FAIR | Canadian Foundation *for* Advancement *of* Investor Rights

February 26, 2016

Ms. Deborah Battell
Independent Evaluator for OBSI
Sent by email to: dbattell@gmail.com

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

FAIR Canada welcomes the opportunity to provide its comments to you as independent evaluator of the Ombudsman for Banking Services and Investments ("OBSI") as part of your evaluation of OBSI with respect to consumer investment complaints that are unresolved by their investment firms as set out in your Issues Paper and Independent Evaluation Terms of Reference (collectively, the "Issues Paper").

FAIR Canada is a national, charitable organization dedicated to putting investors first. As a voice for Canadian investors, FAIR Canada is committed to advocating for stronger investor protection in securities regulation. Visit www.faircanada.ca for more information.

## I. General Overview

FAIR Canada notes that the Issues Paper identifies the following key issues for consideration in this independent evaluation:

(1) Whether OBSI is operating in accordance with its obligations under the Memorandum of Understanding with the CSA (the "MOU")[1].

(2) Whether any operational, budget or procedural changes would be desirable to improve OBSI's effectiveness.

(3) To what extent OBSI meets international benchmarks for industry-based dispute resolution[2] (based on the British and Irish Ombudsman Association criteria and the Benchmarks and Key Practices for Industry-based Customer Dispute Resolution developed by the Australian Government).

[1] Amended and Restated Memorandum of Understanding concerning oversight of the Ombudsman for Banking Services and Investments among the Canadian Securities Administrators and OBSI effective December 1, 2015., available online at: https://www.osc.gov.on.ca/documents/en/Securities-Category3/mou_20151202_31-103_oversight-obsi.pdf

[2] The independent evaluation is utilizing the British and Irish Ombudsman Association criteria, available online at http://www.ombudsmanassociation.org/docs/OA-Rules-Schedule-1.pdf and the Benchmarks and Key Practices for Industry-based Customer Dispute Resolution developed by the Australian Government as its international benchmarks, available online at: http://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2015/benchmarks_ind_cust_dispute_reso/Documents/PDF/benchmarks_ind_cust_dispute_reso.ashx and http://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2015/key%20pract%20ind%20cust%20dispute%20reso/Documents/PDF/key_pract_ind_cust_dispute_resol.ashx. See page 2 of the Issues Paper. FAIR Canada will reference other international benchmarks, as appropriate.

FAIR Canada provides comments below in order to assist with the assessment of these three key issues. **In summary, while we believe OBSI is operating in accordance with its obligations under the MOU, certain governance, structural and operational reforms are needed to improve OBSI's effectiveness. These reforms are necessary for OBSI to meet international standards for dispute resolution and for our system of dispute resolution to live up to Canada's G20 obligations. Additionally, these changes are needed to maintain the soundness of our regulatory system and public confidence in it.**

*Recent Developments*

This review follows several important developments in the area of financial consumer dispute resolution in Canada:

- The release of the report by the independent reviewer of OBSI in 2011 (the "Khoury Report") which recommended a number of important, interconnected reforms.

- The receipt by OBSI of a letter[3] dated October 28, 2011 from the CSA, IIROC and the MFDA concerning the resolution of 21 complaints that were stuck at impasse, urging OBSI to identify a method of finalizing the cases by the end of the year. This led to OBSI offering a specific method of independent review just for these cases, under which former commissioners of the OSC would provide an independent assessment of the files in question. As of November 9, 2012 only one firm took up the offer[4] and it is not apparent whether any other firms subsequently did so.

- The publication (or "name and shame") of a number of refusals by OBSI Participating Firms to compensate consumers as recommended by OBSI, beginning in 2012.

- The lack of any clarity by Canadian regulators as to what it means for a firm to participate in OBSI in a manner consistent with a firm's statutory or regulatory obligation to deal "fairly, honestly and in good faith with their clients", and the lack of any enforcement action against those who have failed to comply with this requirement.[5]

- The federal government's publication in April 2013 of final regulations under the Bank Act allowing External Complaint Bodies ("ECBs") to submit applications to the Financial Consumer Agency of Canada ("FCAC") to be approved as an ECB to resolve banking complaints (regulations effective September 2, 2013). This permitted multiple ECBs to exist on the banking side (currently one ECB is in operation besides OBSI) while the regulations removed systemic issues from the mandate of the ECBs and omitted any duty for ECBs to base their decisions on fairness (an essential principle for any true ombudservice).

- Amendments to NI 31-103 effective May 1, 2014, requiring all registered firms outside Quebec to make available the services of OBSI in respect of their dispute resolution or mediation services obligations for investment complaints, and thereby requiring that exempt market

[3] Letter to OBSI (October 28, 2011) available online at: https://www.obsi.ca/download/blog/96

[4] OBSI Update (November 8, 2012), available online at: https://www.obsi.ca/en/news-and-publications/e-news-archive/november-9-2012-issue

[5] See FAIR Canada's letter to the Chair of the CSA dated May 23, 2014 regarding CSA Staff Notice 31-338 Guidance on Dispute Resolution Services dated May 23, 2014, available online at: http://faircanada.ca/submissions/csa-guidance-on-dispute-resolution-services-client-disclosure/. See also FAIR Canada's editorial "Fundamental change to OBSI is needed" dated May 26, 2014, available online at: http://www.investmentexecutive.com/-/fundamental-change-to-obsi-is-needed.

dealers and portfolio managers participate in OBSI.

