered recommending that OBSI adopt an external reconsideration process with a panel of part-time contractors with expertise in dispute resolution in the securities industry. However, the purpose of the current reconsideration process is to provide a basic assurance of fairness in the event that one of OBSI’s investigators was negligent or biased or otherwise made a significant error. The process also provides a secondary quality assurance check and feedback OBSI uses to improve its services. Although imperfect, the current reconsideration process was designed to be proportionate to this purpose. Adopting an external process would have significant resource implications for OBSI (there were over 100 reconsideration cases last year alone), and would therefore increase costs for its participating firms. We do not believe that the minimal process legitimacy gains that may be made from an external reconsideration process can be justified in the circumstances.

It is also important to remember that a consumer who participates in OBSI’s process and is dissatisfied with the result is not precluded from pursuing the claim in court or any other appropriate forum.

4. OPERATIONAL EFFECTIVENESS

One of the purposes of this evaluation is to assess OBSI's effectiveness and the reasons for settlements below amounts recommended by OBSI.

According to the British and Irish Ombudsman Association *Guide to principles of good complaint handling*, "[t]o be effective and have credibility in the eyes of its stakeholders, a scheme must have a clear remit, demonstrable independence and authority, be evidently knowledgeable about its work and have adequate powers."

The adequacy of OBSI's powers has sparked considerable debate over the last decade. The primary (and perhaps most contentious) issue is whether the current "naming and shaming" system is successful at securing redress for consumers, or whether binding authority is needed to give OBSI credibility.

The 2016 Report considered this issue at length and concluded that, among other things:

1. the use of naming and shaming as an alternative means of prompting redress has not been universally effective; and
2. OBSI currently functions as a dispute resolution service and, without binding authority, it cannot fulfil its role as a true industry ombuds service.

While certain initiatives are currently underway to modernize the Canadian capital markets (as described in section 1.4 above), a number of stakeholders expressed frustration over the ostensible lack of progress made with respect to OBSI's enforcement powers.

At the end of the day, however, over five years have passed since the 2016 Review, and OBSI's sole enforcement mechanism remains publishing the names of firms that refuse to follow its recommendations. We do not believe that this is an effective means of securing redress for individual consumers, or for deterring firms from refusing to abide by an OBSI recommendation. In addition, we believe that the system provides an economic incentive for both parties to settle for amounts below OBSI's recommendation.

4.1 The Name and Shame System

The efficacy of the name and shame system is contingent on firms' fear of the reputational damage associated with being named as not having followed an OBSI recommendation. In theory, this should be a sufficient deterrent and should incentivize compliance with OBSI recommendations. In practice, however, a number of shortcomings with the name and shame system not only significantly limit OBSI's efficacy, but also undermine public confidence in OBSI as an ombuds service.

The first significant downfall to the name and shame system is that it presupposes that firms will comply with OBSI's recommendations, and does not offer any sort of solution or compensation to harmed investors when firms do not comply. The system is more focused on future deterrence than it is on compensating investors who have already been harmed by a firm's wrongdoing. From the perspective of an individual investor who has suffered losses at the hands of a firm that now refuses to compensate the consumer, this result is hardly fair.

Second, as OBSI itself pointed out in its letter to the Modernization Taskforce, the name and shame system can have the unintended consequence of prolonging OBSI's facilitated settlement process, as "the perceived lack of serious consequence leads to disengagement or minimal engagement in [OBSI's] investigative and settlement processes". This leads to inefficient investigations and unnecessarily protracted facilitated settlement discussions, adding unnecessary time and costs for OBSI, the parties, and the system as a whole.

The third and, in our view, most significant drawback to the name and shame system is that OBSI's lack of binding authority provides an economic incentive for both parties to settle for amounts below OBSI's recommendation. When a firm makes an offer to a consumer under the current system, both parties know that, if the consumer does not accept the offer and the parties are not ultimately able to reach an agreement, the firm will not ultimately be forced to pay the consumer anything. This leads to an imbalance of negotiating power, where harmed investors could be induced to accept lesser settlements because of the threat that they will ultimately receive nothing. In these circumstances, the harmed investors' only recourse is to the courts, the costs of which are likely prohibitive. This undermines OBSI's only enforcement mechanism and the fairness of the system as a whole.

A partial solution to this problem is for OBSI to publish the names of not only cases of outright refusals, but also low settlements. At present, OBSI publishes the names of only those firms that refuse to follow its recommendations in their entirety (*i.e.*, the firms that pay nothing to a consumer following an OBSI recommendation for compensation). It does not publish cases of "low settlements" – or, put differently, partial refusals – where firms and consumers ultimately settle for an amount less than what OBSI recommended. The message to firms is clear: if you disagree with OBSI's conclusion or otherwise do not want to pay, so long as you pay something and the consumer accepts it, you won't be named and shamed.

As a result, until binding authority is granted, or if it is not granted, we recommend that OBSI publish not only cases of outright refusals, but also low settlements. We believe this is not only critical for strengthening the deterrent value of the name and shame system, but also for improving transparency about the efficacy of OBSI more generally.

In our consultations with stakeholders, supporters of the name and shame system adopted an "if it ain't broke, don't fix it" attitude, and cited the low number of refusals (three between calendar 2016 and 2020; two during the Five-Year Period) to support the conclusion that the current system is working well, and there is no need to change it by giving OBSI binding authority. When we asked them about whether low settlements are an issue, they typically responded that OBSI does not publish the particulars of its low settlements, and so they could not answer the question.

We note that OBSI does report its statistics with respect to low settlements to the JRC, and the JRC stated the following in its Annual Report for 2020:

> *According to OBSI statistics for its fiscal years 2018 to 2020, out of 456 cases that ended with monetary compensation, there were 31 cases (approximately 7%) that were settled below OBSI recommendations involving 18 firms. About 58% of these cases involved recommendations over $50,000 with an average settlement rate at about 62%. Of the 18 firms, nine firms settled below OBSI's recommended amount more than once. Overall, since its fiscal year 2018, clients received approximately $1.3 million less than what OBSI recommended. This continues to be an area of concern for the JRC.*

We agree with the JRC that low settlements are an area of concern. As described in greater detail below, during the Five-Year Period which is the subject of this review (November 1, 2015 to October 31, 2020), investment firms paid almost **$3 million** less than OBSI recommended to consumers through low settlements. Compared to outright refusals, which totalled almost **$180,000** for the same period, it is clear that low settlements are a more significant issue than refusals. However, OBSI does not currently have any enforcement mechanism to deal with low settlements. We believe it should apply its naming and shaming powers to these situations.

In cases of refusals, OBSI publishes a full investigative report on its website with consumer information anonymized. For efficiency reasons, OBSI does not create full investigative reports where cases have reached a settlement. We do not wish to impose such a burden on OBSI, when the same result can be achieved through more efficient means. For example, OBSI could publish a chart of low settlements every quarter or annually. The chart should contain information such as the firm name, registrant category, type of complaint (*e.g.*, suitability, incomplete or inaccurate disclosure about a product, etc.), the amount recommended by OBSI, the ultimate settlement amount, and the difference between the two.

While we do not believe that this recommendation will resolve all cases of low settlements, it will impose a negative reputational consequence on firms who choose not to follow OBSI's recommendations in full, and may deter some firms from doing so.

Recommendation

Until binding authority is granted, or if it is not granted, OBSI should publish not only cases of outright refusals, but also low settlements in the form of quarterly and annual chart posted to its website.

4.1.1 Refusals during the Five-Year Period

During the Five-Year Period, OBSI reported two refusals:

1. August 9, 2016: a mutual fund dealer refused to compensate an investor **$128,800** for losses caused by an advisor working for the firm recommending unsuitable investments. Notably, this same firm refused to follow two previous OBSI recommendations – one to compensate an investor $55,000 in May 2015, and another to compensate investors $245,462 and $20,249 in April 2015.
2. August 27, 2020: an exempt market dealer refused to compensate an investor **$50,810** for losses caused by the firm's sale of unsuitable investments in high-risk exempt market securities.

Accordingly, refusals for the Five-Year Period totalled **$179,610.** Notably, this was significantly less the previous five-year period, where there were 18 refusals totalling **$2,540,366.00**. We understand that this period included all of the "stuck cases" that resulted from the market turmoil of the global financial crisis and that it was not a representative five-year period.

In addition, there was one case shortly after the conclusion of the Five-Year Period where an exempt market dealer initially refused to compensate an investor $33,055 for losses caused by the dealer's sale of unsuitable investments. However, we understand that the dealer eventually paid.

4.1.2 Low Settlements during the Five-Year Period

The table below summarizes the following information for each fiscal year of the Five-Year Period:

1. the total number of cases in which OBSI recommended compensation for the fiscal year;
2. the number and percentage of those cases that settled for less than the OBSI recommended amount;
3. the number and percentage of those cases where the discount rate was 25% or more (*i.e.*, the ultimate settlement amount was at least 25% less than the OBSI recommended amount);
4. the number and percentage of those cases where the discount rate was 50% or more (*i.e.*, the ultimate settlement amount was at least 50% less than the OBSI recommended amount);
5. the mean difference between the OBSI recommended amount and the settlement amount; and
6. the aggregate deficiency of compensation received by consumers who settled for less than the OBSI recommended amount for the fiscal year;

Table 2: Low settlements during the Five-Year Period

Fiscal Year	# of cases where OBSI recommended compensation	# (%) of cases that settled below OBSI's recommended amount	# (%) of cases where discount rate was 25% or more	# (%) of cases where discount rate was 50% or more	Mean difference between OBSI recommendation and settlement amount	Aggregate amount of less compensation received
2016	152	26 (17%)	20 (13%)	10 (7%)	$21,840.14	$567,843.51
2017	151	23 (15%)	15 (10%)	7 (5%)	$47,869.80	$1,101,005.32
2018	139	11 (8%)	8 (6%)	2 (1%)	$50,721.73	$557,939.00
2019	185	12 (6%)	8 (4%)	4 (2%)	$39,986.00	$479,831.96
2020	142	8 (6%)	7 (5%)	2 (1%)	$31,940.12	$255,520.92

Although refusals and low settlements account for a minority of OBSI's files, the aggregate deficiency of compensation paid to consumers ($2,962,140.71 in low settlements and $179,610 in refusals during the Five-Year Period) is significant. We note, however, that the figures above do not account for any monies paid to consumers following the refusal or low settlement in connection with any regulatory action taken by MFDA or IIROC. This is addressed in greater detail in Section 4.1.5 below.

In addition, the average difference between the OBSI recommended amount and the settlement amount in cases of low settlement is troublingly high every year, reaching as high as $50,721.73 in fiscal 2018. This means that, in fiscal 2018, the 11 consumers who received less than OBSI recommended received on average $50,721.73 less. These figures also do not account for cases where the consumer and the firm reached a settlement before OBSI determined an amount for recommendation, which do not count as "low settlements", but where the consumer may ultimately have felt pressured to accept a low offer knowing OBSI would not have the power to enforce any decision it made.

4.1.3 Reasons for Low Offers

The table below summarizes the main reasons cited by firms for making a low offer for each fiscal year during the Five-Year Period.

Table 3: Low settlements during the Five-Year Period

Fiscal Year	Most Commonly Cited Reasons for Making Low Offers
2016	1. disagreed with OBSI's calculation with respect to client mitigation or apportionment (9 cases) 2. disagreed with OBSI's calculation with respect to KYC (5 cases) 3. disagreed with OBSI's conclusion (3 cases) 4. disagreed with OBSI's conclusions with respect to risk ratings (2 cases) 5. thought another firm was liable (2 cases)
2017	1. disagreed with OBSI's calculation with respect to client mitigation or apportionment (7 cases) 2. disagreed with the benchmark comparison used by OBSI (5 cases) 3. disagreed with OBSI's conclusion (3 cases) 4. disagreed with OBSI's conclusions with respect to risk ratings (2 cases) 5. disagreed with OBSI's conclusions regarding KYC (2 cases)
2018	1. disagreed with OBSI's conclusion (4 cases) 2. disagreed with OBSI's conclusions regarding risk ratings (3 cases) 3. disagreed with OBSI's calculation with respect to client mitigation or apportionment (2 cases) 4. disagreed with OBSI's conclusion regarding suitability (1 case) 5. did not want to pay the recommended amount (1 case)
2019	1. did not want to pay the recommended amount (4 cases) 2. disagreed with OBSI's conclusions regarding suitability (2 cases) 3. disagreed with OBSI's conclusion (2 cases) 4. disagreed with OBSI's conclusions regarding vicarious liability (2 cases)
2020	1. disagreed with OBSI's conclusion (3 cases) 2. disagreed with OBSI's conclusion regarding suitability (3 cases) 3. disagreed with OBSI's calculation with respect to client mitigation or apportionment (2 cases)

In a majority of low settlement cases, the firm cited disagreement with some aspect of OBSI's analysis as its reason for making a low offer. This is not surprising. Naturally, parties often disagree with findings against their interests. Some consumers also disagree with OBSI's conclusions, as evidenced by OBSI's customer survey results for 2020.[6] Overall, it appears satisfaction with OBSI's process on both the firm and consumer side is closely tied to receiving a favourable result.

4.1.4 Firms with Repeat Low Settlements

Based on information provided by OBSI, since 2015, 20 firms settled for amounts lower than the OBSI recommended amount on more than one occasion. The firm with the highest number for this period had nine low settlements, followed by another firm with six low settlements. These are

[6] 15% of consumers indicated they were satisfied with the outcome of their case, while 28% gave OBSI a favourable rating. We note that OBSI recommended compensation in approximately 33% of cases in that year.

large firms with a high number of cases closed each year, and low settlements account for a minority of their cases closed. However, the majority of low settlements involve small or mid-size firms.

4.1.5 What Happens to Refusals and Low Settlements?

Since 2018, IIROC, MFDA and CSA members have followed up on refusals and low settlements in accordance with Joint CSA Staff Notice 31-351, IIROC Notice 17-0229, MFDA Bulletin #0736-M *Complying with requirements regarding the Ombudsman for Banking Services and Investments*. As a result, a low settlement at the OBSI level does not always mean that a complainant will not be compensated, or that a firm will not be disciplined by its regulator.

Both MFDA and IIROC require their members to file a report on their online systems whenever they receive a complaint. The reporting system for MFDA is called METS, and IIROC's is called ComSet. Complaints received directly from complainants are also tracked on these systems. MFDA and IIROC use these platforms to track claims and identify potential emerging regulatory issues in the industries they regulate.

Depending on the outcome of an OBSI investigation, MFDA and IIROC may take further regulatory action against a firm.

Since the publication of Staff notice 31-351, Canadian securities regulators have required OBSI to report its statistics with respect to refusals and low settlements to the JRC on a quarterly basis. Both MFDA and IIROC receive information on their members' low offers through these reports. The MFDA, through its Enforcement Department, reviews complaint handling in all cases. MFDA reviews any low offers or refusals to ensure firms comply with their obligations under MFDA Rule 2.11 and Policy No. 3 to ensure that complaints are dealt with promptly and fairly, which includes addressing unfair compensation offers. The MFDA may take regulatory action against firms where regulatory requirements were not met.

IIROC's process for following up on refusals and low settlements is slightly different. For any low settlement, it considers a variety of factors, including the difference between the OBSI recommended amount and the settlement amount, whether the firm has a history of refusals and low settlements, the firm's rationale for not paying the full amount, etc. in determining whether to follow up with the firm. If IIROC determines that it should follow up with the firm, depending on the gravity of the case, IIROC may use an array of measures, from informal discussions with the firm to formal compliance reviews, cautionary letters, terms and conditions on membership, and referrals to enforcement.

OBSI does not formally receive information from MFDA, IIROC, the JRC or any other body on what happens to refusals and low settlements following OBSI's process. Until binding authority is granted, or if it is not granted, we believe that it would be helpful for MFDA and IIROC (and any other regulators or SROs that follow up on low settlements) to report publicly on the results of these follow ups. In our view, this is an important piece of information for OBSI (and the public) to know. We understand that there may currently be limitations in the various regulators' or SROs' by-laws or mandates restricting their ability to publicly disclose the results of follow-up activity on specific low settlements or refusals outside of formal disciplinary proceedings. We believe it would be helpful for this point to be reconsidered in the context of the new SRO.

4.1.6 Conclusions on Effectiveness

Consumers received $2,962,140.71 less than OBSI recommended in low settlements during the Five-Year Period. This is a significant issue. While some low settlements may be followed up on by the relevant firm's regulator, the regulators may not pursue every case where a consumer receives less than the OBSI recommended amount, and such follow up may not result in compensation. OBSI's inability to universally secure redress through the name and shame system continues to tilt the scales in favour of firms and leaves consumers with the distinct impression that the OBSI process is fundamentally unfair. In our view, the regulators should immediately address this issue.

