IGM Financial

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Sent Via email to publicaffairs@obsi.ca and Courier

Terms of Reference Review
Ombudsman for Banking Services and Investments
PO Box 896, Station Adelaide
Toronto, Ontario
M5C 2K3

Dear Sir:

Re: Consultation Draft on Proposed Revised Terms of Reference

We are responding to the Consultation Draft published on December 3, 2007, which proposes a number of changes to the Terms of Reference for the Ombudsman for Banking Services and Investments (OBSI). This letter sets out our comments on the amendments proposed in the Consultation Draft.

Background

IGM Financial Inc. (IGM) is a diversified financial services company and is Canada's largest mutual fund manufacturer, managing over $100 billion in assets on behalf of clients. Included within its subsidiaries are a number of firms that participate in OBSI, namely:

- three members of the Mutual Fund Dealers Association of Canada (MFDA)[1];
- three members of the Investment Dealers Association of Canada (IDA)[2];
- three members of the Investment Funds Institute of Canada[3]; and
- two federally regulated trust and loan companies[4].

[1] Investors Group Financial Services Inc., M.R.S. Inc. and IPC Investment Corporation.
[2] Investors Group Securities Inc., M.R.S. Securities Services Inc. and IPC Securities Corporation.
[3] Investors Group Inc., Mackenzie Financial Corporation and Counsel Group of Funds Inc.
[4] M.R.S. Trust Company and Investors Group Trust Co. Ltd.

While some of these firms participate in OBSI voluntarily others are required to do so under regulatory rules governing their activities[5]. As OBSI participants, these firms pay periodic assessments to defray the cost of the ombudservice and most have had clients submit complaints to OBSI for resolution since its mandate was extended to the securities industry in 2002. As a result, IGM has a keen interest in any changes to OBSI's Terms of Reference.

OBSI's Role

At the outset it is important to keep in mind what OBSI is – an independent reviewer of complaints against a participating firm that operates relatively informally at no cost to the complainant and outside the formal rules that govern legal proceedings. Some of the key elements of the philosophy underlying OBSI's approach and the process it uses to investigate complaints are reflected in its Code of Practice and the Framework for Collaboration it has entered into with various regulators:

- OBSI's services are "non legalistic". This has a number of consequences, including the following:

  - there are no rules of evidence that apply. Instead OBSI investigators can consider whatever information they believe to be relevant and to give whatever weight to individual pieces of it that they see fit

  - OBSI investigators determine what evidence they will consider. Unlike a proceeding in court, where the parties determine what evidence will be called, the OBSI investigators control the fact finding process and decide who they will interview, although consent of the parties is required where the investigator wants to interview a third party

  - the investigatory process is not open to all affected parties. In conducting their inquiries OBSI investigators may interview a number of witnesses and review various documents. Neither the participating firm nor the complainant are allowed to be present when these interviews are taking place nor are they provided with transcripts or even summaries of what an individual may have said. Similarly, the affected parties are not given access to the documents that investigators receive in the course of their investigations. While investigators may refer to evidence that was important in making their decision in the body of the written recommendation they prepare, this is not the same as having access to the actual evidence in its entirety before the decision is reached

  - there is no opportunity to cross examine witnesses or challenge evidence reviewed by the investigator. As noted in the previous point, when an OBSI investigator conducts an interview, neither the participating firm nor the complainant is present and they have no opportunity to cross examine the individual being interviewed.

[5] See MFDA Bylaw 24A and IDA Bylaw 37, which essentially mandate that member firms participate in an ombudservice approved by the self regulatory organization's board of directors – which have designated OBSI in this regard – and cooperate with that entity if a client submits a complaint for investigation by it.

Cross examination, of course, is a key element of the process used to test the validity of the evidence and the credibility of the witness giving it in the course of a proceeding in court. While a participating firm is provided with an opportunity to review the draft recommendation prepared by the OBSI investigator before it is being finalized, this is of limited use and is not the same as having the opportunity to cross examine witnesses and adduce relevant evidence in the course of the fact finding process itself