- Changes to OBSI's Terms of Reference precluding OBSI from dealing with complaints about segregated funds (and presumably other insurance-regulated investment products), thereby leading to fragmentation of consumer investment complaints;

- Changes to OBSI's Terms of Reference eliminating the ability of OBSI to investigate systemic issues.

- Entering into the MOU which provides, among other things, that the Chair of OBSI "…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."[6] At the same time, the MOU imposes no obligation on the CSA or OBSI to (i) make public the number of potential systemic issues OBSI has identified in the year, whether in respect of securities or banking complaints, and (ii) provide any generic description of the type of issues identified. The MOU replaced the framework for oversight set out in The Financial Services OmbudsNetwork – A Framework for Collaboration which was adopted and endorsed by the CSA in August 2007 (the "Framework").

- Repeated calls by FAIR Canada (and similar calls by the Investor Advisory Panel of the Ontario Securities Commission and other investor advocates) for steps to be taken to give Canada a single, national statutory ombudservice with power to make binding decisions in respect of investment complaints (and ideally, also for banking complaints).

- A growing concern that an unknown number of consumers have settled for amounts well below OBSI's recommendations, suggesting that consumers are being coerced to accept reduced offers rather than face the possibility that a Participating Firm will outright refuse OBSI's recommendation, resulting in no compensation at all (known as "low-ball" settlements).

- A recent change whereby Quebec has joined as a signatory to the MOU with OBSI given that investors in Quebec have been 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 , if the consumer's investment firm also has operations outside of Quebec.

- The resignation of the Ombudsman Doug Melville effective May 31, 2015 and the appointment of a new Ombudsman, Sarah Bradley, as of August 2015.

**FAIR Canada continues to believe that regulators and governments should ensure Canadians have access to an ombudservice that fully meets international standards (and our international obligations) for all investment complaints. Steps should be taken, therefore, to have a single, national, statutory ombudservice in Canada with the power to make binding decisions[7]. FAIR Canada believes this is vital to the integrity of the Canadian financial services market and the protection of Canadian consumers.**

[6] MOU, at Article 3, (7), supra note 1.

[7] See letters from FAIR Canada to OBSI dated August 12, 2013 and January 25, 2013, available online at: http://faircanada.ca/wp-content/uploads/2011/01/FAIR-Canada-comments-re-Changes-to-OBSIs-Terms-of-Reference.pdf and http://faircanada.ca/wp-content/uploads/2011/01/FAIR-Canada-comments-re-Dispute-Resolution-Service.pdf.

The January 2009 Report of the Expert Panel on Securities Regulation noted the inadequacy of complaint handling and redress mechanisms in Canada[8]:

> Although many mechanisms have been put in place to provide investors with simpler, more cost-effective alternatives to the courts, the numerous organizations, the multi-step processes, and the lack of uniformity across Canada pose challenges for investors to properly understand and achieve a proper conclusion in an expeditious manner. Based on some of the personal accounts, it appears that investors are often not provided with the information required to understand the full range of options available to seek redress.

Given the complexity of the Canadian financial services landscape and the multi-step and multi-organizational process that exists in Canada for investors to seek redress, a single independent dispute resolution provider that meets international standards[9] is essential in the Canadian context and is needed on an urgent basis to ensure adequate protection of Canadian consumers.

FAIR Canada is strongly of the view that our G20 obligations – including the obligation to ensure consumers have access to adequate complaint handling and redress mechanisms that are "accessible, affordable, independent, fair, accountable, timely and efficient…" – **require giving Canadian consumers access to a dispute resolution process that will actually deliver a resolution of each dispute, as is the case in other leading jurisdictions.** In the United Kingdom, Australia, New Zealand and Malaysia, for example, decisions are binding if the consumer accepts the recommendation. Canadian consumers deserve no less.

Moreover, the consumer redress system in Canada (and for OBSI in particular) requires binding dispute resolution in order to: (i) work fairly and effectively for the benefit of investors, financial consumers and businesses; and (ii) in order to improve confidence in, and soundness of, our financial marketplace and regulatory system. If the status quo is maintained, the opposite will be true.

Steps to make OBSI into a statutory ombudservice will allow for greater transparency, additional procedural safeguards to address issues of natural justice, greater accountability, and improved consumer protection. One single dispute resolution service provider is necessary to avoid fragmentation, inconsistencies, serious potential conflicts of interest, and complainant (consumer) confusion. A single dispute resolution service also will promote accessibility and accountability, and will enable the detection of systemic or widespread issues.

**FAIR Canada therefore calls on securities regulators, insurance regulators, banking regulators, governments and other stakeholders to work together to bring about a single, national, statutory ombudservice for banking and investment complaints that provides for binding decision making. We**

[8] Expert Panel on Securities Regulation, "Final Report and Recommendations" (January 2009) at page 3, available online at:http://www.expertpanel.ca/eng/documents/Expert_Panel_Final_Report_And_Recommendations.pdf.