4.2 Binding Authority

One way to address low settlements, refusals and the current imbalances in OBSI's system would be to give OBSI the authority to issue binding decisions. Through stakeholder consultations, we learned that the issue of binding authority continues to be the main sticking point for both consumers and industry representatives. On the consumer side, we heard that binding authority is required to level the playing field between consumers and firms, bring OBSI in line with its international counterparts and ultimately give it legitimacy as a true ombuds service. By contrast, industry representatives were generally against giving OBSI binding authority, taking the position that this would require an overhaul of OBSI's processes, introduce too much formality into the process and ultimately cause OBSI to lose what makes it valuable. We summarize various arguments we heard in favour and against binding authority in the table below.

Table 4: Binding Authority – Pros and Cons

Binding Authority – Pros and Cons	
Pros	Cons
1. A binding system would ultimately be more efficient and quicker because there would be less focus on coming to a mutual resolution (*i.e.*, less focus on buy-in from firms and less back and forth with firms) 2. A binding system would level the playing field between firms and consumers and address consumer impartiality concerns, leading to improved consumer confidence, improved consumer experience and decreased attrition in OBSI's process 3. Binding authority would cause firms to take the OBSI process more seriously, leading to increased engagement in OBSI's process and increased legitimacy for OBSI 4. A binding system would lead to increased consumer compensation 5. Binding authority is an international best practice, and is required to make OBSI a world-class ombuds service	1. A binding system would be more adversarial and less collaborative than the current system, which may reduce consumer and firm experience 2. A binding system would require the introduction of enhanced processes and a right of appeal, leading to the potential for added delays, procedural complications and increased costs 3. A binding decision could put a smaller dealer out of business

6. Binding authority would require certain enhanced processes, which may lead to more informed and fairer decisions	

On balance, and in light of the discussion above regarding the inadequacy of the name and shame system, we believe that the arguments in favour of giving OBSI binding authority outweigh the arguments against giving it binding authority. While there is merit to the view that a binding system would require certain procedural enhancements that may lead to delays and increased costs, we believe that the system can be tailored to find the appropriate balance between speed and efficiency and procedural fairness.

4.2.1 International Best Practices

Citing the World Bank's 2012 *Good practices for financial consumer protection*, the INFO Network Guide recommends the following best practices in setting up a financial services ombudsman scheme:[7]

> *Consumers have access to an affordable, efficient, respected, professionally qualified and adequately resourced mechanism for dispute resolution, such as an independent financial services ombudsman or equivalent institution with effective enforcement capacity. The institution acts impartially and independently from the appointing authority, the industry, the institution with which the complaint has been lodged, the consumer, and the consumer association. Decisions by the financial services ombudsman or equivalent institution are binding on the financial institution.* (Emphasis added)

Similarly, in 2018, the World Bank Group stated that consumers should have the right to use a financial ombuds service "that has powers to issue decisions on each case that are binding on the financial service provider (but not binding on the consumer)."[8] Shortly after that, the International Monetary Fund stated in its 2019 Technical Note on the assessment of Canada's securities and derivative markets that "providing binding authority for OBSI would improve investor protection" in Canada.[9]

The key recommendation arising out of the 2016 Report was that OBSI be given binding authority to obtain redress for consumers. We agree with this recommendation. For the reasons described above, including the inefficiency and unequal playing field created by the name and shame model, we are of the view that the time has come to bring OBSI in line with its international counterparts (including the UK, Australia, New Zealand and India financial ombudsman schemes, which all have binding authority) by making it a true ombuds service, capable of issuing decisions that are binding on the parties.

For the binding decision-making model to be adopted, we recommend a model similar to the one suggested by the INFO Network Guide and the models employed by the United Kingdom's Financial Ombudsman Service (FOS UK) and the Australian Financial Complaints Authority (AFCA). Specifically, we believe the process should involve the following steps:

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[7] INFO Network March 2018 *Guide to setting up a Financial Services Ombudsman Scheme* at page 8
[8] World Bank *Good Practices for Financial Consumer Protection*, 2017 edition, at page 51, available at https://documents1.worldbank.org/curated/en/492761513113437043/pdf/122011-PUBLIC-GoodPractices-WebFinal.pdf.
[9] IMF 2019 Technical Note on the assessment of Canada's securities and derivative markets, available at https://www.imf.org/en/Countries/CAN#.

1. an OBSI investigator investigates the case;
2. if the investigator determines that compensation is warranted, the investigator will attempt to facilitate a reasonable settlement between the parties;
3. if a facilitated settlement cannot be reached, the investigator sends the parties a written recommendation about what the outcome should be;
4. if either of the parties rejects the recommendation, both parties are able to submit further arguments and evidence, and a separate, senior member of OBSI's staff with appropriate experience and training who has not been previously involved in the case (perhaps one of its deputy ombudsmen) issues a final decision;
5. if compensation is awarded, the complainant has a defined amount of time to accept the decision;
6. if the complainant accepts the decision within that timeframe, the decision is binding on both the firm and the complainant, and the complainant cannot pursue the matter in court;
7. if the complainant rejects the decision, or does not accept the decision within the specified timeframe, the decision is not binding on either party, and the complainant is free to pursue the matter in court.

Recommendation

OBSI should be empowered to make awards that are binding on the firm and on the consumer, if accepted by the consumer.

4.2.2 Procedural Changes and Right of Appeal

We understand that the CSA working group is considering what types of procedural changes and rights of appeal, if any, should be added to OBSI's process if binding authority is granted. We wish to add the following general comments for consideration:

1. **OBSI's processes should not become overly formalized:** Although we do believe that certain procedural changes should be made to the current system, we do not consider that an entire overhaul of the system would be necessary. Indeed, we caution against over-formalizing OBSI's processes and making it too court-like, as this will cause stakeholders and the system as a whole to lose what they value in OBSI – its informal, speedy and free (for consumers) dispute resolution service.

2. **OBSI's process should not require legal representation:** Additions to the system that would require the assistance of legal counsel to navigate (for example, cross-examinations of parties and witnesses, discovery of evidence, the making of legal submissions at an actual hearing, etc.) should be avoided.

3. **The process should be flexible and at the discretion of the decision-maker:** Given that OBSI deals with a range of cases of varying complexities and involving a multitude of issues, we do not believe a one-size-fits-all approach makes sense in terms of process. For example, in some more challenging cases, a mediation-style process that would involve having both parties in the same room to discuss the issues with an OBSI decision-maker mediating the discussion may be helpful. For other, simpler cases, this would obviously not be necessary. We note that FOS UK and AFCA both have binding authority, and their processes do not involve cross-examinations. They also do not include direct face-to-face mediations or arbitrations. We believe the investigator is the best person to determine which procedural steps need to be taken to achieve a fair outcome in a given case.

4. **There should be a right of judicial review:** Rights of appeal are not a given in binding systems. Rather, most systems (such as FOS UK and AFCA) provide for a right of judicial review, which is more focused on procedural than substantive fairness. We support this type of approach, where an OBSI decision could only be reviewed in certain limited and prescribed circumstances. We believe that a system with a full right of substantive appeal would effectively negate OBSI's purpose and undermine its authority.

Recommendation

OBSI's binding decision-making authority should be accompanied by certain limited procedural enhancements at the discretion of the decision-maker and a right of judicial review.

4.3 Systemic Issues

Prior to 2013, OBSI had the power to investigate systemic issues. Its Terms of Reference were amended in December 2013 to remove these powers and to replace them with a requirement to monitor and inform the regulators of any potential systemic issues. Under the MOU, the Chair of OBSI's board of directors must inform the CSA Designates of issues that "appear likely to have significant regulatory implications, including issues that appear to affect multiple clients of one or more registered firms".

In 2015, the MOU was amended to define potential systemic issues and to set out a regulatory approach to address these issues when reported by OBSI – the Protocol for Handling Systemic Issues (the **Protocol**).[10] The Protocol defines systemic issues as encompassing the following:

1. multiple complaints against one or more registered individuals about products or services provided to investors,
2. multiple complaints against the same registered firm about similar products or services provided to investors, or
3. the same complaint against multiple registered firms in a registration category and/or about similar products or services provided to investors which appear likely to have significant regulatory implications or to raise concerns about the registrant's fitness for registration.

During the Five-Year Period, OBSI reported only four systemic issues to the JRC. In 2021, it reported six systemic issues to the banking regulators and two to the securities regulators. Intuitively, we would expect OBSI to report more systemic issues than this. Likewise, on the banking side, the FCAC noted at page 17 of the FCAC Report that there is "room to strengthen OBSI's procedures for assessing whether reportable complaints raise a potentially systemic issue".

OBSI's numbers appear particularly striking when compared to how many systemic issues its international counterparts are reporting (and investigating). For example, in Australia, last year, AFCA assessed 1,086 possible systemic issues and possible serious contraventions of the law, conducted 147 detailed investigations into possible systemic issues and 36 possible serious

[10] Systemic Issues, available at https://www.obsi.ca/en/how-we-work/systemic-issues.aspx#:~:text=Systemic%20issues%20as%20referred%20to,services%20provided%20to%20investors%2C%20or.

contraventions of the law, leading to a range of enforcement actions taken by regulators and providing more than $31 million in financial remediation to consumers and small businesses. Around 357,959 customers have been affected by these systemic issues. AFCA referred the 147 potential systemic issues to financial firms for response and action, and based on the responses received from these firms, it reported 55 "definite" systemic issues to regulators.[11] It is important to note that AFCA's mandate and the definition of systemic issues are considerably different from OBSI's, and AFCA deals with over 75,000 complaints each year and has approximately 40,000 members. However, the experience of other countries suggests that reporting of systemic issues by OBSI to regulators is not meeting its full potential value.

OBSI explained that there are two main reasons for the low number of systemic issues it reports on the investments side:

1. The definition of "systemic issues" under the Protocol is restricted to issues that "appear likely to have *significant* regulatory implications or to raise concerns about the registrant's fitness for registration". Similarly, the Protocol does not permit OBSI to report potential systemic issues if the information is based only on one complaint.
2. If the JRC and the regulators are already aware of the systemic issue, OBSI does not report it.

We note that the JRC has not raised any concerns with OBSI's reporting under the Protocol, which suggests a common understanding of the requirements of the Protocol.

However, there appears to be a disconnect between what OBSI/the JRC understand OBSI is required to report under the Protocol (multiple complaints of the same type of which the JRC and the regulators are not already aware), and what investors expect OBSI to report with respect to systemic issues. We heard from several consumer advocates that OBSI is not reporting enough systemic issues annually, and that this makes them lose confidence in OBSI.

It is important to note that OBSI does alert consumers to current issues through social media and the case studies and bulletins it publishes on its website. However, consumers have a reasonable expectation that such issues will also be reported to the regulators, and that the regulators will take steps to address the issues. They also have a reasonable expectation that they will have visibility into this process. At present, they do not.

We note that this same issue was identified in the 2016 Report, which recommended that OBSI produce a working definition for what constitutes a matter that is "serious" enough to refer for regulatory attention, and a guide for firms on how it will implement the systemic issues protocol. It also recommended that the CSA extend the systemic issues protocol to include complaints raised by a single complainant.

We understand that OBSI is planning an upcoming "OBSI Approach" publication on the subject of its obligations to report systemic issues. We also understand that preliminary discussions have taken place with respect to specific singular issues that have arisen since the implementation of the Protocol. For the reasons outlined above, we believe this is a significant issue, and that more needs to be done in the near term.

We agree with the recommendations from 2016. We believe the definition of "systemic issues" under the Protocol is too narrow, and that it should be amended to include issues with the potential

[11] See AFCA 2020–21 Annual Review at page 72, available at https://www.afca.org.au/about-afca/annual-review.

to negatively affect a number of consumers, even if only one complaint has been made to OBSI. As the 2016 reviewers noted at page 21 of the 2016 Report, it is not "unusual for systemic issues to be identified by one particularly knowledgeable and conscientious person." We also believe that OBSI should report on any systemic issues it identifies, even if the JRC and the regulators already seem to be aware of the issue.

Recommendation

OBSI should work with the JRC to review and improve the systemic issue reporting system, including by:

1. Amending the definition of systemic issue to include complaints raised by a single complainant;
2. Requiring OBSI to report repeated systemic issues year-after-year, even if the same issue was identified in prior years; and
3. Ensuring more robust communication between the JRC and OBSI once a systemic issue has been identified by OBSI.

We heard from a number of stakeholders that what happens to systemic issues after they are reported to the JRC is largely a mystery. To increase consumer awareness of the steps taken by OBSI and the regulators after a systemic issue has been identified, we recommend that OBSI set out in its Annual Report the number of potential systemic issues it has identified in the previous year, both in respect of securities and banking complaints, and provide a generic description of the type of issue identified. Similarly, we recommend that OBSI work with the JRC or the CSA Designate to issue a report to the public on steps taken with respect to potential systemic issues that have been brought to their attention.

Recommendation

OBSI should set out in its Annual Report the number of potential systemic issues it has identified in the previous year, both in respect of securities and banking complaints, and provide a generic description of the type of issue identified.

OBSI should work with the JRC or the CSA Designate to issue a report to the public on what steps have been taken with respect to the potential systemic issues identified by OBSI.

At this time, we do not recommend that OBSI's power to investigate systemic issues be reinstated. While we believe this is a potential value add for OBSI in the future, we think the immediate focus should be on improving the current reporting framework, as described above.

4.4 Serving Seniors

According to OBSI's 2019 Seniors Report, 38% of consumers who use OBSI's services are seniors, higher than seniors' shares of the population. As Baby Boomers retire, this percentage is likely to go up. Therefore, seniors are a core group of users of OBSI's services. Moreover, seniors have unique substantive issues (including reduced capacity and coercion from family members) and operational requirements (including those related to reduced eyesight, hearing or cognition). For that reason, we welcome OBSI's focus on seniors (as reflected in its Seniors Report) and would recommend additional steps to continue serving seniors.

We heard from the Canadian Association of Retired Persons (**CARP**) that OBSI lacks the ability to adequately serve seniors because its board lacks seniors advocacy representation. We do not agree. Wanda Morris, OBSI's consumer interest director, was the Chief Advocacy and Engagement Officer for CARP until 2019. Prior to Ms. Morris joining OBSI's board, Laura Tamblyn Watts was a director and was simultaneously National Director of Law, Policy and Research for CARP. She then went on to found CanAge.

We believe that OBSI is adequately receiving the views of seniors, but offer certain recommendations for further improvements below.

Recommendation

OBSI should ensure that it is adequately serving seniors by:

- changing CIAC's Statement of Expectations to require at least one member with experience in advocating for seniors; and
- requiring special training for all existing (and then, as they are onboarded, all new) investigators on working with seniors (e.g., identifying diminished capacity).

5. Independence and Standard of Fairness

OBSI should provide impartial and objective dispute resolution services that are independent from the investment industry, and that are based on a standard that is fair to both Registered Firms and investors in the circumstances of each individual complaint. When determining what is fair, OBSI should take into account general principles of good financial services and business practice, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct.

MOU, s. 3(b)

Through our consultations with stakeholders, we heard from some consumers that they think OBSI is biased in favour of firms, and from some firms that they think OBSI is biased in favour of consumers. Based on our thorough review of OBSI's case files, policies and procedures, as well as extensive interviews with OBSI staff and stakeholders, we do not believe OBSI is biased in favour of either. We believe these are the views of a vocal minority of firms and subset of consumers who were disappointed with their case outcomes and that OBSI meets and exceeds its standards for independence and fairness.

For certain consumers, the perception of bias in favour of firms appears to be closely related to a consumer's success in a case. When consumers complained about a lack of fairness, this was usually in the context of their own complaints, and the lack of success they had experienced through OBSI's process. Consumers also pointed to the fact that firms ultimately fund OBSI, and stated that OBSI investigators collaborate too closely with firm representatives in reaching their conclusions. We did not find any evidence of this in our file review. Finally, consumers argued that the current name-and-shame system provides an economic incentive for both parties to settle for amounts below OBSI's recommendation and therefore puts firms at an advantage over consumers. We agree, and address this issue in section 4.1 above.

From certain firms, we heard that OBSI is a consumer advocate. They believe OBSI investigators:

1. consider matters outside the four corners of the complaint and create new complaints for consumers;
2. automatically side with a complainant and apply a reverse onus on firms to prove that they did nothing wrong; and
3. look beyond the evidence and relevant laws, rules and regulations in assessing a complaint.

We do not agree that OBSI acts as a consumer advocate, and consider each of these assertions below.

5.1 Creating New Complaints for Consumers

Section 4.1(e) of OBSI's Terms of Reference requires OBSI to assist complainants with the complaint process, including by helping them articulate their complaints to OBSI or a participating firm. The section provides that OBSI should only do so where necessary and without advocating on behalf of a complainant.

Certain stakeholders commented that OBSI goes beyond helping consumers articulate their complaints, and actually creates new complaints for consumers that they have not previously raised with the firm. These stakeholders stated that the complaints are different when they come back from OBSI than when they came in to the firm, and that this is an inappropriate role for OBSI to be playing given its adjudicatory function.