- there is no appeal from a recommendation by an OBSI investigator. Once a recommendation has been issued by the OBSI investigator, the process is complete. While technically the recommendation is non binding on both the participating firm and the complainant – who are free to accept it or reject it as they see fit – OBSI's mandate specifically contemplates publishing the names of participating firms who do not accept a recommendation and the facts of the complaint. This is such a powerful incentive to accept a recommendation, given the reputational risk associated with negative publicity, that in its history only once has a participating firm rejected an OBSI recommendation. Similarly, the threat to publish as a consequence for not accepting a recommendation is, on the surface, retaliatory in nature and, in certain cases, could result in defamatory and highly damaging public statements being made about a participating firm. Conversely, there are no sanctions imposed on a complainant who decides not to accept a recommendation

- "fairness in the circumstances" is the fundamental principle on which OBSI's decisions are based. By definition, "fairness" is an elastic concept that ultimately cannot be divorced from the perception of the individual – in this case the OBSI investigator – who is making the determination. This is the case even where, as contemplated by the Framework with Regulators that governs OBSI's operations, it is required to establish a clear fairness standard to assess complaints. This is very different from the role of a judge in a legal proceeding, who is bound to render justice in the context of underlying legal principles, which may or may not accord with a particular individual's perception of what may be just in that case

The fundamental nature of the OBSI complaint resolution process – relatively informal, free and non binding on the part of complainants and non legalistic – is both its strength and weakness. On the positive side, it is a process that can work well for complainants in that they have nothing at risk, even in the weakest of cases, and yet have the benefit of an independent party who can make recommendations that OBSI believes are fair, unconstrained by formal legal rules. On the negative side, because OBSI is not a court, none of the legal or procedural safeguards that apply in a judicial proceeding exist. It is particularly important to keep these inherent weaknesses in the OBSI process in mind when considering any proposal to expand or significantly amend its mandate, as is the case here. It is also important to bear in mind that the costs associated with investigating and ultimately settling complaints, are bourne by the market participants and, in turn, the public generally, who end up paying higher prices for the participating firms' products and services, thus further highlighting the need to tread very carefully when exploring the idea of expanding OBSI's mandate.

Key Concerns

The proposed amendments to OBSI's Terms of Reference set out in the Consultation Draft would, if adopted, represent a significant expansion of OBSI's mandate and would implement significant changes in the rules under which it operates. We have a number of key concerns with the proposal that can be summarized as follows:

- it proposes to give OBSI the power to order compensation for "systemic issues" it discovers at a participating firm during the course of an investigation and to recommend that payment be made to all affected individuals and small business, regardless as to whether or not they have complained. Essentially this amendment would operate to give OBSI authority broadly analogous to that which a court has in a class action proceeding, but with none of the procedural safeguards or due process that apply in that forum. We strongly believe that this proposed expansion of the OBSI mandate should not go forward. Systemic issues are better dealt with in a court or before a securities commission or self regulatory organization such as the MFDA or the IDA, where substantive and procedural safeguards (that are not present in an OBSI investigation) apply in any proceeding that is brought.

- it recommends that OBSI be given the power to investigate all entities that are affiliated with firms that are subject to OBSI's dispute resolution service (as opposed to limiting it to affiliates that provide financial services to customers, as is currently the case), potentially expanding its scope significantly. The justification for the proposed expansion is not articulated and in the absence of a compelling reason for this change, the current provision should be retained.

- it proposes to remove the ability for a participating firm to withhold information from OBSI on the basis that it is privileged. The concept of privilege is central to the Canadian legal process and is rooted in sound policy considerations that have been consistently upheld. This change should not be made.

- it would establish substantive rules on the part of participating firms for the handling of client complaints, which is arguably a power that should be solely within the authority of their primary regulators, such as the MFDA and the IDA, which already have comprehensive rules in this regard.

Detailed Comments

The following sets out our detailed comments on the changes to OBSI's Terms of Reference contemplated in the Consultation Draft:

- ***Definition of "participating firm" (section 2(a))***- currently OBSI's mandate is to investigate and seek resolution of complaints against an "FSP", which is defined as an OBSI member and affiliates that provide financial services to customers. The Consultation Draft proposes to replace this definition with the concept of a "participating firm", which includes not only the MFDA or IDA member, for example,

but also representatives and all affiliates of that member, unless the affiliate is a member of another industry ombudservice ("affiliate" is defined as an entity that is controlled by another entity and entities that are under common control). This would extend the reach of OBSI's mandate into virtually any firm that is part of a member's corporate group. As noted above, no supporting rationale has been provided for this expansion and no justification for it is apparent. The current provision provides adequate scope for OBSI to conduct its investigations and should be retained as it is.