[9] International standards can be found in the G20 High-Level Principles on Financial Consumer Protection, October 2011. In particular, Principle 9 requires that "Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient....Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers and authorised agents internal dispute resolution mechanisms." Available online at http://www.oecd.org/dataoecd/58/26/48892010.pdf. See also the International Ombudsman Association Code of Ethics, available online at http://www.ombudsassociation.org/about-us/code-ethics and those developed by Australia and the British and Irish Ombudsman Association, referenced at page 2 of the Issues Paper.

**call on the CSA to work to bring about the reforms set out below, and we ask the Federal Minister of Finance to revisit the previous government's decision to allow multiple ECBs for banking disputes.**

## II. FAIR Canada's Comments on the Issues and Questions Raised in the Issues Paper

### 1. Clarity of purpose and accessibility

1.1. FAIR Canada is of the view that OBSI's website and its brochure more-or-less adequately explain in simple terms how to access OBSI, how OBSI works, and what major areas OBSI covers. We believe these media could be clearer, however, on such things as the need to first make a complaint to the consumer's firm in writing, the firm's obligation to acknowledge the complaint and respond within a certain time frame (IIROC regulated firms must do so within 5 business days), and the firm's obligation to provide their final decision, in writing, within 90 days.

1.2. We also believe OBSI could do better at explaining the limits of its mandate. For example, consumers will not know that OBSI does not deal with insurance-regulated investment complaints (as discussed below, we do not support the fragmentation of complaint handling that makes such an explanation necessary).

1.3. FAIR Canada believes OBSI could do more to raise awareness that its mandate includes the ability to "assist Complainants with the Complaint process, including helping them articulate their Complaint to a Participating Firm where necessary"[10]. The increasing complexity of financial products and of the financial services marketplace, coupled with the significant number of vulnerable consumers in Canada, means that many consumers may not be capable of articulating the nature of their complaint to their firm and could require assistance. The availability of this service is likely unknown by those who need it.

1.4. FAIR Canada believes Participating Firms could do a much better job of informing consumers about the firm's complaint handling obligations and the existence of OBSI by making this information easy to find on their websites and by posting on those websites copies of OBSI's consumer brochures.

1.5. Moreover, FAIR Canada believes that Participating Firms should not be able to confuse consumers by calling any of their internal complaint handling procedures "ombudsman" as such processes do not meet international criteria to be called an "ombudsman" nor can be said to be "impartial" in accordance with international criteria.[11] We agree with the recommendations contained in the previous two independent reviews of OBSI "[t]hat OBSI meet with participating firms that have an internal Ombudsman's Office function to discuss this naming problem and to suggest a re-naming/redescription of the internal function to

[10] See OBSI's Terms of Reference, at section 3(g).

[11] See for example, the British and Irish Ombudsman Association Criteria for the Recognition of Ombudsman Office, available online at http://www.ombudsmanassociation.org/docs/BIOA-Rules-New-May2011-Schedule-1.pdf. See also the International Network of Financial Services Ombudsman Schemes "Effective approaches to fundamental principles", (September 2014), Principle 2: Independence, to secure impartiality, at page 2, available online at http://www.networkfso.org/assets/info-network_effective-approaches-to-fundamental-principles_september2014.pdf.

reduce confusion by consumers between the firm's internal function and OBSI."[12] Calling the internal resolution person an ombudsman adds to consumer confusion and should be prohibited.

1.6. **FAIR Canada recommends that OBSI set out detailed requirements for how Participating Firms must inform customers about OBSI, and regulators should prohibit financial firms from naming their staff "ombudsman".**

1.7. Regulators could also do a better job of explaining the complaint process to consumers including the length of time that firms are permitted to take before providing their response (the 90 day time limit) and the length of time that complainants have to take their complaint to OBSI (the 180 days). For example, IIROC's brochure "An Investor's Guide to Making a Complaint" does not recommend that the consumer make the complaint to the investment firm in writing, and does not mention the 90 day time limit. It also does not say that the consumer can access OBSI if they have not received the firm's response within 90 days. The OSC's brochure on Getting Help With Your Complaint [13] is written in extremely general terms and could be improved with more plain language informative steps to take (see, for example, the materials published by the U.K.'s Financial Conduct Authority).

*1.8.* FAIR Canada believes that materials provided by OBSI, regulators and firms could be more clear about the limitation period for commencing a civil action and when and how such limitation periods are affected by the OBSI process, including when the limitation period for commencing an action starts, when the OBSI process will suspend that limitation period, against whom it is stopped, and what triggers the recommencement of the limitation time clock. It is important that consumers know this information at the very beginning of the process. If steps were taken to make OBSI a national, statutory ombudservice, legislative provisions could address this and materials could be provided to consumers that set this out in plain language.

*Appropriateness and Scope of OBSI's Mandate with respect to Investment Complaints*

*1.9.* FAIR Canada believes consumers neither know nor understand that OBSI's mandate does not allow it to address complaints about insurance-regulated investment products such as segregated funds. Similarly, consumers are unlikely to understand why a complaint relating to a product sold by either TD Bank or the Royal Bank of Canada must go to ADR Chambers Banking Ombuds Office (ADRBO) *when complaints about the same product sold* by any other bank can go to OBSI. And it is even more mystifying why certain financial services firms, such as mortgage brokers, and banks, can voluntarily become members of OBSI but are not required to do so.