When we asked these stakeholders to provide examples, they pointed to situations where OBSI's document request was broader and went back farther in time than the firm considered necessary to assess the complaint. We looked for instances of this in our file review, and did see certain situations where OBSI considered the client's historical trades and relationship with the firm in assessing the complaint. However, it did not do so to create new complaints for consumers, or to act as a consumer advocate. In these cases, OBSI was simply looking to establish a baseline trading pattern against which to assess the complaint.

For example, if the consumer complains that the consumer had a low risk tolerance, and certain risky trades were unsuitable for the consumer, OBSI will look at the consumer's trading history to see if there were other, similarly risky trades. If so, OBSI will consider whether the consumer also complained about those trades, especially if the trades ultimately ended up being profitable. We believe OBSI is justified in doing so.

5.2 Reverse Onus on Firms

We also heard from a number of industry stakeholders that, when OBSI receives a complaint, it acts as an investor advocate in its search for the truth. These stakeholders believe that OBSI's default is to accept an investor's position, and that it shifts the burden of proof to require firms to provide evidence to the contrary.

When we asked for examples of this, firms pointed to situations where an advisor failed to take notes and could not disprove the complainant, and OBSI sided with the consumer.

In our file review, we did not come across any cases where OBSI sided with the consumer on the basis of missing management notes alone. Rather, we found that OBSI considers the evidence in the case as a whole, and determines whether a given complaint is proven on a balance of probabilities before makes a recommendation compensation. In any event, as the reviewers from 2016 noted, firms have a greater responsibility for record-keeping than consumers and it is not unusual for ombudsmen to hold firms to a higher standard of proof.

5.3 Looking Beyond the Evidence and Relevant Laws, Rules and Regulations

Section 8.1(a) of OBSI's Terms of Reference provides that OBSI will consider general principles of good financial services and business practice, law, regulatory policies and guidance, professional body standards and any relevant code of practice or conduct applicable to the subject matter of the complaint in determining what is fair to the parties.

Certain stakeholders complained that, in some cases, OBSI has moved away from these principles and has simply recommended compensation to get closure. When we asked for specific examples, they cited situations where OBSI went beyond the client's KYC forms, or substituted its own risk assessment of a particular security for that of a firm. They also cited situations where

OBSI considered a security in isolation, rather than considering a client's entire portfolio with the firm, in determining whether the security was suitable for the client.

Both of these specific issues are addressed in section 6.3 on OBSI's loss calculation methodology below. As a general matter, however, we did not come across any cases where OBSI came to a conclusion that was contrary to the evidence or required a different standard than would be required under law.

6. Processes to Perform Functions on a Timely and Fair Basis

OBSI should maintain its ability to perform its dispute resolution on a timely basis and deal with complaints without undue delay and should establish processes that are demonstrably fair to both parties.

MOU, s. 3(c)

6.1 Timeliness

We heard from community and industry members alike that the timeliness of OBSI's process is incredibly important to them. Both parties (but particularly consumers) want to reach a resolution (and be compensated for their losses, if warranted) as quickly as possible. While OBSI is meeting its current timeliness standards, there is room for improvement in certain areas. In addition, we believe that OBSI's current method of calculating and reporting on timelines may lead to confusion or misaligned expectations on the part of consumers, and that it needs to be supplemented with further information to give consumers a better idea of how long the entire complaint process takes.

6.1.1 Pre-Investigation Delays

From a timeliness perspective, our biggest concern is not how long it takes for OBSI to investigate a complaint, but rather how long it takes for a complaint to be ready for investigation. When OBSI receives a complaint from a consumer, a number of things need to happen before the complaint can be assigned to an OBSI investigator. OBSI needs to collect the file from the investment firm, get any relevant documents from the consumer and obtain a signed consent letter from the consumer.

Through our file review, we were surprised to discover just how long the pre-investigation process can take. In almost all of the files we reviewed, it took longer than two weeks from the date the consumer initially contacted OBSI with the complaint for the complaint to be ready for investigation. In most cases we reviewed, it took longer than one month.

OBSI does not include this pre-investigation period in its computation of how long it takes to close a complaint. It starts the clock when it receives the information it needs to commence an investigation, as opposed to the date the consumer makes the complaint. We understand OBSI's logic in calculating timeframes in this way. The pre-investigation delays are largely attributable to firm delays in sending the file to OBSI, consumer delays in getting consents and other documents to OBSI, or a combination of both. These delays are outside of OBSI's control, and it would not be fair to assess OBSI's performance on this basis.

From a consumer perspective, however, the complaint begins when the complaint is filed, and there is a significant difference between OBSI's reported timelines and how long it actually takes for a consumer to get closure. Indeed, consumers may be looking at timelines that are one month longer than the 62 days on average (in 2020) being reported by OBSI. This is on top of the considerable time the client has already spent dealing with the firm, including potentially 90 days that the client has spent waiting for a final response from the firm.

Based on the files we reviewed, OBSI should be able to "start the clock" when OBSI receives a consumer's signed consent letter and count from there for the purposes of meeting its timeliness targets.

Recommendation

OBSI should begin counting its investigation targets when OBSI receives the consumer's signed consent letter.

It is difficult to directly compare OBSI's timeliness to its international counterparts because the metrics, complaint processes and mandates are different. Nevertheless, we offer some general observations and a recommendation below.

In the UK, FOS UK[12] measures the time it takes to allocate a complaint to a case handler. Its goal is to allocate 100% of complaints to a case handler within 28 days. According to its annual report for the year ended March 31, FOS UK allocated 50% of complaints to a case handler within 28 days. This is comparable to OBSI's average time to allocate a case.

In Australia, AFCA starts its clock when the complaint progresses from registration and referral status to case management status. This appears to be similar to OBSI's process. AFCA has the power under its *Complaint Resolution Scheme Rules* to take whatever steps it considers reasonable in the circumstances if a party fails to provide information or take any other step required by AFCA within the AFCA specified timeframe.

We think OBSI should adopt a similar approach. It should require firms to provide the relevant files within two weeks, failing which OBSI should publicly report the firm's failure to meet OBSI's timelines.

Recommendation

OBSI should require firms to provide documents within two weeks, failing which OBSI should publicly report the firm's failure to meet OBSI's timelines.

OBSI's current standard for case assignment is 42 days from the date the consumer signs the consent letter. We believe OBSI should move this target up to 30 days, bringing it more in line with its international counterparts.

Recommendation

OBSI should set a target of 30 days to assign a case to an investigator, and should report on how frequently it is meeting this target.

For complaints that are out of mandate, OBSI's service standard is to communicate this conclusion to consumers within 30 days. This standard does not apply to cases where the

[12] See FOS UK Annual Report and Accounts for the year ended 31 March 2021, available at https://www.financial-ombudsman.org.uk/files/316572/Financial-Ombudsman-Service-Annual-Report-and-Accounts-2020-21.pdf.

mandate issue is not clear and requires investigation to be determined, such as where a limitation period is at issue.

We feel that the 30-day period for out of mandate assessments is appropriate at this time and does not need to change. An out of mandate determination is a very serious decision, and we do not want to recommend that OBSI make such a determination in a compressed period of time. If it is obviously out of mandate, OBSI can inform the consumer immediately, in line with its current practice. If not (such as in cases where a complaint may be outside of OBSI's 6-year limitation period, but it is not clear when a client knew or ought to have known that he or she had a complaint) then OBSI should be able to take the time needed to make the determination.

6.1.2. Information provided at case opening

To open a file, OBSI requires consumers to sign consent letters, which are template documents. They contain basic information about OBSI and what an investigation will look like from a consumer's perspective. Attached to these letters is a What to Expect guide. We reviewed these documents closely, since, as the opening document, consumers will play close attention to the information provided therein. If a matter is out of mandate, OBSI provides a letter to this effect, citing to its Terms of Reference.

Consumers receive a link to the OBSI's Terms of Reference in the consent letter. The What to Expect document provides some information related to the investigation process. The consent letter and What to Expect document contain most of the relevant information that the consumer will need and communicates it in plain, non-legalistic language. That being said, there are three possible suggestions for change which will provide clearer information to consumers. We believe that, given the importance of limitation periods, OBSI should include reference to the "ought to have known" standard for limitation periods and should lay out the limitation periods of each province. This does not constitute legal advice but rather legal information. Moreover, an investigation pathway or "investigation steps" graphic would assist consumers in understanding the process. Lastly, we believe that OBSI should provide more disclosure of the timing of investigations, including the time it might take to collect documents and the target for completion after all documents are collected.

Recommendation

OBSI should provide additional information in the standard consent letter and their What to Expect document, including:

a. Legal information about limitation periods for civil actions in each jurisdiction in Canada;
b. Reference to the "ought to have known" standard for limitation periods;
c. An investigation pathway/steps graphic; and
d. Better disclosure with respect to timing of the investigation, including the target for completion and an estimated time for collecting documents.

6.1.3 Investigation Timelines

OBSI's current timeliness standards for investment-related complaints are set out in its annual corporate objectives. For investments cases, OBSI's standards are that 50% of cases will be closed in 90 days, 75% will be closed in 120 days, and 100% will be closed in 365 days.

For most of the Five-Year Period, OBSI was using its older standard of closing 80% of cases within 180 days. OBSI's timeliness has improved significantly over the years. Specifically, the average time it takes to close an investments case has been cut by more than half – from 136 days in 2016 to 62 days in 2020. Following the significant improvements in its case closing timeliness between 2016 and 2020, OBSI implemented its new standard in early 2020, to clearly communicate that it expected to close most cases in 90 days or less. Given how recently OBSI updated its timeliness standard, we do not believe it is necessary to update it again at this time.

With respect to timeliness, we note that OBSI compares well against its international peers. For example, FOS UK takes "up to 90 days" to handle complaints.[13] In 2020-2021, AFCA took on average 88 days to close a complaint. The average timelines for OBSI to complete investigations for the review period are reflected in the table below.

Table 5: OBSI Timelines for Closing Investments Investigations (2016-2020)

Year	Average Time to Close Investigation (Days)
2020	62
2019	75
2018	72
2017	86
2016	136

6.2 $350,000 Compensation Limit

OBSI's compensation limit of $350,000 has not been adjusted since 2002. We recommend increasing OBSI's compensation limit to $500,000 to align it with the limits found in other countries. For example, FOS UK has a cap of GBP355,000 (approximately CAD$597,000). In Australia, for a claim relating to direct financial loss, AFCA's monetary jurisdiction is capped at AUD$542,500 (approximately the same in CAD$). We also note that Ontario's Capital Markets Modernization Task Force also recommended increasing OBSI's compensation limit to $500,000, to be adjusted over time.

Recommendation

OBSI should increase its compensation limit from $350,000 to $500,000.

6.3 Loss Calculation Methodology for Suitability Cases

Since OBSI was formed in 2002, it has received more complaints about suitability than any other issue. OBSI has been standardizing and fine-tuning its approach to suitability cases over the last couple of decades, with the ultimate goal of achieving greater efficiency and applying a consistent approach to determining an investor's losses in these cases.

From 2011-2013, OBSI conducted an extensive public consultation on its process for assessing investment suitability and calculating losses in suitability cases. Using the feedback received from industry and investors, and guidance obtained from external legal counsel, OBSI refined and validated its loss calculation methodology.

[13] https://www.financial-ombudsman.org.uk/consumers/expect/how-long-it-takes.

The objective of OBSI's loss calculation methodology is to reasonably estimate the position the investor would have been in had the unsuitable investment not been made. To be as accurate and fair as possible, OBSI compares an investor's actual investment performance with historical data (referred to as notional portfolios) for the relevant time frame.

The process involves three steps:

1. **The KYC determination:** OBSI considers documents such as KYC forms. In certain cases, investors complain that their KYC forms do not accurately reflect their actual KYC information (for example, because the advisor did not review the KYC forms with the investor or explain their significance). In these cases, if the KYC information is reasonable based on the firm's professional obligations and the consumer's disclosures at the time, OBSI will accept it and base the suitability analysis on the documented KYC information. If the KYC information is not reasonable, OBSI will substitute reasonable information for the purpose of the suitability analysis.

2. **The suitability analysis:** OBSI analyzes the investments and strategies recommended by the advisor to determine if they were suitable based on the investor's KYC information. The fact that the investor has incurred losses is not relevant to OBSI's analysis of whether the investments were unsuitable. Rather, the relevant issue is whether the investments were in line with the investor's risk tolerance and other requirements. If OBSI determines that the investments were suitable, that is the end of the analysis and OBSI does not recommend compensation. If, however, OBSI finds that the investments were unsuitable, it moves on to determine whether the investor suffered financial harm and, if so, the appropriate quantum of compensation.

3. **Determining financial harm and compensation:** At this stage of the inquiry, OBSI compares the actual performance of the investor's unsuitable investments to the performance of a notional portfolio of suitable investments, using common indices as a performance benchmark. The purpose of this exercise is to determine how the investor would have fared had they been suitably invested. If OBSI determines that the investor did not incur financial harm, it concludes the investigation by explaining to the parties why it believes no compensation is warranted. If OBSI determines that the investor incurred financial harm, it goes on to consider whether the investor bears any responsibility for the loss before determining the amount of compensation that it considers fair in all the circumstances of the case.

To achieve greater efficiency and consistency, OBSI has a separate team of certified financial analysts who conduct the risk assessment and loss calculations required for investments complaints. OBSI provides these calculations to investment firms, who are then able to challenge any aspects with which they do not agree in advance of OBSI issuing its final recommendation. There is also a comprehensive summary of OBSI's loss calculation methodology, which includes specific examples of how particular issues would be addressed under the methodology, on OBSI's website.

Unfortunately, the methodology continues to be a significant point of contention for stakeholders. As described in greater detail below, we heard many of the same criticisms that industry stakeholders raised in 2011 and 2016. We found these criticisms to be largely unsubstantiated, and likely the result of the continued application of what the 2016 reviewers described as a "mythology" surrounding OBSI's loss calculation methodology on the industry side.

Consumers view the methodology as being a leading, world-class approach to estimating losses, and describe it as a point of pride for OBSI. They find support for this position in the 2016 Report, as Ms. Battell and Ms. Pender concluded that OBSI's loss calculation methodology leads the ombudsman world, and that its approaches (*e.g.*, the use of indices, opportunity costs) are consistent with underlying international policies. We agree with the findings of the previous reviewers that OBSI's loss calculation methodology is first-rate, enabling all parties to agree on underlying assumptions and ensuring that prices from the relevant time are used, bringing a high level of efficiency, consistency and fairness to the process.

6.3.1 Opportunity Costs, Notional Portfolios and Indices

Many stakeholders take issue with OBSI including opportunity costs in its assessment of losses. This is the primary criticism we heard about OBSI's loss calculation methodology on the industry side. These stakeholders argue that it cannot be presumed what a complainant would have done, and compensation awards should not be based on hypothetical assumptions.

It is true that opportunity costs are inherently speculative, and a vast range of reasonable alternatives would have been available to a given complainant had an unsuitable investment not been made. To mitigate against these concerns, in most cases, OBSI uses common stock market indices (which collect data from a variety of issuers across different industries) as the benchmark against which an investor's unsuitable investments are compared.

One stakeholder complained that OBSI uses broad-based benchmark indices rather than sectoral indices in its loss calculation methodology. While OBSI generally uses broad-based indices to calculate an investor's losses, the indices it uses in a given case depend on the circumstances of the case. In any event, in each case, OBSI discusses the indices it is using with the firm, and has at times changed its views based on the firm's input.

We find OBSI's process for calculating losses and, in particular, the inclusion of opportunity costs and the use of notional portfolios and benchmark indices, to be entirely reasonable and consistent with what a Canadian court would do in similar circumstances. The Ontario Superior Court of Justice had the opportunity to consider these very issues in *Smith v. Scotia Capital Inc.*,[14] a case where the plaintiff sued the defendant (his financial advisor) for failing to provide him with suitable investments. At paragraphs 117-122, the Court endorsed an approach identical to the approach followed by OBSI in assessing losses:

> Whether in contract or tort, **the measure of damages is that which is required to put the Plaintiff in the position the Plaintiff would have been in had the wrong not occurred**. The damages award should be as full compensation to the Plaintiff as is practicable.
>
> The calculation of damages remains a complex issue. The focus should be on the date of breach in the circumstances of each case. Where the allegation is of an unauthorized trade, the date of breach is the date of the particular trade. However, where the allegation is of unsuitable trading, the date of breach is not easy to determine. In all cases, the evidence of the Plaintiff must be carefully examined.
>
> The measure of damages is subject to the duty to mitigate and avoid accumulating losses. When considering the period in which the Plaintiff will be allowed to claim ongoing losses

[14] 2006 CarswellOnt 9434 (Ont. S.C.J.).

before being required to mitigate, it is a question of fact and depends on the circumstances of each case. The standard is one of "reasonableness" and in assessing damages the courts will allow a Plaintiff in investment cases a "reasonable" amount of time to assess the situation. Recent case law has determined that the amount of time to be allowed to mitigate damages has been assessed from six months to one year after a transfer of the impugned portfolio to a new advisor.