- ***OBSI's powers (section 3(aa))***- under the proposed revised Terms of Reference, OBSI's powers would include assisting clients in the complaint process, including helping them articulate their complaint, where necessary. The potential issue here is that this proposed change may blur the distinction between OBSI as neutral arbiter, which is appropriate and consistent with its mandate, and complainant advocate, which is not. Central to the whole role of OBSI, of course, is impartiality and fairness. If by this one means treating of all sides alike, justly and equitably, then this proposed power flies directly in the face of these notions. As a result, this change should not be made.

- ***The ombudsman's principal powers and duties (section 3(d)***- the proposed changes to the Terms of Reference would remove the word "investigate" and replace it with "evaluate" in reference to what OBSI is to do with complaints. In turn, section 8 provides that OBSI "may" investigate any Complaint...". This could be interpreted to mean that OBSI can evaluate complaints and make a recommendation without conducting an investigation. This would be inconsistent with OBSI's mandate and this proposed change should be revised to make it clear that OBSI will make a recommendation only after conducting an investigation.

- ***Right to investigate complaint (section 8(b))***- under OBSI's current Terms of Reference, it cannot become involved in a complaint until the participating firm has finished considering the complaint and provided a response to the complainant. The Consultation Draft would change this by providing, in essence, that after 90 days a complainant would have the option of having OBSI become involved and investigate the complaint, even if the participating firm has not completed its review. The concern with this proposed change is that a cornerstone of OBSI's process to date is the idea that the participating firm has completed its review and made a determination on the complaint, the underlying principle being that the firm has the primary obligation to deal with complaints from clients and OBSI becomes involved only after this been done. This amendment is inconsistent with this approach and should not be implemented.

- ***Time limitation for bringing a complaint (section 8(c))***- while the Consultation Draft proposes to retain the provision in the Terms of Reference that a complaint must be filed with OBSI within 180 days after the participating firm has made its determination on the complaint, it proposes to give OBSI the power to investigate a complaint where this time limit is not met if OBSI "...considers it fair to do so", effectively giving OBSI the unilateral power to waive this limitation. If this change is to be made, OBSI should adopt guidelines as to when it would exercise this discretion and the factors that it

would consider in making this determination. The concern is that this dispensation should be granted only in the most deserving of cases, with the risk being that in the absence of clear guidelines it could be granted routinely. It is a well recognized principle that finality is an important policy goal of all dispute resolution.

- ***Proceedings in court (section 8(e))***- currently OBSI cannot proceed with a complaint if the complainant has brought a lawsuit, arbitration or similar proceeding. The Consultation Draft would change this to allow OBSI to proceed in such a case if the complainant agrees not to proceed with the lawsuit or other action until OBSI has competed its review. The issue this change raises is that it would allow a client to essentially proceed on two paths at once. The original principle underlying the OBSI process was that clients had to elect whether to have OBSI look at the case or file a lawsuit. This amendment would allow clients to move on both fronts at once, although the client would have to agree not to proceed under the lawsuit while OBSI is investigating the matter. However, simply having the client provide such an undertaking is not enough to address the underlying concerns and may create practical problems if the lawsuit is in the case management stage in court. In light of the above, the current provisions, which prevent a participating firm from having to deal with a matter in more than one forum, should be retained.

- ***Fees (section 9(a)***- the Consultation Draft would amend the Terms of Reference to make it clear that although OBSI will not look at whether a fee or other charge is fair in general, it does have the power to look at whether the assessment of a fee in a particular situation is fair. This change is consistent with OBSI's current practice and should be made.

- ***Ombudsman's mandate section 9(d)***- this proposed provision states that OBSI will not investigate, or shall cease to investigate, complaints where the complaint has been before the court or other independent dispute resolution body "...where those proceedings have been concluded with a decision or finding". This proposed addition is consistent with OBSI's current practice and should go forward but should add that this will also apply where the proceedings were concluded by way of a full and final settlement without going to court. This is an important omission since this entire section does not address the issue of a firm settling a matter and obtaining a release.

- ***Systemic issues (section 10)***- a very significant change proposed to OBSI's Terms of Reference is the ability to pursue systemic issues. "Systemic Issue" is defined as:

  > "a matter discovered in the course of considering a Complaint which may have caused a loss or inconvenience to one or more other Customers in a similar fashion to that experienced by the original Complainant."