1.10. It would be much simpler and more appropriate if OBSI's mandate dealt with all investment (and banking) complaints regardless of whether they are regulated as "securities", "insurance products", or "banking products", or "mortgage brokerage services". **It would be less**

[12] Khoury Report, at page 64 and page 68, Recommendation 15 of the Khoury Report; available online at https://www.obsi.ca/en/download/fm/46/filename.

[13] See the OSC's web brochure "Getting Help with your Complaint", available online: http://www.osc.gov.on.ca/en/Investors_brochures_getting-help-with-your-complaint.htm

**confusing, less burdensome, and more efficient if Canada had one ombudservice for consumer's investment and banking services complaints**.

1.11. FAIR Canada notes that OBSI provided no substantive reason why it was in the interests of consumers to remove segregated fund complaints from its Terms of Reference. We could discern no rationale, and none was forthcoming from OBSI, explaining how this would improve the system of consumer redress.

1.12. FAIR Canada continues to believe that it makes no sense to review one investment in isolation from the rest of the consumer's portfolio of investments. In light of modern portfolio theory, the segregated funds or insurance-investment related component of a client's portfolio should be considered when dealing with the complaint, and must be included in the analysis in order to avoid perverse findings. We refer you to our letter to OBSI dated August 12, 2013 at paragraph 1.1 to 1.8 for our detailed submissions on this point.[14]

1.13. Furthermore, we note that the use of two dispute resolution processes to resolve a consumer's investment complaint is more burdensome, time consuming, inefficient, and confusing to consumers and creates greater barriers to access to redress than a single process. Moreover, it creates the risk of inconsistent findings as the two ombudservices (OBSI and OLHI) could come to different conclusions with respect to the same underlying facts. Thus the use of two dispute resolution processes for a consumer's complaint jeopardizes public confidence in the overall competence of the dispute resolution system.

1.14. Moreover, the Ombudservice for Life & Health Insurance ("OLHI") is not subject to regulatory oversight and suffers from gaps in coverage which may result in the complaint not being within OLHI's mandate. In such instances the consumer will have to resort to the court system, provided they can afford to do so and provided their claim is of a sufficient amount to make it worthwhile given the costs. It is preferable to allow the consumer to have the matter resolved through OBSI.[15]

1.15. Fundamentally, consumers with investment complaints that have not been adequately resolved by the firm's internal complaints process should not have to pay the price of our fragmented regulatory system. This is not in line with best practices in other jurisdictions, such as the U.K., Australia or Malaysia, where all investor complaints are handled through a single, seamless ombudservice.

1.16. We note that OBSI has previously dealt with segregated fund complaints and there is no evidence that the process was in any way unfair. The use of two dispute resolution processes, as discussed above, is not only more burdensome and time consuming but also flawed since the entire portfolio is not reviewed. Navigating both processes can be confusing for consumers and creates more barriers to access to redress than a single ombudservice process.

1.17. With the increasing average age of our population, segregated funds may become a more

[14] Letter from FAIR Canada to OBSI dated August 12, 2013 Re Consultation on Proposed Changes to OBSI's Terms of Reference, available online at: http://faircanada.ca/wp-content/uploads/2013/08/130812-Changes-to-OBSIs-Terms-of-Reference-1.pdf.

[15] See FAIR Canada's Letter to OBSI dated August 12, 2013, at paragraph 1.4, available online at: http://faircanada.ca/wp-content/uploads/2013/08/130812-Changes-to-OBSIs-Terms-of-Reference-1.pdf.

common part of consumers' investment portfolios and seniors should not be disadvantaged by having to make two separate complaints.

## 2. Governance

2.1. The Issues Paper sets out that OBSI's governance structure is expected to, among other things, (i) ensure that the Ombudsman and the scheme are independent from those whom the Ombudsman investigates (participating firms); (ii) ensure that it safeguards that independence and provides for fair and meaningful representation of different stakeholders on its board of directors and board committees; and (iii) ensure that those involved in scheme governance conduct themselves in the best interest of the scheme.

2.2. The Australian Government's Key Practices for Industry-based Customer Dispute Resolution sets out at 2.7 that "[w]here the office is established as a company, the overseeing entity must have a balance of consumer, industry and, where relevant, other key stakeholder interests involved in governance", and at 2.8 that "[r]epresentatives of consumer interests on the overseeing entity must be: a) capable of reflecting the viewpoints and concerns of consumers; and b) be a person in whom consumers and consumer organizations have confidence".[16]

2.3. The International Network Financial Services Ombudsman Scheme sets out under the principle of independence at 2.28 that "[w]hoever appoints them, the members of the governing body, they are appointed on terms that:

- Require them to act in the public interest; and
- Secure their independence from those appointing them."

2.4. The Khoury Report recommended that there should be established "a Board with an independent Chair, 3 Industry Directors, 3 Consumer/Investor Advocates and 3 Community Directors" and the Khoury Report contained, as one of its recommendations, "[t]hat the OBSI Board be restructured to include an independent Chair, a consumer voice and to involve all Directors in all decisions."