In addition to recovering capital losses, the courts have also recognized that the Plaintiff is entitled to recover damages for the lost opportunity to have realized gains or a positive return with a suitable portfolio.

There is an argument to be made that all profits and all losses within the relevant time frame should be offset against each other in calculating the net damages. An alternative argument, of course, is that the client be permitted to sue only for the time frame where the unsuitable trading yielded losses. It has also been said that a client should be entitled to sue for the loss on a particular trade and keep the profits from earlier trades even if some of the earlier ones were determined to be unsuitable.

Given the nature of the Plaintiff's allegations, namely, that he authorized all trades but that the advice given to him was generally unsuitable, it would appear to me that the appropriate way to assess damages is to calculate a reasonable expected rate of return. This was the method that was followed in the case of *Davidson v. Noram Capital Management Inc.*, [2005] O.J. No. 4964 (Ont. S.C.J.) where the Court found that the risk tolerances recorded and applied to the client's account had not been adequately explained to them and were inappropriate. In that case, Mr. Justice Cumming stated as follows:

> **Damages may be calculated using a reasonably expected rate of return based on a composite index, such as the Scotia Bond Index employed by Mr. Weinstein, given that such a model is fairly representative of the plaintiffs' investment objectives.** (Emphasis added)

We also note that opportunity costs work both ways. That is to say, OBSI will not recommend compensation in a situation where an investor was unsuitably invested, but likely would have lost money in any event. As a result, we are of the view that the inclusion of opportunity costs in OBSI's loss calculation methodology is appropriate and fair to both parties.

6.3.2 Making Recommendations with Hindsight

Some industry members criticized OBSI for making recommendations with the benefit of hindsight, rather than using only the information that was available at the time. We were disappointed to hear this criticism, given that OBSI specifically developed its loss calculation methodology to address previous concerns raised in the 2011 review about using hindsight. We did not see evidence of OBSI using hindsight in its suitability analysis in our file review.

6.3.3 Going Beyond the KYC Forms / Firm's Risk Assessments

A few industry members complained about OBSI going beyond a complainant's KYC forms in determining risk tolerance. They argue that OBSI should not be making its own determination of a complainant's knowledge, objective and time horizon where it is contrary to what is stated in a client's signed KYC forms, which the client has specifically acknowledged reading and understanding. Similarly, these stakeholders take the position that OBSI should not substitute its risk assessment of a particular security for that of a firm where the assessment is properly documented.

We do not agree. There may be situations where the firm inaccurately recorded the client's KYC information, or failed to update the client's KYC forms on being advised that the client's risk tolerance had changed. It cannot simply be assumed in every case that what is stated in a client's KYC forms is accurate, and it is entirely appropriate for OBSI to look beyond the KYC forms if their contents appear unreasonable in the circumstances of the case. This is consistent with what a Canadian court would do in similar circumstances.[15] Likewise, we are of the view that a firm's risk assessment of a security is not to be taken as gospel, and it is OBSI's job to look beyond the assessment to ensure it was reasonably made.

6.3.4 Portfolio vs. Single Security Approach

Certain stakeholders criticized OBSI for looking at a security in isolation, rather than considering a client's entire portfolio with the firm, in determining whether the security was suitable for the client. OBSI's approach is more nuanced, and depends on the nature of the investment purchased by the client and the advice given by the firm. Generally speaking, if the client received portfolio advice, OBSI will make its assessment on the basis of the client's entire portfolio. If the client was sold a single stock, OBSI will consider the stock in isolation. Additionally, if OBSI's analysis indicates that most of the investments in a client's portfolio were suitable, and only a portion were unsuitable, its loss calculations will focus on the performance of only the unsuitable investments. We believe this approach is reasonable.

6.3.5 Compensating for Non-Financial Losses

Under its Terms of Reference, OBSI is permitted to recommend payment for both financial and non-financial losses. A non-financial loss is a loss that does not have a direct monetary value. In OBSI's dispute resolution process, a common example is the distress or inconvenience caused by a firm's actions. Others include loss of reputation, damage to credit ratings and loss of privacy.

OBSI's approach to non-financial losses recognizes that all consumers will experience some level of inconvenience in a dispute with an investment firm. OBSI will only recommend compensation for distress or inconvenience if it exceeds what OBSI believes to be reasonable under the circumstances. OBSI investigators do not recommend compensation related to medical harms, such as anxiety and lack of sleep, as they are unable to make health determinations.

The training materials provided to investigators contain useful guidance, including a typical monetary range for such recommendations, lists of factors to consider and case studies outlining when these recommendations could be issued. We found this training material to be relatively comprehensive. Unfortunately, in our file review, it was not always clear to us why OBSI did not make a recommendation for non-financial harm/indirect financial harm. In the cases we reviewed

[15] See, for example, *Graham v. Wells*, 2015 BCSC 734.

that did make such recommendations, it was not clear to us how they came to the amount recommended.

In our stakeholder interviews, we also heard confusion about when and how OBSI applies its policies and procedures on this topic. On the investor side, we heard from one individual who received substantial compensation through OBSI's process, but who nevertheless felt like his experience had been minimized because OBSI did not recommend compensation for stress in his case, and he felt like he had been through an unreasonable amount of stress. On the industry side, we heard from many that OBSI should not be compensating for stress and inconvenience at all, while others thought that OBSI's approach to non-financial losses should be standardized.

We believe it is appropriate for OBSI to compensate for non-financial losses. This is an international best practice (see, for example, the INFO Network Guide at page 41), and both FOS UK and AFCA also compensate for non-financial harms. AFCA's compensation for non-financial loss is capped at AUD$5,000.[16] FOS UK does not have a limit on its compensation for non-financial loss, but does provide different levels of compensation based on the severity of the conduct. It also provides helpful guidance (with case studies) on its website so that consumers can compare and have realistic expectations about the likelihood that they will receive non-financial compensation.[17]

We recommend a similar approach, whereby OBSI would set fixed amounts for non-financial harms. We believe this would provide clarity to the parties, increase consistency in outcomes and enhance confidence in OBSI's processes.

Recommendation

OBSI should reform its approach to non-financial harms and indirect financial harms in the following ways:

1. To provide certainty, OBSI should create three levels for non-financial harm/indirect financial harm (low, medium and high), with set compensation amounts for each one; and
2. When providing a determination with respect to compensation for non-financial harm/indirect harm, OBSI investigators should be required to provide detailed reasons as to why they came to their conclusion.

6.3.6 Exempt Market Dealers and Portfolio Managers

Many exempt market participants complained about OBSI's approach to calculating losses in cases where OBSI has found that an exempt market product has been unsuitably sold to a consumer. Valuation is difficult or impossible for many exempt market securities for which no market effectively exists. In these cases, OBSI attempts to determine the current value of the investment based on any relevant information that the firm or others can provide. Often, however, there is insufficient information to value the investment.

[16] See AFCA Operational Guidelines to the Rules, 5 October 2021, available at https://www.afca.org.au/about-afca/rules-and-guidelines/afcas-operational-guidelines.
[17] See Compensation for distress or inconvenience, available at https://www.financial-ombudsman.org.uk/consumers/expect/compensation-for-distress-or-inconvenience.

Where current value cannot be determined, but wrongdoing has occurred and investor losses must be calculated, OBSI's approach is to assign a current value of zero to these securities and include as part of its recommendation that the investor transfer the unsuitably sold securities back to the firm to ensure that the benefit from any remaining value in the securities accrues to the firm and there is no potential for double recovery.

From the perspective of certain EMDs and PMs, this is highly problematic because they generally operate on very thin working capital (a $50,000 surplus is required by regulation). We also understand that it is difficult to get insurance for these types of claims.

However, when we asked EMDs and PMs about how to improve OBSI's loss calculation methodology for exempt market products, they generally told us that, due to the unique nature of these products, EMDs and PMs should fall outside of OBSI's mandate. We disagree that EMDs and PMs should be excluded from OBSI's process, as we believe that fragmentation of this sort would be inconsistent with all of the recent moves towards consolidating the Canadian securities markets, and would deprive retail investors in Canada's exempt markets of an important investor protection measure.

In assessing OBSI's approach to calculating damages where an unsuitable exempt market product was sold to a consumer, we attempted to compare OBSI's approach with the approach a Canadian court would take in similar circumstances. However, we are unaware of any relevant case law where a Canadian court considered how to calculate a consumer's damages where an unsuitable exempt market product was sold to the consumer. As a general matter, we note that OBSI's approach in these circumstances appears consistent with the overarching principle that an aggrieved party should be made whole.

However, we acknowledge that we heard a lot of criticism from the EMD/PM community on OBSI's approach, and that these criticisms have been long-standing. While OBSI has sought to open dialogue on these issues with interested stakeholders, no alternative solution has been found. As a result, we believe that OBSI should conduct a public consultation on its loss calculation methodology for exempt market product cases. Ideally, in order to ensure acceptance from the EMD/PM community, the resulting methodology would be approved by the securities regulators. We believe that this would help to improve OBSI's credibility with EMDs and PMs

Recommendation

OBSI should conduct a public consultation on its loss calculation methodology for exempt market product cases. Ideally, in order to ensure acceptance from the EMD/PM community, the resulting methodology would be approved by the securities regulators.

7. Fees and Costs

OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership.

MOU, s. 3(d)

OBSI is a not-for-profit organization that operates on a cost recovery basis. Each September, OBSI's board of directors approves its budget and the allocation of its budget among its participating firms for the upcoming year. OBSI's fee allocations are broadly based on the principle that no one sector or registrant category should subsidize another.

For fee purposes, OBSI has five industry sectors:

1. Banks and deposit taking institutions;
2. Investment firms that are members of an SRO (IIROC and the MFDA);
3. Investment firms that are not members of an SRO, which includes PMs, EMDs, Restricted Portfolio Managers, Restricted Dealers and Investment Fund Managers;
4. Scholarship plan dealers; and
5. Provincial credit unions (new in 2022).

The allocation of the budget among the five industry sectors is based on the total number and complexity of the cases opened for each sector in the previously completed year.

Once the budget has been allocated to each sector, fees for each firm in the sector are determined on the basis of size. The various sectors have different proxies for size. For example, for banks and other deposit-taking firms, the banking sector allocation is divided among institutions on the basis of their self-declared Canadian banking assets relative to other banks in the most recent benchmark year.

For the SRO investment sector, there is a further allocation between IIROC and MFDA based on their proportionate share of cases opened over a trailing eight quarter period. Both IIROC and MFDA then allocate firm-specific fees among their firms using their own membership payment calculation methodology.

For investment firms that are not members of an SRO (including PMs and EMDs), fees are paid based on each firm's number of registered representatives. The per representative fee is determined by dividing the sector's budget allocation by the total number of representatives reported for the sector in the previous year. To determine their fees, firms log onto OBSI's online firm portal and use the fee calculator to input their total number of registered representatives for the current fiscal year (excluding those representatives that work exclusively in Quebec or deal exclusively with permitted clients). An invoice is created and firms pay OBSI directly.

Some stakeholders told us that OBSI's process for setting fees is transparent but difficult to understand. In their view, a fee structure where members are charged a set administration fee plus a per case fee would be fairer and simpler.

Members of the PM community were the most critical of OBSI's process for setting fees. They took the position that the percentage of fees allocated to them is not consistent with the percentage of overall complaints against them. They view this as negatively impacting their overall value for money.

As support, they cite the case statistics in OBSI's annual reports. In 2020, for example, there were 692 PMs participating in OBSI. Only 26 cases involving PMs were opened, representing 5% of the total cases opened by OBSI. In 2019, this figure was 3.6%. Given that the PM category accounts for a small percentage of the overall cases opened by OBSI, PMs argue that the current model results in the PM sector paying a disproportionately high amount of OBSI's infrastructure costs in relation to the services provided to PMs.

OBSI's response is that its fee allocations are based not only on the number of cases, but also the complexity of cases. The fees allocated to EMDs and PMs are proportionate when complexity is taken into account. In 2020, the EMD & PM sector was allocated 7.6% of OBSI's total fees. In 2018 (the year on which 2020 fees are based), cases from the EMD-PM sector made up 7% of OBSI's complexity-weighted case volume.

OBSI told us that it prefers its current fee allocation methodology to a per-case fee allocation for a number of reasons. The main reason is that OBSI considers its current methodology fair to all firms. The methodology also allows OBSI to meet its budget needs and is responsive to the preferences that firms have expressed to OBSI (for example, their preference for year-over-year fee predictability and minimal risk of upward volatility).

OBSI also sees a per-case fee allocation as potentially disincentivizing firms from referring consumers to OBSI, notwithstanding their regulatory obligation to do so.

While complex, we find the system to be fair and transparent, and are not recommending that any changes be made at this time.

8. Resources

OBSI should have the appropriate resources to carry out its functions and to deal with each complaint thoroughly and competently.

MOU, s. 3(e)

8.1 Budget and Resources

We reviewed OBSI's budgets, budget summaries and audited financial statements for 2016-2020. OBSI's leadership presents budget summaries for the board that are comprehensive and well-considered. On the face of these documents, there does not appear to be anything of great concern. Budget planning appears to be accurate, as budgets typically have a positive variance at the end of the fiscal year, with the exception of 2019, which had a small negative variance. In our discussions with OBSI leadership, it was noted that the organization's budget has remained largely consistent in recent years, even with the spike in cases caused by the COVID-19 pandemic.

The management and staff we spoke to did not express any significant budget or resource concerns. We find that OBSI's budget and resources during the Five-Year Period were adequate. However, we note that if certain of the recommendations in this report are implemented (for example, if OBSI is given binding decision-making authority and certain reforms are made to its systems), it will likely require an increase in fees.

8.1.1 Response to the COVID-19 Pandemic

In March 2020, the COVID-19 pandemic led to enormous disruption at OBSI, both externally and internally. Externally, cases spiked, with more consumers complaining to their banks and investment firms for various reasons. This led to an enormous increase in workflow for the organization. While OBSI dealt with 90-95 total intakes (not specific to investments) per week on average pre-pandemic, it received about 150 total intakes per week during the pandemic. Internally, OBSI dealt with the same challenges every employer dealt with in Canada, including the need to transition to a work-from-home model and the need for flexibility to allow for childcare and sick time.

OBSI was criticized for the backlogs it suffered after the 2007-09 financial crisis, which also resulted in a spike in cases. By contrast, OBSI has not had significant delays in its services during the COVID-19 pandemic. In response to the pandemic and the influx of cases, OBSI hired more investigation staff. Moreover, managers expressed to us that staff simply "worked a lot," hunkering down for a busy period. We commend OBSI for its success in this regard. Senior management observed that the organization had learned lessons from the financial crisis and the backlog it created. There was more staff, more support, a stronger analyst team and more guidance from management during the pandemic, and all of this led to better results.

At the management and board levels, the pandemic was taken seriously from the beginning. In both 2020 and 2021, management prepared Case Volume Increase Response Plans, outlining possible case increase scenarios and the budgetary and operational impacts of each. The 2020 plan was produced in April 2020, mere weeks after the declaration of a global pandemic. The key motivator for this was the associated stock market drop in March 2020 and subsequent market

volatility. This shows that OBSI's leadership was on top of the matter. This strong leadership complemented the hard-working staff.

Also notable was the organization's digital transformation between 2015 and 2020 – to completely cloud-based computing, VOIP telephone communications and paperless workflows. Technological innovations such as OBSI's consumer and firm portals and online case opening process have also driven efficiency significantly through the period.

The shift to remote work was smooth due to OBSI's advance business continuity planning and the fact that even pre-pandemic, about a quarter of OBSI's workforce worked remotely, as they are located across the country. OBSI also adjusted workflows, reduced project work and reduced cross-training to allow staff to focus in areas of high expertise in order to facilitate efficiency.

8.2 Staff

OBSI has sufficient staff to fulfill its investments mandate. It currently has a complement of 21 investigators (all of whom work on both OBSI's investments and banking mandates), two deputy ombudsmen, four managers (who also work on both investments and banking), five investments analysts (four analysts and a manager), and five case assessment officers (four officers and a manager).

Inherently tied into its reputation for good operations is the reputation of OBSI's investigators. OBSI's investigators are full-time permanent staff of the organization. They come from a range of backgrounds, including law, finance and accounting.

With respect to style, the comments about OBSI investigators were generally positive. Industry and consumers alike found OBSI investigators pleasant, professional and communicative. With respect to the investigators' expertise, stakeholders told us that, overall, OBSI has done a good job bringing knowledgeable investigators in. However, there were concerns raised by some industry stakeholders that the quality of OBSI's investigators varies, and that some are more knowledgeable on certain subjects than others. In particular, we heard that:

1. Sometimes the same dealer is treated differently depending on who the investigator is;
2. What is given weight varies depending on the investigator on the file;
3. It is difficult for less seasoned investigators to conduct a retroactive analysis;
4. OBSI has too many generalists reviewing complex products and transactions, which leads to inconstant results. If staff were specialists in a particular area, this would result in greater consistency; and
5. OBSI's staff do not have the requisite knowledge and experience of having trained or worked in the exempt market. Taking the Exempt Market Product Exam or Chief Compliance Officer's Course are not appropriate proxies of knowledge of and experience in the exempt market.