  Under the proposal in the Consultation Draft, if OBSI identifies a systemic issue, it may request information from the participating firm regarding the individuals and small businesses affected by it and may recommend that the firm:

(i) compensate all affected individuals or small businesses, whether or not they have complained; and

(ii) adopt measures to prevent future occurrences of the issue.

There are several major concerns with this proposal:

- this provision essentially creates a kind of "class action" remedy that OBSI can pursue where it believes doing so is appropriate. This is potentially problematic in that, as noted above, the OBSI complaint resolution process is a non legalistic and relatively informal one where the participating firm has neither access to all of the information obtained by the OBSI investigator nor the opportunity to challenge the evidence presented. The result is that a participating firm could be subject to a recommendation that involves large sums of money (see the change proposed to section 11 below on the maximum amounts it can award) without having a meaningful opportunity to fully know or challenge the basis upon which the recommendation is based. In short, although this proposed process has many of the attributes of a class action proceeding in court, it has none of the procedural safeguards or due process involved in a judicial proceeding

- the proposed authority under which OBSI can recommend that Participating Firms adopt measures to prevent future reoccurrences is a power more in the nature of one available to a regulator such as the MFDA or the IDA as opposed to a dispute resolution service. However, unlike a regulator, which can only take action of this kind after conducting a hearing, with all of the procedural safeguards those venues involve, OBSI could make such a recommendation after completing its investigation, without any of the due process that would be required in a regulatory proceeding. Further, it should be noted that there are real problems in granting OBSI the power to order changes regarding a systemic issue it has identified in that the definition of a "systemic issue" includes a loss or inconvenience to "one or more" other customers. In theory, this would give OBSI authority to recommend costly (in terms of both money and effort) measures to remedy a situation in which only a very small number of people were affected. This underlines the fact that an OBSI investigation is not the proper forum for determining these kinds of issues

- as noted, securities regulators already have jurisdiction regarding systemic issues. To give OBSI its own separate authority to deal with these issues raises the possibility of it making a determination that is inconsistent with a decision made by a securities regulator

For these reasons, this change to the Terms of Reference should not be made.

- ***Increase in recommended amounts (section 11)***- although OBSI is generally limited to cases where the amount at issue is not more than $350,000, a proposed change to section 11 of the Terms of Reference would lift the maximum for systemic issues. Essentially the change would mean that if a systemic issue is involved, the total amount

that OBSI can recommend as compensation could be far in excess of $350,000, although the amount that could be recommended in the case of an individual complainant or small business could not exceed this amount. Because this change is inextricably linked to the proposed amendment that would allow OBSI to pursue systemic issues, it should not go forward for the same reasons set out above.

- ***Duties of participating firms (section 15)***- the Consultation Draft proposes a number of changes to the obligations of participating firms, including:

  - ***Promote complaint handling process (section 15(b))***- requiring firms to promote their internal and external complaint handling processes on websites and in other communications. Arguably if this duty is desirable, it would be more appropriately established as a rule of a regulator, such as the MFDA or the IDA, and not by a dispute resolution service such as OBSI.

  - ***Cooperation regarding complaint against another firm (section 15(d)(i))***- stating that firms must cooperate in providing information on a complaint involving another firm, if appropriate releases are obtained. This is consistent with current OBSI practice and is a reasonable amendment.

  - ***Providing information on industry practices (section 15(d)(ii))***- mandating that firms must provide information on general industry practices where requested by OBSI, even if the participating firm is not involved in the complaint. Responding to these requests by OBSI, which in a specific case could be nothing more than a fishing expedition, may require extensive work on the part of participating members who are not the subjects of the complaint. As a result, this change should not be made.

  - ***Duty to provide information (section 15(e))***- currently the obligation on the part of participating firms is to provide all non privileged information relating to a client's complaint to OBSI. The Consultation Draft proposes to delete the reference to "non privileged", which would suggest that the duty would be to provide all information it has, other than that which is subject to a confidentiality obligation that has not been waived (despite the participating firm's "best endeavour to obtain such a waiver), and that privilege can no longer be a basis for withholding documents. As noted above, this proposed change is inconsistent with fundamental legal principles and exposes the participating firms as being viewed as having waived their privilege. Importantly, this may also prejudice any insurance coverage the firm may have. For these reasons, this change should not go forward.