2.5. After reviewing OBSI's governance structure and taking the international standards and recommendations referenced in this submission (as referenced in the Issues Paper or immediately above) in account:

(i) FAIR Canada is disappointed that OBSI's governance reforms did not adopt international principles or the independent reviewer's recommendation by including consumer or investor representatives on its board. **FAIR Canada recommends that there should be three positions on the board for consumer or investor representatives who are capable of reflecting the viewpoints and concerns of consumers and in whom consumers and consumer organizations have confidence.** This will provide visibility that OBSI has consumer representation, and that it has the necessary knowledge and

[16] Key Practices for Industry-based Customer Dispute Resolution, The Australian Government, (February 2015) at page 12; available online at:http://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2015/key%20pract%20ind%20cust%20dispute%20reso/Documents/PDF/key_pract_ind_cust_dispute_resol.ashx.

expertise of consumer and investor issues. The appointment of qualified people whose body of work is known to reflect and foster the interests of investors and consumers would be in the public interest and would foster the independence of OBSI's governance.

(ii) **FAIR Canada believes "independence" should require that the person not have any direct or indirect material relationship with any Financial Services Provider and recommends that the overarching principle of independence for a community director should be articulated in the By-Laws.** Currently, Article 6.6 of OBSCI's By-Laws merely states that community directors are those who have not been providing services to the financial services industry in the prior two years. FAIR Canada believes that the MOU's Governance principles should be strengthened. The Framework (now replaced by the MOU) had the Guideline of Independence which defined "independence" as follows: "independence" means the absence of relationships with the affected financial sector industry, or firms within it, which would cause a reasonable person to question whether the person can…provide objective and disinterested oversight (in the case of directors)" and the charter documents were to enshrine appropriate independence criteria, with a substantial majority of its directors who met the independence relationship standard.[17] **FAIR Canada supports this approach and recommends that the Governance principles set forth in the MOU be accordingly strengthened and that the role of the Joint Regulators Committee include supporting the independence of the dispute resolution process.**[18]

(iii) **We also recommend that the cooling off period to be considered for nomination as a community director should be increased to at least three years** in line with National Instrument 58-101, Disclosure of Corporate Governance Practices[19] and the timeframe set out in section 2.8 of the International Network: Effective Approaches to fundamental principles.[20] Given the existing definition of community director in OBSI's By-Laws, the OBSI Board could be composed entirely of former financial services industry participants, which would be contrary to the principle of independence.

(iv) **FAIR Canada further recommends that Article 6.2 of the By-Laws be amended to provide that directors are required to act in the public interest.**[21]

(v) FAIR Canada is surprised that the IIROC Nominee on OBSI's board is the Chief Operating Officer and Director of Richardson GMP, a participating firm that refused to compensate several investors and who informed OBSI that "it will not compensate its customer in

[17] The Financial Services OmbudsNetwork – A Framework for Collaboration, (August 10, 2007) at page 5, available online at: http://www.jointforum.ca/en/init/fson_framework/august_10_2007_a_framework_for_collaboration-en.pdf.

[18] See Article 3 of the 2015 Amended MOU and Schedule A, section 1 of the MOU, "OBSI Joint Regulators Committee ("JRC") Terms of Reference".

[19] NI 59-101 Disclosure of Corporate Governance Practices, available online at: http://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20050617_58-101_disc-corp-gov-pract.pdf. In particular, see section 1.4 of MI 52-110, available online at:https://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20040326_52-110-audit-comm.pdf.

[20] INFO Network: Effective approaches to fundamental principles, September 2014, Principles 2 Independence, to secure impartiality at 2.8, page 2, available online at http://www.networkfso.org/assets/info-network_effective-approaches-to-fundamental-principles_september2014.pdf.

[21] See paragraph 2.3 of our submission for reference of the applicable benchmark.

the context of the specific complaint no matter what OBSI's final conclusions are" and was accordingly named and shamed by OBSI.[22] Regardless of the competencies that the individual may bring to the Board, which we do not dispute, the open defiance of OBSI's process by his firm results in, at a minimum, a significant conflict of interest and more importantly, shows a disregard for the mandate of OBSI, which should warrant his disqualification as an IIROC nominee director.

*Position of Ombudsman*

2.6. According to the *Guiding Principles of the British and Irish Ombudsman Association and the International Network: Effective approaches to fundamental principles*, (i) the term of office of the ombudsman should be of sufficient duration not to undermine independence; (ii) such appointment should be for a minimum of five years; and (iii) such appointment is not removable – except for incapacity, misconduct or other just cause.[23] Article 8.3 of OBSI's By-laws does not adhere to this standard, stating instead that the term of the Ombudsman is to be decided by the Board and "[t]he Ombudsman may be removed with or without cause at any time by a resolution…".[24] **We recommend that this be changed so that the Ombudsman cannot be terminated without cause and their appointment be a minimum of three years**[25].

*OBSI's Consumer and Advisory Council*

2.7. **FAIR Canada recommends that OBSI's Consumer and Advisory Council be included in the Terms of Reference. We recommend that if reforms allow for a statutory ombudservice then the consumer and advisory council should also be set out in the legislative framework.**

2.8. **OBSI's Consumer and Advisory Council's work should be more transparent to the public**. For example, the fifty-page report that examined OBSI's processes and communication materials through a consumer/investor lens, and the report's recommendations for improvement should be publicly disclosed.[26] The Consumer and Advisory Council should also publish its meeting agendas and minutes of its meetings, similar to the practice of the OSC's Investor Advisory Council.