These stakeholders recommended making relevant industry experience an essential requirement for new staff hired to conduct complaint investigations.

We did not see anything in our file review to substantiate these concerns and note that OBSI's 2020 firm survey results indicate that 90% of investment firms who used its services agreed that its investigators were knowledgeable about applicable laws and regulations and firms' applicable policies. As a result, it seems the above viewpoints are those of a vocal minority.

From other stakeholders, we heard that OBSI's investigators were proficient, qualified and skilled at their jobs. These stakeholders told us that their overall experience at OBSI has improved substantially as a result of the quality of OBSI's investigators. We heard that OBSI's investigators are willing to hear both parties' viewpoints and that they are very reflective on feedback. Based on our file review, we agree.

With respect to particular concerns raised by the EMD/PM community, we note that, in addition to having taken the Exempt Market Product Exam or Chief Compliance Officer's Course, most members of OBSI's investigative staff have completed the IFSE Institute exempt markets proficiency course (the qualifying course to allow individuals to become registered exempt market representatives). They are also very familiar with the requirements of NI 31-103 and other securities regulations that apply to exempt market dealers. Certain investigators also have exempt market experience.

We suggest, however, given the outstanding concerns about industry knowledge, that it would be worthwhile for OBSI to "bring the outside in" more often (that is, increase the number of times industry and firm staff come into OBSI's offices to share the latest industry developments or insights they feel may help OBSI's understanding of issues). We also recommend that OBSI work with the relevant industry associations to develop a training program on exempt market issues for its investigators.

Recommendation

OBSI should increase the number of times industry and firm staff come into OBSI's offices to share the latest industry developments or any industry insights they feel may help OBSI's understanding of issues. OBSI should also work with the relevant industry association to develop a training program on exempt market issues for its investigators.

9. Accessibility

OBSI should promote knowledge of its services, ensure that investors have convenient, well-identified means of access to its services, and provide its services at no cost to investors who have complaints.

MOU, s. 3(f)

9.1 Bilingual Services

OBSI is a national organization. It is required to offer its services in Canada's two official languages, English and French, and to provide those services across our vast country.

In order to discern whether OBSI is accessible, we reviewed OBSI's public-facing materials, interviewed OBSI investigators and consulted with stakeholders who serve the Francophone communities.

Overall, we found that OBSI makes its services available in both official languages. In speaking with OBSI staff, we found that there were investigators who spoke English and French and heard from investigators that they could not recall any situations where a consumer was unable to work with an investigator who did not speak their chosen official language.

We reviewed files that were in both English and French. While most were in English, those that had Francophone consumers received services in French if requested including having their interviews in French.

In conducting our review, we took a broader definition of 'services' than just the dispute resolution process. We reviewed the public-facing materials produced by OBSI. The website is fully bilingual and users can access the information and resources there in either English or French.

However, we note that not all publications are in both official languages, though most are. While key documents such as annual reports are in both French and English, there are some documents in the *Présentations, rapports et propositions* section of the website that are in English only. Importantly, case studies and data reports are in both languages.

9.2 Services across Canada

OBSI is meant to be a national service, available to residents of any of Canada's 13 provinces and territories and consumers outside Canada using the services of a Canadian participating firm. However, we heard feedback from multiple stakeholders that OBSI's services are not available to everyone. There was concern raised that those in remote, rural and Indigenous communities might not know about OBSI or have the resources to go through the dispute resolution process. We flag this as a concern though it is not entirely within OBSI's control; for example, some communities lack adequate broadband access and there is little that OBSI can do to improve accessibility in this case.

That being said, we found no pattern of service differentials depending on geography. A consumer in a remote town and a consumer in a big city did not face different service timelines or quality of service, as best we could tell through our file review.

9.3 Free Services

OBSI is required to provide its services free of charge to consumers. This is also a crucial internationally recognized best practice for financial services ombudsmen and an important aspect of OBSI's accessibility. OBSI has maintained this standard and we heard no concerns from stakeholders to the contrary.

9.4 Broader Accessibility Considerations

In our discussions with OBSI senior management, we also heard that OBSI publishes some materials in languages in addition to English and French. We believe this is an important practice to ensure that OBSI is reaching all communities in Canada.

Recommendation

OBSI should continue to produce core materials for consumers in languages in addition to English and French, to the extent possible within resource constraints.

9.5 Promoting Awareness

Promoting awareness of OBSI's services is one of the key requirements of the MOU. Consumer awareness of OBSI's services is necessary for OBSI to fulfill its role in instilling confidence in the sector and in ensuring that consumers do not abandon their unresolved complaints due to a perception of futility.

We heard from some firms that awareness raising is akin to "advertising for complaints" or trying to instill dissatisfaction. We do not find these arguments compelling, and commend OBSI for the strides it has made in its consumer awareness activities since the 2016 Review. Among other things, in recent years, OBSI has:

1. met regularly with consumer groups to share information;
2. leveraged its community outreach program to deliver information webinars to vulnerable consumer groups and the communities they serve;
3. increased digital communications on its website and social media platforms and increased its promotion of posts and tweets;
4. developed and promoted a full-length video about its complaint process and numerous shorter videos and promoted them through social media and its website; and
5. introduced a community outreach program to augment its existing efforts to foster relationships with vulnerable consumer groups and the communities they serve.

Looking to the future, we understand that OBSI is looking to expand its role as a thought leader, by using its experiences and expertise to contribute to the overall fairness, effectiveness and trust in the financial services sector in Canada. We believe this is an important function of a financial services ombudsman and will be a significant value add to the system.

Recommendation

OBSI should continue to expand its role as a thought leader in the future by using its experiences and expertise to contribute to the overall fairness, effectiveness and trust in the financial services sector in Canada.

10. Systems and Controls

OBSI should have effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes.

MOU, s. 3(g)

10.1 Confidentiality

OBSI's dispute resolution process is confidential. In order to participate in the process, both parties have to agree not to disclose any information they have received through OBSI's process, including its letters and documentation, subject to certain limited exceptions. They can speak about the process generally. Consumers specifically agree to the confidentiality of OBSI's process by signing a consent letter to participate in the process. For firms, the duty of confidentiality is set out in OBSI's Terms of Reference, which firms agree to abide by when they become participating firms.

Confidentiality is an important feature of OBSI's complaint process. It allows firms and consumers to freely share information without fear that it will be used against them later. Put simply, confidentiality helps to foster settlement by allowing consumers and firms to focus on getting to a fair resolution of their case by working collaboratively, without fear that an adverse inference will be drawn against them, and avoiding unnecessary posturing or hostile communications. This free exchange of information helps OBSI to quickly find a fair resolution to the case.

We heard from some consumers that OBSI should not require consumers to sign a confidentiality agreement to participate in OBSI's process. For the reasons described above, we believe that confidentiality is an important part of OBSI's process that should be maintained.

10.2 Quality Control

OBSI has various quality control processes in place, including:

1. Manager oversight of every file, including through the review of the investigation plan prepared by the investigator at the outset of the investigation;
2. Regular informal management meetings with staff;
3. The application of OBSI's loss calculation methodology by a specialized team of analysts in suitability cases;
4. The ability to have peers review draft closing letters and other documents, or to discuss issues with peers;
5. Management review of all closing letters; and
6. The availability of reconsideration.

In addition, almost all of OBSI's cases are subject to a Quality Assessment Review by the manager to assess quality against six key quality metrics (efficiency of investigation, information gathering, analysis and insight, writing quality, stakeholder engagement, data integrity), as well as qualitative comments.

OBSI also has semi-annual compliance reviews conducted by its Chief Compliance Officer that examine compliance with regulatory and internal controls for a random sample of cases. This is an important accountability function that includes but is broader in scope than case quality control.

In addition, OBSI offers consumers the ability to lodge compliance complaints if they believe OBSI has not complied with its standards and obligations. Finally, OBSI has the independent external review process, as well as ad hoc regulator reviews (such as the recent FCAC review).

Other than the minor suggestions for improvement noted throughout this report, we believe that OBSI has effective and adequate internal controls to ensure the confidentiality, integrity and competence of its processes.

11. Core Methodologies

OBSI should have appropriate and transparent processes for developing its core methodologies for dispute resolution.

MOU, s. 3(h)

As discussed throughout this report, OBSI has robust dispute resolution methodologies and record-keeping. It has also posted many of its core methodologies (such as its approach to suitability, limitation periods, risk ratings, DIY investing cases, etc.) on its website.

Nevertheless, residual complaints about the transparency and consistency of OBSI's decisions do exist. Peer agencies internationally, such as FOS UK and AFCA, post their binding decisions online. This allows the parties to understand how any particular case might be approached by investigators. Others, such as the New Zealand Insurance & Financial Services Ombudsman Scheme (**IFSO**), post helpful case studies in an easy-to-understand format. OBSI does the same, although not as frequently as IFSO.

We understand that, in June 2022, *Bank Act* requirements under the consumer protection framework will be coming into force which will require OBSI to publish a summary of its final recommendation for every case, including: the nature of the complaint, the name of the institution, a description of any compensation, and the reasons for the final recommendation. These summaries will need to be published within 90 days of the final recommendation. We believe this is a positive step. It will enhance transparency, promote consistency of like decisions and increase confidence in OBSI's decision-making processes on the banking side.

We also understand that OBSI already provides similar case summaries to the JRC (except with both the consumer and firm name anonymized) as part of its reporting on the investments side. We recommend that OBSI post these anonymized summaries to its website in the same way it plans to do for banking files.

Recommendation

OBSI should be required to post anonymized case summaries of all of its investments cases to its website.

12. Information Sharing

OBSI should share information and cooperate with the Participating CSA Members through the CSA Designates in order to facilitate effective oversight under this MOU.

MOU, s. 3(i)

OBSI meets and shares information with the JRC on a quarterly basis. OBSI's reporting to the JRC is detailed and robust. It includes analytical reports in the form of tables and raw data on matters such as open and closed complaints, case outcomes, reasons for file delays and low settlements, accompanied by a helpful report from the CEO setting out the main insights and observations for the period. OBSI also provides anonymized summaries of all of its investment cases to the JRC, which we recommend it also post to its website. Additionally, OBSI's board meets annually with the JRC, including holding an in-camera meeting.

In our view, the information OBSI provides helps to facilitate effective oversight under the MOU.

13. Transparency

OBSI should undertake public consultations in respect of material changes to its operations or services, including material changes to its Terms of Reference or By-Laws.

MOU, s. 3(j)

In 2018, OBSI underwent a public consultation process on the modernization of its Terms of Reference in order to make them easier to use and current. A number of submissions were received and considered by OBSI's board.

We are not aware of any material changes to either OBSI's Terms of Reference or By-Laws that were made without consultation.

14. Progress Since 2016 Review

As outlined in greater detail throughout this report, OBSI has made significant progress since the 2016 Review. Key achievements include:

1. The modernization of OBSI's organizational practices through:

    a. the development of a five-year strategic plan;
    b. the development and launch of a new internal intranet knowledge management system;
    c. the development and launch of a new financial accounting system;
    d. the writing of, consulting on and launch of entirely new Terms of Reference; and
    e. the launch of OBSI's social media strategy.

2. Improved efficiency, which allowed OBSI to respond to significant case volume increases during the COVID-19 pandemic, through:

    a. the development and launch of a new case management system;
    b. pursuing a digital transformation to cloud-based data and VOIP-based communications systems (ongoing);
    c. the automation of OBSI's online complaint intake process; and
    d. the launch of OBSI's expedited investigations process.

3. Improved value to stakeholders through:

    a. a completely rebuilt, user-friendly, secure website;
    b. the plain language rewrite of all communications;
    c. new Consumer and Firm Portals;
    d. the launch of Firm Helpdesk;
    e. quarterly newsletters;
    f. firm continuing education presentations; and
    g. the posting of various OBSI core methodologies and approaches to key issues to OBSI's website.

4. Minimized enterprise risks through:

    a. new enterprise risk framework;
    b. fully funded financial reserves and reserve sufficiency assessment process;
    c. implementation of independent IT security maturity audit; and
    d. new IT managed services and vendor relationships.

Certain recommendations from the 2016 Report remain outstanding, the most significant being OBSI's continued lack of binding decision-making authority (which is outside of OBSI's control). Another key outstanding recommendation relates to the clarification and/or broadening of the definition of "systemic issues".

15. Summary of International Comparisons

Comparisons with other international financial ombuds services have been included throughout the report. To summarize, OBSI has improved its overall effectiveness in relation to its international counterparts. However, it continues to trail behind in the following respects:

1. its inability to secure redress for consumers by issuing decisions that are binding on the parties; and
2. its handling of systemic issues.

We see these as key areas for improvement for OBSI in the future.

16. Summary of Recommendations

Governance Recommendations

1. OBSI's board should undertake a strategic review of its governance structure to determine how best to ensure that key stakeholder interests are most effectively considered in board oversight and decision-making. In particular, OBSI's board should:

    a. add other metrics to the Governance & Human Resources Committee's diversity deliberations for recruitment purposes, including indigenous ancestry, membership in a visible minority community and disability;
    b. transition towards having a board with no specific categorical requirements regarding the number of industry and community directors and amend its bylaws to remove the requirement that industry directors be nominated by IIROC, MFDA and CBA, respectively;
    c. amend and update its skills matrix and use it as the basis for recruitment to ensure that directors have the skills and competencies needed to effectively oversee OBSI. The skills matrix should include experience in the range of relevant industry sectors, as well as important consumer and investor perspectives; geographic and linguistic diversity; and diversity of backgrounds should also be explicitly accounted for;
    d. establish roundtables with industry and consumers, including advocacy groups of both, to receive their perspectives and opinions on key issues of importance to OBSI and current developments and trends; and
    e. in light of the above, carefully consider whether it is necessary or desirable to continue having a CIAC, given that the recommended governance structure described above would see an OBSI board that has balance in industry and investor backgrounds and where the OBSI board would receive input from industry and consumer stakeholders through other means.

Strategic Recommendations

2. Until binding authority is granted, or if it is not granted, OBSI should publish not only cases of outright refusals, but also low settlements in the form of quarterly and annual chart posted to its website.

3. OBSI should be empowered to make awards that are binding on the firm and on the consumer, if accepted by the consumer.

4. OBSI's binding decision-making authority should be accompanied by certain limited procedural enhancements at the discretion of the decision-maker and a right of judicial review.

Operational Recommendations

5. OBSI should add more information about limitation periods to the closing letter sent to consumers. Specifically, OBSI should include:
    a. information about the limitation periods in each province; and
    b. language indicating the "ought to have known" standard for limitation periods.

6. OBSI should conduct consumer and firm interviews over a videoconferencing platform, allowing for a stronger credibility assessment.

7. OBSI should work with the JRC to review and improve the systemic issue reporting system, including by:
    a. Amending the definition of systemic issue to include complaints raised by a single complainant;
    b. Requiring OBSI to report repeated systemic issues year-after-year, even if the same issue was identified in prior years; and
    c. Ensuring more robust communication between the JRC and OBSI once a systemic issue has been identified by OBSI.

8. OBSI should set out in its Annual Report the number of potential systemic issues it has identified in the previous year, both in respect of securities and banking complaints, and provide a generic description of the type of issue identified.

9. OBSI should work with the JRC or the CSA Designate to issue a report to the public on what steps have been taken with respect to the potential systemic issues identified by OBSI.

10. OBSI should ensure that it is adequately serving seniors by:
    a. changing CIAC's Statement of Expectations to require at least one member with experience in advocating for seniors; and
    b. requiring special training for all existing (and then, as they are onboarded, all new) investigators on working with seniors (*e.g.*, identifying diminished capacity).

11. OBSI should begin counting its investigation targets when OBSI receives the consumer's signed consent letter.

12. OBSI should require firms to provide documents within two weeks, failing which OBSI should publicly report the firm's failure to meet OBSI's timelines.

13. OBSI should set a target of 30 days to assign a case to an investigator, and should report on how frequently it is meeting this target.

14. OBSI should provide additional information in the standard consent letter and their What to Expect document, including:

    a. Legal information about limitation periods for civil actions in each jurisdiction in Canada;
    b. Reference to the "ought to have known" standard for limitation periods;
    c. An investigation pathway/steps graphic; and
    d. Better disclosure with respect to timing of the investigation, including the target for completion and an estimated time for collecting documents.