  - ***Deadline for providing substantive response (section 15(f))***- requiring that firms provide a substantive response to clients within 90 days of the receipt of a complaint. Again, this is clearly an intrusion into the realm of regulators such as the MFDA and the IDA, which have their own rules governing their members regarding complaint handling. To allow OBSI to establish its own rules in this regard is

needlessly duplicative at best and potential contradictory with other regulatory requirements at worst.

- ***Mandatory agreements to extend limitation periods (section 15(g))***- mandating that firms must enter into an agreement with OBSI to suspend limitation periods relating to a client's complaint, where required by OBSI. The rules regarding limitations of actions are laws of general application in individual provinces that govern everyone. Requiring participating firms to suspend these at the request of OBSI is unfair. Clients should be required to determine how they wish to proceed and if a limitation date is an issue, they should have to decide whether to proceed in court or not. Accordingly, this change should not be made.

- ***Mandatory disclosure of complaint resolution process (section 15(h))***- requiring that firms inform all complainants of their right to bring their unresolved complaints to OBSI, regardless of whether the participating firm believes the matter is in OBSI's jurisdiction. Under MFDA and IDA rules firms are required to advise clients of OBSI's existence and role in all complaint cases, which means this requirement is, at best, superfluous.

- ***Scope of recommendation (section 20))***- under the proposed revised Terms of Reference, the scope of the recommendation that OBSI may grant will be clarified to delete the ability to compensate for damage or harm but will add the power to recommend that clients be paid for inconvenience in addition to loss. In our view OBSI's role should be limited to recommending payments to clients for the actual loss they suffered. As the OBSI commentary on the proposed changes to the Terms of Reference notes, compensation for general damages, pain and suffering and other awards are "...more appropriately considered in venues such as the courts". We strongly agree with this comment and believe is not only supports deleting the ability to recommend compensation for "damage and harm" but also leads to the conclusion that OBSI should not have the authority to include inconvenience to clients. Again, OBSI's powers should be limited to recommending compensation for the actual loss suffered by clients.

- ***Role of OBSI (section 24)***- currently OBSI's Terms of Reference indicate that it should seek to obtain a resolution that is satisfactory to the complainant and the participating firm. The Consultation Paper recommends that this be deleted. This proposed amendment suggests that OBSI role is moving away from that of a dispute resolution service towards one that is more analogous to that of a court, where the role is that of a decider of disputes between parties. This proposed change is inconsistent with the fundamental role of OBSI and should not be made.

- ***Disclosure of non cooperation (section 25)***- the ability of OBSI to issue public statements as to the actions of participating firms would be amended in the proposals set forth in the Consultation Draft to include situations where the Participating Firm has not cooperated in providing information. This is a powerful tool in the hands of OBSI and, unlike a situation where a firm has rejected a recommendation (which is a clear question

of fact) determining whether or not a participating firm has cooperated may involve a subjective element. In this context, this change should not be implemented.

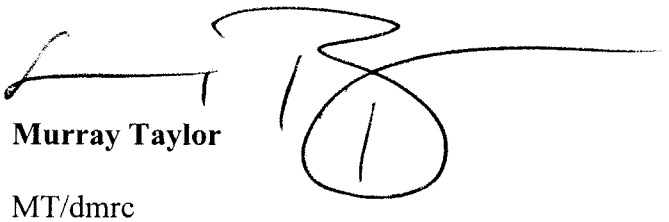
Other Comments

One deficiency in the current OBSI Terms of Reference is that there is no limitation date regarding client complaints, beyond the requirement that complainants request OBSI's intervention within 180 days of the date the participating firm has provided a substantive response to the complainant (although even in this case the proposed changes would allow OBSI to waive this requirement, as noted above). One of the difficulties with this is that the OBSI process allows a complainant to bring a complaint to OBSI even where they could not file an action in court. This is unfair to participating firms and there should be an overall limitation date as to when a complainant can bring a complaint to OBSI. As noted above, finality is a valid policy goal in establishing rules of dispute resolution, whether in a formal judicial proceeding or in an OBSI investigation.

We appreciate having the opportunity to comment on these proposed changes to OBSI's Terms of Reference. If you would like to discuss any of our comments, please do not hesitate to contact David Cheop at david.cheop@investorsgroup.com or at (204)956-8444.

Yours truly,

IGM FINANCIAL INC.



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