## 3. Independence and standard of fairness

*Independence*

3.1. FAIR Canada believes OBSI plays a crucial role in dispute resolution and redress, which is a critical component of investor protection in Canada. The last independent review of OBSI in 2011 concluded that "…OBSI's approach to investment loss is based on sound logic, provides a fair and transparent platform for well-founded consistent decision-making and is consistent

[22] See OBSI Refusal to Compensate notice (April 16, 2014) available online at: https://www.obsi.ca/en/news-and-publications/refusal-to-compensate/richardson-gmp.
[23] See OBSI Independence Criteria, paragraphs 1(c) and (e), available online at: http://www.ombudsmanassociation.org/docs/OA-Rules-Schedule-1.pdf.
[24] OBSI Consolidation of By-Law No. 1 and By-Law No. 2, Article 8.3
[25] The Australian's Key Practices for Industry-based Customer Dispute Resolution provides at Benchmark 2: Independence that the decision-maker is appointed for a fixed term. See page 11.
[26] OBSI's 2014 Annual Report at page 26, available online at: https://www.obsi.ca/en/download/fm/290/filename/Annual-Report-2014-1444055310-0ac88.pdf

with other jurisdictions."[27] The independent review found that OBSI's overall decision-making in investment complaints is competent and highly consistent with comparable EDR schemes in other countries…"[28]. FAIR Canada supported the suitability and loss assessment methodology as being fair at that time and did not see the need for further changes. Nonetheless, OBSI subsequently did put forth proposed amendments in 2012 (a consultation had occurred in 2011).[29] It went on to make a number of changes, largely stemming from industry pressure.

3.2. FAIR Canada agrees with the Khoury Report that the loss calculation methodology and OBSI's processes are not the real reason that cases became "stuck" or OBSI has been criticized. As stated in the independent review of OBSI: "Our own view is that the methodology is only a 'lightning rod' for industry criticism. The real issue is industry's discomfort with the evolving role and independence of OBSI. …We are skeptical that any technical concession on methodology would purchase any lasting 'peace'."[30] Unfortunately, OBSI's approach was to try to appease industry stakeholders.

*Fairness*

3.3. FAIR Canada has identified several issues of fairness within OBSI's settlement process. First, FAIR Canada notes that, from the outside, it is difficult to assess the degree of fairness to participating firms and investors, as well as the degree of consistency, given that OBSI's decisions are not published and the process is confidential. We discuss this issue below at paragraph 3.5 and section 4.

3.4. Second, FAIR Canada is seriously concerned by the practice of settling investor complaints for amounts well below OBSI's recommendations – known as low-ball settlements. **Low-ball offers and low-ball settlements fundamentally undermine the fairness of both outcomes and process, and this undermines consumer protection and consumer confidence in our system of redress.**

3.5. OBSI has proclaimed that "[o]ver 99% of complaints we investigate are successfully resolved", but it has not disclosed what percentage of settlements are the result of low-ball offers and thus bear no resemblance to the fair resolutions recommended by OBSI. **FAIR Canada is of the view that such results should not be considered "successful settlements". Accordingly, while the specific terms of settlements can be kept confidential by the consumer, the participating firm and OBSI, the number and percentage of low-ball settlements should be publicly disclosed and the amount of any settlement that results from using OBSI's process should be disclosed to OBSI staff. In this manner, OBSI can become aware of the prevalence of low-ball settlements and can then take steps to address them.**

3.6. **FAIR Canada notes it is the absence of binding decision-making authority that makes low-ball settlements possible. Such settlements occur because consumers feel they are out of**

[27] The Navigator Company, "Ombudsman for Banking Services and Investments Report 2011 Independent Review" (2011), at page 17, available online at: https://www.obsi.ca/en/download/fm/46/filename/2011-Independent-Review-1426030496-60d22.pdf (the "Khoury Report").
[28] The Khoury Report, at page 17.
[29] Letter from FAIR Canada to OBSI dated July 9, 2012, available online at: http://faircanada.ca/wp-content/uploads/2012/07/120709-FAIR-Canada-comments-re-OBSI-suitability-and-loss-assessment-consultation.pdf.
[30] Khoury Report, at page 18.

**options and are in a "take it or get nothing" position; and firms can and do take advantage of that perception. This dynamic would not arise, however, if OBSI's process included binding decision-making authority. As detailed in the next section, the prospect of OBSI imposing a result would (a) allow the consumer to have confidence that they can reject a low-ball offer and still retain the ability to achieve a fair outcome, and (b) give firms a greater incentive to make fair settlement offers instead of low-ball ones.**

**4. Processes to perform functions on a timely and fair basis: the need for binding decision-making, and power to compel information**

4.1. Given that OBSI does not have binding decision-making as part of its process, firms are able to put very low offers to consumers. Such offers may be accepted by the consumer simply because the alternative is no compensation, assuming the participating firm rejects OBSI's recommendation. Low-ball offers would occur much less frequently (if at all) if OBSI decisions were binding: the firm in question would be motivated to put forward a reasonable settlement offer or they would run the risk that, should the matter be put to the ombudsman, the ombudsman would instead conclude the firm is responsible for a significantly greater amount. Normally, the uncertainty of what a decision-maker will decide can be factored into any settlement offer. Without the inclusion of an ombudsman decision that is binding on the firm, the firm is free to offer the consumer far less than what is fair in the circumstances. Settlement offers would be subject to a different risk assessment if the ombudsman could bind the firm once the consumer accepts the recommendation.