15. OBSI should increase its compensation limit from $350,000 to $500,000.

16. OBSI should reform its approach to non-financial harms and indirect financial harms in the following ways:
    a. To provide certainty, OBSI should create three levels for non-financial harm/indirect financial harm (low, medium and high), with set compensation amounts for each one; and

b. When providing a determination with respect to compensation for non-financial harm/indirect harm, OBSI investigators should be required to provide detailed reasons as to why they came to their conclusion.

17. OBSI should conduct a public consultation on its loss calculation methodology for exempt market product cases. Ideally, in order to ensure acceptance from the EMD/PM community, the resulting methodology would be approved by the securities regulators.

18. OBSI should increase the number of times industry and firm staff come into OBSI's offices to share the latest industry developments or any industry insights they feel may help OBSI's understanding of issues. OBSI should also work with the relevant industry association to develop a training program on exempt market issues for its investigators.

Value-Added and Awareness Recommendations

19. OBSI's reconsideration closing letters should contain additional information with respect to the process the reconsideration officer undertook and more detailed reasons for either upholding or overturning the original decision.

20. OBSI should continue to produce core materials for consumers in languages in addition to English and French, to the extent possible within resource constraints.

21. OBSI should be required to post anonymized case summaries of all of its investments cases to its website.

22. OBSI should continue to expand its role as a thought leader in the future by using its experiences and expertise to contribute to the overall fairness, effectiveness and trust in the financial services sector in Canada.

APPENDIX "A" – MEMORANDUM OF UNDERSTANDING BETWEEN THE CSA AND OBSI

Amended and Restated Memorandum of Understanding
concerning oversight of the Ombudsman for Banking Services and Investments

among

the Canadian Securities Administrators

and

OBSI

WHEREAS an accessible and effective dispute resolution service is vital to the integrity of the Canadian securities market and is an important public policy objective of the CSA;

WHEREAS investors should have ready recourse to effective dispute resolution mechanisms both (a) within a Registered Firm and (b) in the case of unresolved complaints at the firm level, within an independent third-party dispute resolution system;

WHEREAS the CSA consider effective dispute resolution through an independent ombudservice to be an important component of a well functioning investor protection policy framework;

WHEREAS OBSI has established an accessible and effective system to resolve investor complaints based on standards acceptable to the CSA;

WHEREAS OBSI resolves the vast majority of complaints brought to it to the satisfaction of both the investors and the firms involved and, in those instances where a Registered Firm does not accept OBSI's recommendations, the CSA consider the mechanism of making such refusals transparent to be an important element of the investor protection framework;

WHEREAS the CSA have made amendments to NI 31-103 effective May 1, 2014, to require, among other things, that Registered Firms make available the services of OBSI for disputes that fall within OBSI's mandate;

WHEREAS these amendments to NI 31-103 are not applicable in Québec since the Autorité des marchés financiers may act as a mediator and Registered Firms are deemed to comply with the dispute resolution requirements included in NI 31-103 if they comply with the applicable provisions in the *Securities Act* (Québec);

WHEREAS investors in Québec are nevertheless entitled to use the services of OBSI for disputes that fall within OBSI's mandate, in lieu of the mediation services of the Autorité des marchés financiers; and

WHEREAS the CSA consider it important to articulate an oversight framework for OBSI as the mandated dispute resolution service provider under NI 31-103.

The parties agree as follows:

Article 1 – Definitions

1) For purposes of this Amended and Restated Memorandum of Understanding ("MOU"):

   a) "Board of Directors" means the board of directors of OBSI;

   b) "By-Laws" means the by-laws adopted by OBSI, which became effective on December 3, 2013, as amended from time to time;

   c) "Chair" means the chair of the Board of Directors;

   d) "CSA" means "Canadian Securities Administrators";

   e) "CSA Designates" mean the Alberta Securities Commission, the British Columbia Securities Commission, the Ontario Securities Commission, and the Autorité des marchés financiers, or another member or members of the CSA selected from time to time to act as the CSA Designates under this MOU;

   f) "JRC" means the OBSI Joint Regulators Committee which includes representatives from the CSA Designates, the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada. The terms of reference for the JRC are attached as Schedule A to this MOU;

   g) "NI 31-103" means National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*;

   h) "OBSI" means the Ombudsman for Banking Services and Investments, or its successor;

   i) "Ombudsman" means the ombudsman appointed by the Board of Directors;

   j) "Registered Firm" has the same meaning as in NI 31-103;

   k) "Registered Individual" has the same meaning as in NI 31-103; and

   l) "Terms of Reference" means the Terms of Reference adopted by OBSI on December 2, 2013, as amended from time to time.

Article 2 - Purpose

2) This MOU provides an oversight framework for the CSA and OBSI to cooperate and communicate constructively.

3) The purpose of the oversight framework is to ensure that OBSI continues to meet the following standards set by the CSA:

a) *Governance* – OBSI's governance structure should provide for fair and meaningful representation on its Board of Directors and board committees of different stakeholders, promote accountability of the Ombudsman, and allow OBSI to manage conflicts of interest.

b) *Independence and Standard of Fairness* – OBSI should provide impartial and objective dispute resolution services that are independent from the investment industry, and that are based on a standard that is fair to both Registered Firms and investors in the circumstances of each individual complaint. When determining what is fair, OBSI should take into account general principles of good financial services and business practice, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct.

c) *Processes to perform functions on a timely and fair basis* – OBSI should maintain its ability to perform its dispute resolution on a timely basis and deal with complaints without undue delay and should establish processes that are demonstrably fair to both parties.

d) *Fees and costs* – OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership.

e) *Resources* – OBSI should have the appropriate resources to carry out its functions and to deal with each complaint thoroughly and competently.

f) *Accessibility* – OBSI should promote knowledge of its services, ensure that investors have convenient, well identified means of access to its services, and provide its services at no cost to investors who have complaints.

g) *Systems and controls* – OBSI should have effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes.

h) *Core Methodologies* – OBSI should have appropriate and transparent processes for developing its core methodologies for dispute resolution.

i) *Information sharing* – OBSI should share information and cooperate with the CSA through the CSA Designates in order to facilitate effective oversight under this MOU.

j) *Transparency* – OBSI should undertake public consultations in respect of material changes to its operations or services, including material changes to its Terms of Reference or By-Laws.

4) This MOU is not intended to:

   a) displace or reduce the duties or responsibilities of the Board of Directors in overseeing OBSI; the Board of Directors continues to be fully responsible for providing oversight of OBSI and the Ombudsman (through the adoption of transparent governance and other policies embracing best practices and through sound stewardship of the operations of OBSI) in accordance with OBSI's Terms of Reference and By-Laws;

   b) be used to share information that relates to individual complaints made to OBSI, including the identity of any complainant, Registered Firm or Registered Individual against whom a complaint has been made, unless provided by section 7 of this MOU.

5) This MOU is intended to replace the oversight framework contemplated in the Joint Forum of Financial Market Regulators' *The Financial Services OmbudsNetwork – A Framework for Collaboration*, which was adopted and endorsed by the CSA in August 2007.

Article 3 – Cooperation and Information Sharing

6) The CSA and OBSI agree that:

   a) The CSA Designates and the Chair will meet and communicate as appropriate to discuss matters significant to investor disputes.

   b) The Chair will consult at an early stage with the CSA Designates on issues that might have significant implications for the dispute resolution system and for its members.

   c) The Chair will share at an early stage with the CSA Designates draft documents that are proposed to be published for stakeholder feedback, including any proposed changes to OBSI's Terms of Reference, By-Laws or fees.

7) The Chair will inform the CSA Designates of issues and share information that appear likely to have significant regulatory implications, including issues that appear to affect multiple clients of one or more firms.

8) The Chair will deliver an annual report to the CSA Designates on OBSI's activities, including the number and types of complaints handled.

9) The Board of Directors will make itself available to meet with the CSA Designates and the JRC at least once a year, or more frequently if requested by the CSA Designates to discuss, among other things:

   a) material operating issues, including fees, specific to OBSI;

   b) governance matters; and

   c) effectiveness of OBSI's dispute resolution practices.

10) The Ombudsman will also meet with the CSA Designates and the JRC, as appropriate, to discuss significant issues that could materially impact OBSI's operations or the effectiveness of the dispute resolution system for investors.

Article 4 – Independent Evaluations

11) Within two years of the amendments to NI 31-103 coming into force, OBSI will commence an independent evaluation of its operations and practices in accordance with terms of reference and a mandate established in consultation with the CSA, and undertaken by an evaluator acceptable to the CSA in consultation with the JRC. OBSI will cooperate with the evaluator to facilitate the completion of the evaluator's report within a reasonable time from the commencement of the evaluation. Thereafter, such independent evaluations will occur at least once every five years.

12) The Board of Directors will provide the CSA Designates with an action plan respecting the proposed implementation of any recommendations made in the independent evaluator's report.

Article 5 – Amendments

The parties will periodically review the functioning and effectiveness of this MOU with a view, among other things, to expanding or altering the scope or operation of this MOU should that be judged necessary.

Article 6 - Execution of MOU

Cooperation in accordance with this MOU will become effective on the date this MOU is signed by the parties.

The effective date of the MOU is December 1, 2015.

The MOU may be signed in any number of counterparts (which may be delivered by facsimile, PDF format or other electronic transmission), each of which is deemed an original, and all of which taken together constitute one single document.

SCHEDULE A

OBSI Joint Regulators Committee ("JRC")
Terms of Reference

1. Mandate

The role of JRC is to:

- facilitate a holistic approach to information sharing and monitoring of the dispute resolution process with an overall view to promoting investor protection and confidence in the external dispute resolution system
- support fairness, accessibility and effectiveness of the dispute resolution process
- facilitate regular communication and consultation among JRC members and OBSI.

As part of these overall purposes, the JRC will provide a forum for the CSA Designates, the Investment Industry Regulatory Organization of Canada ("IIROC") and the Mutual Fund Dealers Association of Canada ("MFDA") to:

- introduce issues and concerns regarding OBSI that have come to the attention of the regulators through investors and Registered Firms and discuss these among the regulators, before bringing them to the attention of OBSI
- identify emerging issues or potential risks and challenges
- discuss background and current information with respect to regulatory policies and guidance as well as standards applicable to and methodologies used by Registered Firms in order to assist OBSI in understanding the context of disputes.

The JRC will provide a forum for OBSI to:

- introduce issues and concerns, including matters that impact OBSI's operations or the effectiveness of the dispute resolution system for investors
- bring to the attention of the JRC at an early stage, issues that might have significant implications for the dispute resolution system and for Registered Firms
- bring to the attention of the JRC issues that might impact the regulators, and to consult in relation to measures that might be taken to improve the way that Registered Firms deal with complaints.

2. JRC membership and frequency of meetings

The JRC will consist of representatives of the CSA Designates, IIROC and the MFDA.

The JRC will meet on a regularly scheduled basis and at least twice a year. Special meetings will be scheduled as necessary. Representatives of OBSI may be invited to attend a meeting or a portion of a meeting, either on an ad hoc or on a regularly scheduled basis. For example, the JRC may wish to meet from time to time with the Ombusdman and senior staff to learn about investors' complaint experiences relating to Registered Firms and to facilitate OBSI staff's understanding of industry practices.

As provided in the MOU, the JRC will meet with the Board of Directors of OBSI at least once a year to discuss, among other things:

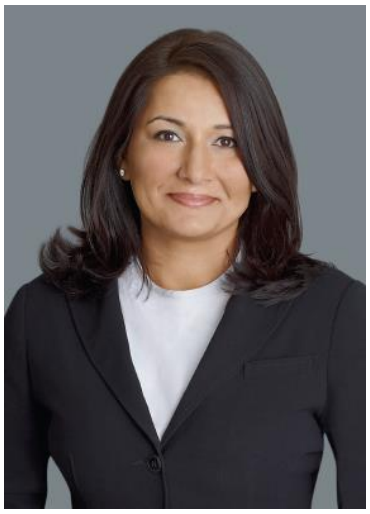
- material operating issues, including fees, specific to OBSI
- OBSI governance matters
- effectiveness of OBSI's dispute resolution practices.

3. Matters for discussion at JRC meetings

Matters for consideration or discussion by the JRC will include:

- consultation regarding the criteria that OBSI should meet to achieve the public interest objectives of dispute resolution, as well as any need for improvements to industry standards
- updates on proposed changes to rules, guidelines, terms of reference and other matters relating to complaint handling or dispute resolution
- complaint handling practices and Registered Firms' compliance with related rules established by the regulators
- information sharing regarding types of complaints, timelines for resolving complaints and discussion of general trends; including matching aggregated information from regulators (e.g. with respect to types of complaints /volumes) with aggregated information from OBSI
- coordination of JRC members' respective communications to ensure investor awareness of dispute resolution and the availability of OBSI processes
- consultation on fee setting by OBSI
- consultation regarding the choice of independent evaluator and discussion of the results of the first independent evaluation, and subsequent evaluations at least every five years, including any recommendations by the evaluator and OBSI's action plan to address the recommendations.

APPENDIX “B” – TEAM BIOS



Professor Poonam Puri

Professor Puri is one of Canada’s most respected leaders in corporate governance and corporate and securities law. She is a tenured professor of business law and former Associate Dean at Osgoode Hall Law School. Professor Puri has been recognized with the Law Society Medal (2021), the David Walter Mundell Medal (2021) and the Royal Society of Canada’s Yvan Allaire Medal (2021) for excellence in contributions to the governance of public and private organizations in Canada. Professor Puri has been previously recognized as one of Canada’s Top 25 Most Influential Lawyers, one of Canada's 100 Most Powerful Women and one of Canada's Top 40 Under 40 leaders. She is a graduate of the University of Toronto Faculty of Law (LL.B., 1995, Silver Medalist) and Harvard Law School (LL.M., 1997).

Dina Milivojevic

Ms. Milivojevic is an experienced litigator and corporate lawyer with a deep understanding of litigation and dispute resolution, expert governance knowledge and superior research skills. Ms. Milivojevic has extensive experience conducting investigations and independent evaluations in a range of contexts. Most recently, she conducted an independent review of two major transactions for a large not-for-profit organization. Ms. Milivojevic is a graduate of McMaster University (B.A., 2009) and the University of Western Ontario Faculty of Law (J.D., 2012).

APPENDIX "C" – INDEPENDENT EVALUATION TERMS OF REFERENCE

Independent Evaluation Terms of Reference

The Evaluator will report on:

A. Whether OBSI is fulfilling its obligations as outlined in the MOU between the Participating CSA Members and OBSI; and,
B. Whether any operational, budget and/or procedural changes in OBSI would be desirable in order to improve OBSI's effectiveness in fulfilling the provisions of the MOU and/or recognized best practices for financial services ombudsmen.

The Evaluator will evaluate OBSI's operations and procedures applicable to the handling of investment complaints involving participating firms whose relevant regulator is a Participating CSA Member, IIROC and/or the MFDA, including the effectiveness of complaint resolution.

The Evaluator will consider and evaluate:

- investment complaint case files completed between November 1, 2018 and October 31, 2020 (the "Review Period").
- current operating policies and procedures, including any changes made between November 1, 2015 and October 31, 2020 (the "Five Year Period").
- third party evaluations, financial audits and internal self-assessments completed during the Five Year Period.

The Evaluator will ensure that the complaint files included in their review sample are selected at random and include files with the following outcomes: out of mandate following investigation, compensation recommended, no compensation recommended, settlement below recommended amount, and refusal of recommendation resulting in publication.

In addition to examining case files, the Evaluator will undertake interviews with key stakeholders including participating firms, complainants, consumer/investor groups, securities regulators and OBSI staff. Interviews may be conducted personally, in writing, by telephone, or by electronic means and may include the use of surveys.

The Evaluator will be given full access to information, meetings, communications, and OBSI staff for the purposes of the Evaluation. OBSI will use its best efforts to facilitate and coordinate access to former staff members and other stakeholders. Access to any materials or staff must pertain to the Review Period.

A. Obligations under the MOU

With respect to requirement (A) set out above, the Evaluator's report must include analyses and conclusions on OBSI's performance with respect to the following standards set out in Article 2 of the MOU:

a) Governance – OBSI's governance structure should provide for fair and meaningful representation on its Board of Directors and board committees of different stakeholders, promote accountability of the Ombudsman, and allow OBSI to manage conflicts of interest.

b) Independence and Standard of Fairness – OBSI should provide impartial and objective dispute resolution services that are independent from the investment industry, and that are based on a standard that is fair to both Registered Firms and investors in the circumstances of each individual complaint. When determining what is fair, OBSI should take into account general principles of good financial services and business practice, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct.
c) Processes to perform functions on a timely and fair basis – OBSI should maintain its ability to perform its dispute resolution on a timely basis and deal with complaints without undue delay and should establish processes that are demonstrably fair to both parties.
d) Fees and costs – OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership.
e) Resources – OBSI should have the appropriate resources to carry out its functions and to deal with each complaint thoroughly and competently.
f) Accessibility – OBSI should promote knowledge of its services, ensure that investors have convenient, well-identified means of access to its services, and provide its services at no cost to investors who have complaints.
g) Systems and controls – OBSI should have effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes.
h) Core Methodologies – OBSI should have appropriate and transparent processes for developing its core methodologies for dispute resolution.
i) Information sharing – OBSI should share information and cooperate with the Participating CSA Members through the CSA Designates in order to facilitate effective oversight under this MOU.
j) Transparency – OBSI should undertake public consultations in respect of material changes to its operations or services, including material changes to its Terms of Reference or By-Laws.

B. Operational Effectiveness

With respect to requirement (B) set out above, the Evaluator's report must set out analyses and conclusions including:

a) A report on progress towards the recommendations from the previous independent reviews.
b) A high-level evaluation of OBSI's operations with reference to its terms of reference, internal policies and procedures, fairness statement, and loss calculation methodologies. A detailed assessment of loss calculation methodologies employed by OBSI is not required.
c) A high-level benchmarking exercise that compares OBSI to other financial services ombudsman schemes or equivalent in comparable international jurisdictions both operationally and with respect to OBSI's general organizational approaches to matters such as accessibility and transparency.
d) An analysis of OBSI governance, including particular reference to stakeholder representation on OBSI's board of directors.
e) An analysis of the reasons for settlements below amounts recommended by OBSI.

Deliverable(s)

The Evaluator will present a final report in English to OBSI and make separate presentations to OBSI Senior Management, OBSI's Board of Directors, and a joint meeting of the OBSI Board of Directors and the JRC. OBSI will facilitate a professional translation of the final report into French.

Timeline

The Evaluator will regularly update OBSI on its progress and immediately disclose any material issues that could hinder its ability to carry out an effective independent evaluation. A full project timeline will be presented by the Evaluator to OBSI for consideration and approval.

The final presentation to the OBSI Board of Directors and JRC will take place in December 2021. Work on the review should begin in October 2021.

APPENDIX "D" – OBSI'S TERMS OF REFERENCE

TERMS OF REFERENCE
Ombudsman for Banking Services and Investments (OBSI)

PART 1 – PURPOSE AND SCOPE

1.1 OBSI's purpose – OBSI seeks to resolve disputes between participating financial services firms and their customers if they are unable to resolve them on their own. OBSI is independent and impartial, operates in the public interest, and its services are free and accessible to consumers without the need for legal representation. As an alternative to the legal system, OBSI works efficiently and confidentially to find a fair outcome through a fair process.

1.2 Scope – These Terms of Reference describe the principal powers and duties of OBSI, the obligations of Participating Firms, the scope of OBSI's mandate, and OBSI's process for receiving, investigating and seeking resolution of Complaints about Participating Firms.

PART 2 – DEFINITIONS AND INTERPRETATION

2.1 Definitions – In these Terms of Reference,

"**Board**" means the board of directors of OBSI.

"**Commercial Judgment**" means assessments of risk (such as in lending, taking security or insurance underwriting), and assessments of financial and commercial criteria or of the character of a Customer.

"**Complainant**" means any Customer of a Participating Firm or its Representative making a Complaint to OBSI and includes the authorized representative(s) of the Customer, such as a personal representative, guardian, trustee or executor.

"**Complaint**" means an expression of dissatisfaction made by a Customer about the Provision of a Financial Service in Canada by a Participating Firm, or Representative of a Participating Firm, made

(a) in writing; or

(b) verbally, either
(i) at the reportable complaint level (if the Participating Firm's regulator has established such a level); or

(ii) at any level, if the Customer's dissatisfaction has been recorded by the Participating Firm,

and a Complaint includes issues identified by OBSI in the course of its investigation that are materially connected to issues raised by the Complainant.

"**Customer**" means an individual who, or small business that, requested or received a Financial Service from a Participating Firm or its Representative, regardless of whether the Financial Service was received through an account at the Participating Firm, provided it is reasonable for the individual or small business to believe that they were requesting or receiving a Financial Service from a Representative or a Participating Firm.

"**Financial Service**" is any service related to the provision of financial advice or products including buying or selling investments, devising or implementing investment plans, or saving, borrowing, lending, financial planning or wealth management strategies.

"**Industry Ombudservice**" means any of OBSI, the Ombudservice for Life and Health Insurance (OLHI) and the General Insurance Ombudservice (GIO).

"**OBSI**" means the Ombudsman for Banking Services and Investments, an organization incorporated under the *Canada Not-for-profit Corporations Act*

"**Ombudsman**" means the individual appointed by the Board to exercise the powers and duties of the office of OBSI or a person to whom the powers of the Ombudsman have been delegated in accordance with section 4.4.

"**Participating Firm**" means

(a) an Industry Member as defined in OBSI's by-laws; and

(b) any affiliated entity controlled by an Industry Member and eligible itself for membership in OBSI, excluding affiliated entities whose main business is the provision of insurance products or services;

that directly or indirectly provides Financial Services in Canada.

"**Provision of a Financial Service in Canada**" means the provision of a Financial Service

(a) to any consumer (Canadian or foreign) while that consumer is located in Canada; or

(b) to a resident of Canada, regardless of where they are when they receive the Financial Service; or

(c) from a place of business in Canada to any consumer (Canadian or foreign);

and includes providing, inadequately providing, and failing to provide Financial Services.

"**Regulator**" means any applicable regulator and includes a self-regulatory organization.

"**Representative**" of a Participating Firm includes any individual who dealt with the Complainant or supervised the dealing with the Complainant in the Provision of Financial Service that gave rise to the Complaint, whether the individual is an employee, agent, or third-party contractor of the Participating Firm.

"**Small business**" means an enterprise, irrespective of legal form, with annual gross revenues under $5 million in each of the 5 years preceding submission of the enterprise's Complaint to OBSI.

"**Standards**" means any applicable statutory or regulatory requirements for handling and resolving complaints, as well as any other standards adopted by the Board for those purposes.

2.2 Interpretation

2.2.1 Delegation by Ombudsman – In recognition of the fact that the Ombudsman's powers may be delegated, certain provisions of these Terms of Reference refer to OBSI rather than to the Ombudsman. These provisions should be interpreted as references to OBSI management or staff exercising the powers and performing the duties of the Ombudsman delegated to them.

2.2.2 Gender and number – In these Terms of Reference, all references to the male gender include, where the context admits, the female gender and vice versa, and references to the singular number include, where the context admits, the plural number and vice versa.

2.2.3 Parts, sections and paragraph numbers – In these Terms of Reference, all references to parts, sections and paragraphs mean parts, sections and paragraphs of these Terms of Reference unless otherwise indicated.

2.2.4 Conflicts with statutes, regulations and by-laws – If any statute or regulation applicable in Canada or any portion of OBSI's by-laws conflicts with

any portion of these Terms of Reference, the statute, regulation or by-law will govern and the conflicting portion of these Terms of Reference will be disregarded.

PART 3 – OBSI ORGANIZATION AND GOVERNANCE

3.1 Incorporation – OBSI is incorporated as a non-profit organization under the *Canada Not-for-profit Corporations Act*.

3.2 Membership – Membership in OBSI is available to any firm engaged in the Provision of a Financial Service in Canada. A full list of Participating Firms can be found on OBSI's website.

3.3 Fees – OBSI levies fees on all Participating Firms in accordance with its by-laws. Information about the fees can be found on OBSI's website.

3.4 Governance – OBSI is governed in accordance with the terms of its by-laws, all applicable laws and regulations, and the following governance principles:

(a) The Board is responsible for overseeing OBSI and the Ombudsman, and the Ombudsman is accountable to the Board.

(b) The Ombudsman is OBSI's Chief Executive Officer and leads OBSI's senior management team.

(c) A majority of directors on the Board are Community Directors elected in accordance with OBSI's by-laws, and must not occupy specified positions in Participating Firms, self-regulatory organizations or government or have occupied such positions in the two years prior to their election to the Board.

(d) A minority of directors on the Board are Industry Directors elected in accordance with OBSI's by-laws.

(e) The Board oversees the business and affairs of OBSI, establishes the strategies and objectives to be implemented by management, monitors standards of performance, and ensures that OBSI conducts its business and affairs in a manner consistent with its mission and objectives.

(f) To maintain the independence and impartiality of OBSI staff, the Board does not consider Complaints. The final decision concerning

Complaints rests with OBSI. There is no appeal to the Board, nor can the Board influence the decisions of OBSI staff.

PART 4 – OMBUDSMAN'S POWERS AND DUTIES

4.1 Principal powers and duties - The Ombudsman at all times will serve as an independent and impartial arbiter of Complaints and will not act as an advocate for Participating Firms, Complainants or any other person. The Ombudsman will:

(a) Act fairly in accordance with OBSI's Fairness Statement adopted by the Board;

(b) adhere to these Terms of Reference and all applicable Standards;

(c) advise the public about procedures for making a Complaint to OBSI, to a Participating Firm or to another appropriate body;

(d) receive Complaints;

(e) where necessary, and without advocating on their behalf, assist Complainants with the complaint process, including helping them articulate their Complaint to OBSI or a Participating Firm;

(f) investigate Complaints with a view to resolving them through appropriate dispute resolution processes; and

(g) as appropriate in the circumstances, make recommendations to Participating Firms and Complainants to resolve Complaints or reject them on their merits.

4.2 Duty to oversee staff compliance – The Ombudsman is responsible for ensuring that all OBSI personnel (including officers, employees, consultants, independent contractors and agents) comply with these Terms of Reference, OBSI's Code of Conduct and all policies and procedures adopted by the Board.

4.3 Duty to safeguard privacy – The Ombudsman is responsible for ensuring that OBSI complies with all applicable legislation protecting the privacy of personal information, and all privacy policies and procedures adopted by the Board.

4.4 Ombudsman may delegate – The Ombudsman may delegate any of the Ombudsman's powers to OBSI staff.

PART 5 – COMPLAINTS TO OBSI

5.1 **Preconditions for OBSI involvement** – Subject to the limitations set out below in Part 6 - Exclusions from OBSI's Mandate, OBSI may investigate any Complaint it receives provided OBSI is satisfied that:

(a) **Appropriate Complainant** - the Complaint was made by all persons having an interest in the subject matter of the Complaint, or that OBSI can fairly consider the Complaint without the participation of one or more people having an interest in the subject matter of the Complaint;

(b) **No vexatious claims** - the Complaint is not frivolous or vexatious and that the Complainant is not pursuing it in an abusive, vexatious or threatening way;

(c) **Firm had opportunity to investigate** - the Participating Firm to which the Complaint relates received the Complaint or the substance of it and rejected the Complaint, made an offer to resolve it, or had at least 90-calendar days to respond to it;

(d) **Complaint made to OBSI within 180 days** - the Complaint was made to OBSI no more than 180-calendar days after the Complainant received a written notice rejecting the Complaint, or a written offer for the resolution of the Complaint, from the Participating Firm, subject to section 5.5 - OBSI may extend time for filing Complaints;

(e) **Claim made to Participating Firm within 6 years** - the Complaint was made to the Participating Firm no more than six years after the Complainant knew or reasonably ought to have known about the problem or issue giving rise to the Complaint, having regard to what a reasonable person in the Complainant's circumstances, with the Complainant's abilities and limitations ought to have known;

(f) **No concurrent proceedings** - the Complainant has not commenced proceedings in any court or before an arbitration tribunal to adjudicate the subject matter of the Complaint or, if such proceedings have been commenced, the Complainant has agreed to hold them in abeyance pending completion of OBSI's investigation of the Complaint;

(g) **Consents received** - OBSI has received appropriate consents concerning the release and treatment of confidential information from all necessary parties

and any other consents, agreements or releases that OBSI considers appropriate in the circumstances; and

(h) **No previous OBSI investigation** - OBSI has not previously investigated the Complaint or, if OBSI has done so, that new material information that was not reasonably available has become available and OBSI is satisfied the new information warrants treating it as a new Complaint.

5.2 **Response from firm not required** – Nothing in section 5.1 (d) requires a Complainant to wait for the 90-day period stipulated in section 5.1 (c) to elapse before submitting their Complaint to OBSI if the Complainant has received an offer to settle the Complaint or a notice of its rejection from the Participating Firm.

5.3 **Effect of firm offer or rejection** – The 180-day period stipulated in section 5.1 (d) commences as soon as the Complainant receives from the Participating Firm a written notice rejecting the Complaint or a written offer for the resolution of the Complaint, even if the 90-day period stipulated in section 5.1 (c) has not yet expired.

5.4 **OBSI may extend time for firm's response** – Despite section 5.1 (c), OBSI may decide that the Participating Firm has not had sufficient time to address a Complaint and that the Participating Firm's internal process should continue for a reasonable period of time to be established by OBSI in consultation with the Complainant and the Participating Firm.

5.5 **OBSI may extend time for filing Complaints** – If OBSI considers it fair to do so, OBSI may investigate a Complaint it receives later than the 180-calendar days stipulated under section 5.1 (d). In assessing the fairness of doing so, OBSI will consider, among other things:

(a) Whether, and in what manner, the Participating Firm notified the Complainant of the right to bring a Complaint to OBSI, including whether any written notice provided by the Participating Firm sufficiently specified the 180-calendar day period within which the Complainant has the right to bring a Complaint to OBSI and whether the Participating Firm adhered to any complaint-handling requirements that may apply;

(b) the extent to which the Complainant and the Participating Firm were occupied with negotiations for the resolution of the Complaint during the 180-calendar day period; and

(c) whether the Complainant was subject to extraordinary circumstances.

5.6 Determining whether time limit was exceeded – OBSI may commence investigation of a Complaint to ascertain whether the Complaint was made within or beyond the time limit set out in section 5.1 (e).

5.7 Effect of regulatory proceedings – For purposes of section 5.1 (f), OBSI will not consider a regulatory proceeding, hearing or mediation to be a proceeding before a court or arbitration tribunal.

5.8 Effect of class proceedings – For purposes of section 5.1 (f), OBSI will not consider a class proceeding to be a proceeding commenced by the Complainant unless the Complainant is named as a representative plaintiff rather than merely a member of the class.

5.9 Joint investigations with other Ombudservices – Where, in the opinion of OBSI, the subject matter of a Complaint (in whole or in part) is one in which another Industry Ombudservice has expertise and the Complainant and the Participating Firm consent, OBSI may cooperate with that Industry Ombudservice in the investigation of the Complaint and may, if appropriate, make a recommendation jointly with the other Industry Ombudservice for the resolution of the Complaint. Similarly, OBSI may cooperate with another Industry Ombudservice in the investigation and resolution of a Complaint referred to OBSI by that Industry Ombudservice.

PART 6 – EXCLUSIONS FROM OBSI'S MANDATE

6.1 Matters excluded – OBSI will not investigate Complaints, or portions of Complaints, that relate solely to:

(a) The general interest rate and risk management policies and practices of a Participating Firm;

(b) the pricing of Financial Services by a Participating Firm;

(c) the scale of fees or charges generally applicable to Financial Services offered to Customers of the Participating Firm in similar circumstances; or

(d) the Commercial Judgment of a Participating Firm.

However, OBSI may investigate whether the process by which a Participating Firm implemented its policies and practices or made or maintained a Commercial

Judgment was biased, incomplete, not in accordance with the Participating Firm's policies and procedures or otherwise was unfair.

6.2 Matters already decided – OBSI will not investigate a Complaint where the same subject matter, raised by the same Complainant, has been considered in proceedings in or before any court, tribunal, arbitrator, or any other independent dispute resolution body, and those proceedings have concluded with a binding decision on, or final disposition of, the merits of the Complaint. OBSI will also not investigate a Complaint where the same subject matter has been the subject of a settlement agreement between the Complainant and the Participating Firm.

6.3 Regulatory proceedings and investigations – The proceedings referred to in section 6.2 do not include proceedings conducted by a regulator, and the existence of a regulatory investigation into the subject matter of a Complaint does not preclude OBSI from conducting its own investigation into the Complaint. However, OBSI may decline to conduct an investigation in these circumstances or may defer its own investigation until the regulatory investigation is concluded. Where OBSI so declines, or defers, it will inform the Complainant and the Participating Firm of its decision and will inform the Complainant about other dispute resolution alternatives that may be available.

6.4 More appropriate forum – OBSI may decline to investigate a Complaint if OBSI decides that the Complaint can be dealt with more appropriately by other means, such as a proceeding before a court, tribunal, arbitrator, regulator or any other dispute resolution process.

6.5 OBSI to determine whether Complaints fall within mandate – All questions of whether a Complaint falls within OBSI's mandate will be determined exclusively by OBSI. In making that determination, OBSI will have regard to these Terms of Reference and may consider representations from the Complainant and from the Participating Firm.