4.2. In short, the lack of a binding decision has an impact on the process of negotiation and settlement before OBSI provides its preliminary recommendation. Low-ball offers may also occur after OBSI's preliminary recommendation. This would not be the case if binding decisions were implemented through the OBSI process.

4.3. Furthermore, in the absence of binding decision-making we are left with a fundamentally unfair process. If the consumer does not accept the low-ball offer, they may not obtain any compensation from the OBSI process. At this point, their only recourse is to proceed with a lawsuit through the courts. This requires that the consumer is financially able to do so, and such recourse is available only if their claim is not yet barred by expiry of a limitation period. Given the costs and timing issues associated with going to court, the result in most cases is that the consumer will not obtain any compensation beyond the OBSI process, despite the fact that another process was technically available.

4.4. While OBSI has tried to rely on "naming and shaming" to ensure compliance with OBSI recommendations, FAIR Canada is strongly of the view that "naming and shaming" is not a sufficient deterrent for many registrants. FAIR Canada understands that 17 firms have been named and shamed since 2012. OBSI's 2013 Annual Report advises that while some of the cases arose from firms existing in name only (having been deregistered or winding down, suspended by an SRO or otherwise), "[o]ther times, a viable, operating firm has declared that it will simply not compensate the complainant any amount, no matter what our conclusions are."[31] **The lack of meaningful participation by those firms in the OBSI process demonstrates**

[31] OBSI's 2013 Annual Report, at page 20, available online at https://www.obsi.ca/en/download/fm/71/filename/Annual-Report-2013-1426076731-ec94b.pdf.

**that the publication of the names of the firms who do not accept OBSI's recommendation is not a sufficient deterrent to lead to good faith efforts to resolve the matter on a fair basis. FAIR Canada also believes that such behaviour is not commensurate with the discharge of a firm's duty to deal fairly, honestly and in good faith with its clients.**

4.5. We note that the Khoury Report in 2011 raised the issue of very low initial offers of compensation which the independent reviewer noted were present in a "number of files" and which "does not give the impression of good faith acceptance of the independent decision-maker's role.[32] This appears to have become worse given the increased incidence of firms being named and shamed.

4.6. **Accordingly, in light of the ineffectiveness of name and shame and the existence of low-ball settlements, FAIR Canada is of the view that Canada's consumer dispute resolution system work simply will not work properly without a statutory ombudservice that results in binding decisions if the recommendation is accepted by the consumer. Many other jurisdictions have such a system and there is no reason for a less consumer-friendly system to be the norm in Canada. We also have recommended that regulators need to respond to the present situation by taking enforcement action against those firms that deliberately subvert OBSI's process and thereby intentionally fail to deal with client complaints in good faith**.

4.7. FAIR Canada notes the MOU's preamble states that "…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." The use of such disclosure does not (if it ever did) provide adequate investor protection. What is needed is structural reform so that we have a system of dispute resolution that provides fair outcomes and works properly. Other jurisdictions have such a system and Canada urgently needs to takes steps to obtain the same level of investor and consumer protection.

4.8. FAIR Canada commends the CSA and OBSI for providing terms of reference for the independent evaluation that address "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 as part of this, conducting "…a high-level benchmarking exercise that compares OBSI to other financial Ombudsman schemes or equivalent in comparable international jurisdictions", and "an analysis of the reasons for settlements below amounts recommended by OBSI" (among other things)[33].. We trust that this can be broadly interpreted to include structural reforms such as binding decision-making.

4.9. **Co-ordinate with exercising binding decision-making authority, OBSI should have the ability to compel parties to provide information relevant to a complaint where such information must be considered in the interests of fairness and natural justice.** Reforms to make OBSI a statutory ombudservice would allow for such reforms[34].

[32] Khoury Report, at page 52.
[33] Issues Paper, Appendix 1: Independent Evaluation Terms of Reference, Section B. Operational Effectiveness, at paragraphs (b) and (e), at page 8.
[34] Australia's Key Practices for Industry-based Customer Dispute Resolution, Benchmark 3: Fairness, paragraph 3.9, and its footnote 22, at page 15.

## 5. Fees, costs and resources

5.1. FAIR Canada is not able to comment on how well OBSI meets its obligations under the MOU with respect to setting fees and allocating costs given the lack of public information on this. We would encourage OBSI to make this information publicly available.

5.2. The 2014 Annual Report notes that OBSI will try to build up its operating reserve to mitigate the impact of unforeseen increases in complaints that cannot be managed using existing human resources. Its operating reserve was "completely depleted when RBC withdrew from OBSI with no notice in 2008, as the Board at the time chose not to pass along the bank's share of the budget to other participating firms."[35] The departure of RBC and later TD had a significant impact on OBSI revenues and staffing levels. If the federal government was to revisit this issue and OBSI once again was the sole national ombudservice for banking complaints, OBSI would be placed on a stronger footing.

5.3. Given that OBSI has approximately 1500 Participating Firms, FAIR Canada believes OBSI's budget is reasonable and provides fair value to all stakeholders from a cost perspective. Consumers do not have to pay to use its services. In fact, firms were required to pay compensation in only 33% of all cases closed in 2014, paying a total amount of compensation of $4,264,201 in 2014 in respect of 570 complaints (compared to $4,884,012 in 2013 in respect of 641 complaints) with the average amount of compensation being $16,921 in 2014 ($24,667 in 2013). These fees are not significant to the banking and investment industries. Considering what it would cost the banking and investment industries in legal fees to deal with this number of claims in litigation, these dollar numbers represent considerable value to conclude the claims; while at the same time, the compensation is significant in real terms to consumers (although low-ball settlements calls into question the adequacy of the settlement amounts).

## 6. Cooperation and information sharing

6.1. As set out in the MOU, the Chair is to 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. **FAIR Canada recommends 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, the CSA Designates could issue a report on steps taken with respect to potential systemic issues that have been brought to their attention.** The OBSI Joint Regulators Committee Annual Report for 2014 indicated that the "…JRC is in the process of establishing a protocol to define potential systemic cases and to set out a regulatory approach to address these issues when report by OBSI."[36] In the interests of transparency and accountability, the protocol and the regulatory approach should be publicly disclosed. This will foster confidence amongst all stakeholders that systemic issues are being addressed by both OBSI and the regulators, and it will foster greater accountability.

[35] 2014 Annual Report, at page 84.

[36] CSA Staff Notice 31-340 – OBSI Joint Regulators Committee Annual Report for 2014, (2015), 38 OSCB 2551 at 2552, available online at: http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20150319_31-340_obsi-annual-report.htm.

6.2. **FAIR Canada suggests that the annual report provided to the CSA Designates on OBSI's activities, including the number and types of complaints handled, be made public**.

6.3. **FAIR Canada recommends that OBSI's complaint statistics be produced more frequently, possibly quarterly, given that it reports its complaints data quarterly to the JRC**.[37]

*Terms of Reference of the OBSI Joint Regulators Committee*

6.4. As mentioned above, **FAIR Canada believes that the mandate of the JRC should include supporting the principles of independence and openness and transparency in the dispute resolution process**.

6.5. The inclusion of consumer representation at the JRC, whether through OBSI's Consumer and Advisory council, the formation of a committee of the JRC or otherwise, would benefit the development of policy and should be considered.

## 7. Transparency and accountability

7.1. **FAIR Canada recommends that there be benchmarking done to compare the level of transparency of OBSI's operations with that of other ombudservices**. We note that the UK's Financial Ombudsman Service has much greater levels of transparency regarding its complaint statistics, and they are published by the FCA quarterly[38]. The UK also publishes decisions of the ombudsman in a searchable database format (for those complaints that went as far as a decision by the ombudsman rather than settling before that stage). We recommend that a benchmarking exercise should be conducted against other leading jurisdictions.

We thank you for considering our comments and views in this letter. We welcome its public posting and would be pleased to discuss this issue with you at your convenience. Feel free to contact Neil Gross at 416-214-3408 (neil.gross@faircanada.ca) or Marian Passmore (marian.passmore@faircanada.ca) at 416-214-3441.

Sincerely,

Canadian Foundation for Advancement of Investor Rights

Cc: The Honourable Charles Sousa
Minister of Finance
Ontario Ministry of Finance
7 Queens Park Crescent, 7th Floor
Toronto, ON M7A 1Y7
Sent via e-mail to: financecommunications.fin@ontario.ca

[37] See CSA Staff Notice 31-340 at 2552.
[38] See FCA's Complaints Data, available online at http://www.fca.org.uk/consumers/complaints-and-compensation/complaints-data/

The Honourable Michael de Jong, Q.C.
Minister of Finance
British Columbia Ministry of Finance
P.O. Box 9048 Stn Prov Govt
Victoria, B.C. V8W 9E2
Sent via e-mail to: FIN.minister@gov.bc.ca

The Honourable William Francis Morneau
Department of Finance Canada
90 Elgin Street, 17th Floor
Ottawa, ON K1A 0G5
Sent via e-mail to: bill.morneau@canada.ca

Ms. Sarah Bradley
Ombudsman and CEO, OBSI
OBSI
401 Bay Street, Suite 1505
Toronto, Ontario
M5H 2Y4

CSA Secretariat
Tour de la Bourse
800, Square Victoria
Suite 2510
Montréal Québec H4Z 1J2
Sent by email to: csa-acvm-secretariat@acvm-csa.ca

Louis Morisset
Chair, Canadian Securities Administrators
Chair and CEO, AMF
Autorité des marchés financiers
800, Square Victoria, 22e étage
C.P. 246, Tour de la Bourse
Montréal, QC H4Z 1G3

Maureen Jensen
Chair and Chief Executive Officer
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, ON M5H 3S8

Tom Cotter
Interim Chair and Chief Executive Officer
Alberta Securities Commission
Ste. 600 - 250, 5th Street SW

Calgary, AB T2P OR4

Brenda Leong
Chair and Chief Executive Officer
British Columbia Securities Commission
P.O. Box 10142, Pacific Centre
701 West Georgia Street
Vancouver, BC V7Y 1L2