PART 7 – AGREEMENT TO SUSPEND STATUTORY LIMITATION PERIODS

7.1 Parties deemed to agree – To the extent permitted by applicable law, every Complainant and Participating Firm must agree, and by submitting a Complaint to OBSI or by becoming a Member of OBSI each does agree, that the running of any statutory limitation period in respect of a Complaint will be suspended from the time the Complaint is submitted to OBSI until OBSI's involvement in the resolution of the Complaint ends. For purposes of this section, a Complaint is submitted to OBSI when the Complainant signs a consent

letter authorizing OBSI to investigate the Complaint, and OBSI's involvement ends when:

(a) The Complainant revokes their authorization for OBSI to investigate the Complaint; or

(b) OBSI issues a written rejection of the Complaint or a written recommendation for resolving it, and any requested reconsideration review has been completed by OBSI, or the time for requesting a reconsideration review has expired.

7.2 Other defences and remedies not affected – Nothing in section 7.1 prevents the Participating Firm or Complainant from raising any defences relating to the passage of time before OBSI's receipt of the consent letter signed by the Complainant, or from proceeding at any time with legal remedies against each other.

PART 8 – EXECUTION OF OBSI'S MANDATE

8.1 General practices – In carrying out its mandate and in resolving each Complaint, OBSI will abide by these Terms of Reference, the Standards and the following practices:

(a) In determining what is fair to the Complainant and the Participating Firm, OBSI will take into account general principles of good financial services and business practice, law, regulatory policies and guidance, professional body standards and any relevant code of practice or conduct applicable to the subject matter of the Complaint.

(b) To identify general principles of good financial services and business practice, OBSI may, where appropriate, consult within the financial services industry, including with individual firms, associations, regulators, industry entities and consumer groups, counsel and academic experts or elsewhere.

(c) OBSI will not be bound by the rules of evidence applied in courts, arbitrations or regulatory hearings.

(d) OBSI will not be bound by any of its previous recommendations.

8.2 No advice to parties – In carrying out their duties, and, in particular their, duty under Section 4.1 (e), the Ombudsman and OBSI staff will not provide

Complainants or Participating Firms with legal, accounting or financial advice on matters relating to Complaints.

PART 9 – PROCEDURE WHERE CONFLICTS OF INTEREST ARISE

9.1 Definition of conflict of interest – For purposes of this Part, a conflict of interest is:

(a) a material interest in the outcome of a Complaint;

(b) an interest that reasonably may be perceived as a material interest in the outcome of a Complaint; or

(c) a prior involvement in the Complaint, or involvement with the Complainant or the Participating Firm or Representative against whom the Complaint is directed, that reasonably may be perceived as creating an impediment to the fair and impartial evaluation of the Complaint.

9.2 Where Ombudsman is conflicted – In the event that the Ombudsman has a conflict of interest, the Ombudsman will immediately cease all involvement in the investigation or resolution of the Complaint. In such cases, the Ombudsman will immediately inform the Board about the conflict of interest and the Chair, or his or her delegate, will assign responsibility for investigating and resolving the Complaint to another OBSI staff member, or an external investigator, who does not have a conflict of interest.

9.3 Where Deputy Ombudsman or OBSI investigator is conflicted – In the event that a Deputy Ombudsman or an OBSI staff member investigating a Complaint has a conflict of interest, the Deputy Ombudsman or staff member will immediately cease all involvement in the investigation or resolution of the Complaint and will immediately inform his or her supervisor about the conflict of interest. In such cases, the Ombudsman will assign responsibility for investigation and resolution of the Complaint to himself or herself, to another Deputy Ombudsman or to another OBSI staff member who does not have a conflict of interest.

PART 10 – MONETARY LIMITS

10.1 Limit on single Complaints – OBSI may investigate a Complaint involving a claim for any monetary amount if the Complaint falls within OBSI's mandate under these Terms of Reference. However, OBSI may not recommend

that a Participating Firm pay an amount greater than $350,000 in respect of any single Complaint.

10.2 Limit where multiple Complaints – The limit set out in section 10.1 does not apply to separate Complaints made by a Complainant about unrelated subject matters. In such cases, each of the separate Complaints has a monetary limit of $350,000.

10.3 No improper division of Complaints – A Complaint shall not be divided into two or more Complaints about the same subject matter for the purpose of avoiding the monetary limit set out in section 10.1.

PART 11 – FIRMS' COMPLAINT HANDLING PROCEDURES

11.1 Internal complaint handling procedures –All Participating Firms will have in place and use the internal complaint handling procedures mandated by their regulators. If no such procedures are mandated for a particular Participating Firm, it nonetheless should put in place and use internal complaint handling procedures that are fair and generally equivalent to those mandated by banking or investment regulators in Canada as applicable.

11.2 Fair practices – At a minimum, and regardless of whether the Participating Firm believes the Complaint falls within OBSI's mandate, the Participating Firm should:

(a) Appoint a senior official to act as the final internal decision-maker on unresolved Complaints;

(b) promote their internal and external complaint-handling processes through websites, brochures, mailings, emails and other means necessary to ensure Customers have ready access to them in the event of a Complaint;

(c) inform the Complainant in writing that they have a right to bring the Complaint to OBSI 90-calendar days after making their Complaint to the Participating Firm and within 180-calendar days of the Participating Firm rejecting the Complaint or making an offer to resolve it;

(d) inform the Complainant in writing about the existence of time limits for commencing a lawsuit or arbitration, and that a lawyer should be consulted for advice about those time limits; and

(e) provide the Complainant with a substantive written response to their Complaint within 90-calendar days of receiving it, or, if a substantive response could not be provided within 90-calendar days, the Participating Firm should provide the Complainant with a statement in writing setting out:

(i) the reason for the delay;

(ii) an estimate of the date by which the Participating Firm would provide a substantive response to the Complaint; and

(iii) a reminder that the Complainant has a right to bring the Complaint to OBSI because 90-calendar days have passed.

PART 12 – FIRM'S OBLIGATIONS DURING OBSI INVESTIGATIONS

12.1 Full Cooperation with investigation – Every Participating Firm must:

(a) Fully cooperate with OBSI and assist in its investigation of a Complaint; and

(b) ensure the appropriate parties representing its institution are available to discuss a Complaint, participate in an investigatory interview, and respond to a settlement proposal, in a timely manner.

12.2 Providing relevant documents, records and things in a timely manner – Every Participating Firm must provide OBSI with the following in a timely manner:

(a) Copies of all requested documents, records and things in the Participating Firm's possession or control relating to the subject matter of a Complaint;

(b) information generated and uncovered in the course of the Participating Firm's internal investigation into the subject matter of a Complaint;

(c) redacted copies of any document, record or thing that contains information protected by:

(i) legal privilege or privacy laws; or

(ii) a duty of confidentiality to a third-party, where consent to disclose has not been obtained, despite best efforts to obtain consent,

and

(d) access to original documents if needed for an investigation, to verify the authenticity of a document or signature, unless doing so would cause a waiver of privilege, breach of law, or duty of confidentiality to a third-party where consent to disclose has not been obtained, despite the Participating Firm's best efforts to obtain that consent.

12.3 Extent of obligations – The obligations set out in sections 12.1 and 12.2 apply not only in respect of investigations into Complaints relating to the Participating Firm itself and its own present and former Representatives, but also in respect of investigations into Complaints relating to other Participating Firms and their present and former Representatives.

12.4 Consequences of failure to cooperate – If a Participating Firm fails to fully cooperate with OBSI's investigation of a Complaint:

(a) OBSI must first disclose to the Board and the Participating Firm's regulators and then to the public:

(i) the name of the Participating Firm;

(ii) the fact that the Participating Firm has failed to comply with its obligations under these Terms of Reference; and

(iii) particulars of the non-cooperation, in such manner and detail as OBSI considers appropriate;

(b) OBSI must disclose to the Participating Firm's regulators the identity of the Complainant and their representative or the Representative at the Participating Firm; and

(c) OBSI may disclose to the Board the identity of the Complainant and the Representative at the Participating Firm.

12.5 Escalation before OBSI publicizes non-cooperation – Where the Participating Firm fails to fully cooperate in an investigation, the Participating Firm's reasons for its failure to cooperate will be escalated to the Ombudsman before OBSI publicizes the failure to cooperate.

12.6 Reporting Threats - The Participating Firm will inform OBSI of any threat, made by anyone involved in a Complaint, against the personnel or property of OBSI.

PART 13 – RECOMMENDATIONS AND REJECTIONS OF COMPLAINTS

13.1 OBSI determinations – After investigating a Complaint, OBSI will make a recommendation for payment of compensation or other action if, in OBSI's opinion, the Complainant has suffered loss, damage or harm because of an act or omission of the Participating Firm or its Representative in the Provision of a Financial Service in Canada.

13.2 Basis for determination – OBSI will make a recommendation or reject a Complaint with reference to what is, in OBSI's opinion, fair in all the circumstances to the Complainant and the Participating Firm, having regard to the general practices set out in Part 8 and, the provisions of this Part.

13.3 Settlement efforts while OBSI investigates – While investigating a Complaint, OBSI may seek to promote a resolution of the Complaint by agreement between the Complainant and the Participating Firm. The Complainant and the Participating Firm may also continue to seek to resolve the Complaint themselves if both parties agree. If no resolution is agreed upon, OBSI will complete its investigation of the Complaint and will either make a recommendation for its resolution or reject the Complaint.

13.4 Nature of compensation – Where OBSI recommends payment of compensation, it may do so to compensate the Complainant for monetary and non-monetary losses.

13.5 Quantum of compensation – Any payment OBSI recommends will not exceed:

(a) The amount OBSI considers appropriate to compensate the Complainant for loss, damage and harm suffered by the Complainant due to the acts or omissions of the Participating Firm or its Representative in the Provision of a Financial Service; and

(b) in aggregate, the monetary limits stipulated in Part 10.

13.6 Format of recommendations – All recommendations from OBSI will be made in writing and will include a summary of OBSI's reasons. Where OBSI conducts an investigation jointly with another Industry Ombudservice under section 5.9, OBSI may issue any compensation recommendation jointly with that other Ombudservice.

13.7 Recommendations not binding – OBSI's recommendations will not be binding on the Participating Firm or the Complainant.

13.8 Consequences of refusal of a recommendation – If a Participating Firm refuses an OBSI recommendation for resolution of a Complaint:

(a) OBSI must first disclose to the Board and the Participating Firm's regulators and then to the public:

(i) The name of the Participating Firm;

(ii) the fact that the Participating Firm has refused the recommendation; and

(iii) particulars of the Complaint, as well as particulars of the recommendation, in such manner and detail as OBSI considers appropriate; and

(b) OBSI must disclose to the Participating Firm's regulators the identity of the Complainant and the Representative of the Participating Firm; and

(c) OBSI may disclose to the Board the identity of the Complainant and the Representative at the Participating Firm.

13.9 Escalation before OBSI publicizes refusal – Where OBSI makes a recommendation for resolution of a complaint but the Participating Firm refuses that recommendation, the Complaint and the Participating Firm's reason for refusal will be escalated to the Ombudsman before OBSI publicizes the refusal.

PART 14 – RECONSIDERATION REVIEWS

14.1 Request for reconsideration – OBSI will conduct a reconsideration review where the Complainant alleges:

(a) OBSI overlooked material information;

(b) OBSI failed to address material issues raised by the Complaint;

(c) OBSI made a material error in analyzing information; or

(d) new material information is available that was not previously considered by OBSI.

14.2 Time limit for requesting reconsideration – A request for reconsideration must be made by a Complainant in writing within 30-calendar days of OBSI issuing its notice rejecting the Complaint or issuing its recommendation.

14.3 OBSI may extend time – OBSI may extend the time limit stipulated in section 14.2 if the Complainant shows good cause for missing the time limit.

14.4 Decision following reconsideration – After completing a reconsideration review, OBSI may affirm its previous rejection of the Complaint, or may affirm, or modify, its previous recommendation, and OBSI will provide the Complainant and the Participating Firm with written notice of OBSI's decision and the reasons for it.

14.5 Reopening of Complaint – Where a reconsideration results in the reopening of a Complaint under section 14.1 (a), (b) or (c), OBSI will notify the Participating Firm that the Complaint is being reopened.

14.6 New information – Where OBSI is satisfied, after a reconsideration review, that the criterion in section 14.1 (d) is met, OBSI may reopen the Complaint or consider the Complaint to be a new Complaint, and may deal with it accordingly, including ensuring the Participating Firm is provided an opportunity to investigate and respond to the new Complaint.

PART 15 – LIMITS ON ROLE OF OBSI BOARD

15.1 No appeal to Board – Decisions by the Ombudsman or by OBSI to investigate or not investigate a Complaint, to defer an investigation, to reject a Complaint, to recommend payment of compensation or other action, or to reconsider or not reconsider a Complaint are final and cannot be appealed to OBSI's Board.

15.2 No interference by Board – The Board will not:

(a) Seek the identity of any Complainant who has made an inquiry or Complaint to OBSI;

(b) seek information relating to any specific inquiry or Complaint made to OBSI;

(c) make any representation about an inquiry or a Complaint to a Participating Firm or a Complainant; or

(d) act on any information received that reveals the identity of a Complainant or any information described in sub-paragraph (a) or (b) above.

15.3 Board may consider complaints about OBSI – The Board may consider any concerns brought to its attention about OBSI's complaint-handling process or about the conduct of any employee or officer of OBSI.

PART 16 – CONFIDENTIALITY AND DISCLOSURE

16.1 General principles – OBSI's dispute resolution process is confidential to the parties to the Complaint and OBSI. Accordingly, except as required by law or otherwise provided in these Terms of Reference:

(a) All discussions and correspondence between OBSI and the Complainant, the Participating Firm and their respective representatives that form part of the dispute resolution process are not to be disclosed for any purpose, other than to a professional advisor or a representative who has agreed to comply with this confidentiality requirement, and are not to be used by anyone in any ongoing or subsequent legal or regulatory proceedings except as set out in Part 16.5; and

(b) OBSI's files relating to every Complaint are to remain confidential and protected from disclosure.

16.2 Internal disclosure within OBSI – OBSI may disclose information about a Complaint to its employees, agents, advisors and consultants in the course of carrying out its activities, provided they are made subject to the same confidentiality obligations as OBSI, Complainants and Participating Firms.

16.3 Ombudsman and OBSI not to be called to testify – Complainants and Participating Firms must agree, and by participating in OBSI's dispute resolution process do agree, not to call or attempt to compel the Ombudsman or OBSI staff to testify in any legal or regulatory proceedings relating to a Complaint.

16.4 Use of initial consent letter – An initial consent letter signed by a Complainant submitting their Complaint to OBSI may be disclosed and used for the purpose of enforcing its terms, and also for the purpose of establishing when the suspension of any statutory limitation period commenced.

16.5 Disclosure to regulators - Nothing in these Terms of Reference prevents a Complainant from sharing information with a regulator for regulatory purposes. Participating Firms and OBSI must, and Complainants may, comply with a written request from a regulator for disclosure of information, documents, records or things. Where OBSI complies with such a request, or where OBSI notifies a regulator that a Participating Firm has refused a recommendation or failed to comply with its obligations under these Terms of Reference, the Participating Firm and the Complainant may discuss the Complaint and the underlying facts with the regulator.

16.6 Public disclosure – Where OBSI discloses to the public that a Participating Firm has failed to comply with its obligations under these Terms of Reference or has refused a recommendation made by OBSI, the Participating Firm and the Complainant may refer publicly to the information publicly disclosed by OBSI about the Complaint.

16.7 Confidentiality requests – If any person provides confidential or personal information to OBSI and requests that it not be disclosed to anyone else, OBSI will not disclose the information except with the consent of the person who provided the information to OBSI or as required by law or by a regulator. If consent is not given and the information is prejudicial to any party to a Complaint, OBSI will not use that information for purposes of making a recommendation adverse to any party to whom the information is denied.

16.8 Proprietary information – Notwithstanding section 16.7, when making its recommendations OBSI may take into account the need to maintain confidentiality regarding a Participating Firm's proprietary systems and security measures of which OBSI has knowledge, even though no disclosure of those systems and measures has been made to the Complainant.

16.9 Reporting threats – OBSI will inform a Participating Firm of any threat, made by anyone involved in a Complaint, against a Complainant, the Participating Firm, or OBSI, including threats against personnel or property. Nothing in these Terms of Reference prohibits OBSI from notifying a Complainant or a Participating Firm and law enforcement officials about a threat. OBSI will not disclose to the person making such a threat any information about who from OBSI provided the notification, nor may the Complainant or Participating Firm make such disclosure, unless it is required by law, and then only to the extent so required.

PART 17 – ANNUAL REPORTING

17.1 Matters to be reported – OBSI will prepare and publicly disclose an annual report as well as other reports containing statistics, anonymized case

studies of Complaints for educational purposes (with Complainant and Participating Firm identifiers removed), other information that OBSI considers appropriate to the interests of interested parties and the general public, and information required by law or regulation.

PART 18 – THIRD PARTY EVALUATIONS

18.1 Periodic evaluation – OBSI must submit itself to knowledgeable, independent third-party evaluations of its operations, conducted according to timelines established by its regulators.

18.2 Evaluations to be made public – OBSI will make public the outcome of each evaluation conducted under section 18.1.