

Kenmar  
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Terms of Reference Review,  
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**Kenmar submission to OBSI consultation paper-. Terms of Reference**  
<http://www.obsi.ca/UI/Resources/WhatsNew.aspx?csid1=28>

Dear Sirs:

We are pleased to submit our response. Kenmar is dedicated to investor protection. We maintain a website [www.canadianfundwatch.com](http://www.canadianfundwatch.com) and publish a bi-weekly publication the Fund OBSERVER. Kenmar is pro-active with regulators, politicians and the media in trying to represent and protect the interests of Main Street.

We should point out that we agree with virtually all the recommendations made by Navigator, the independent assessor. As you are aware, we have over the years made additional suggestions and these will be also reflected in our commentary. Our key comments follow:

Availability/accessibility

Work is required in dramatically improving OBSI's public profile and ensuring that financial consumers and investors are effectively referred to OBSI by participating firms and other points of referral. OBSI should publish its actual street address and make available the names and contact points including email addresses of each of its board of directors, for those who want to raise process issues.

Dealing with Systemic issues:

"Systemic Issue" means 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;

Kenmar agrees that systemic issues are key to a modern ombudsman's role and we agree with the definition.

OBSI assistance

~~not provide general information about an Participating Firm (other than, where appropriate, the Participating Firm's dispute resolution process contact information) or a Financial Service, nor provide legal, accounting or other professional advice.~~

Kenmar recommends that OBSI add a positive information element "provide basic information such as where limitation periods by province can be located, the general

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significance of such periods and available alternative dispute resolution services. This is especially important for seniors, the handicapped, the unsophisticated and recent immigrants.

#### Maximum Incubation time

90 days have elapsed since the Complaint was received by the Participating Firm;

We agree that 90 days is fair but would add that if a definitive rejection has been received earlier than 90 days the complainant shall have an unrestricted right to OBSI services earlier than 90 days. This should be harmonized with the IDA, MFDA and other agencies. Clarification should be made that these are calendar days.

#### Action time

where subparagraph 8(b)(i) applies, the Complaint has been made to the Ombudsman within 180 days of the Participating Firm's rejection or recommendation for resolution of the Complaint. ~~the time period established by~~

We wish that is to point out that in far too many cases participating firms do not advise clients of the availability of OBSI services or they provide incorrect information concerning such services. In these cases we would expect OBS I to extend the period beyond 180 days.

~~the Board to ensure that a Complaint is considered without undue delay. The Ombudsman may receive and investigate a Complaint in other circumstances if the Ombudsman considers it fair to do so (for example, where subparagraph 8(b)(ii) applies);~~

#### Disclosure of service standards

OBSI should publicly disclose all of its service standards

#### Complaint segregation

where the subject matter of the Complaint by the same Complainant (or any one or more of them) is the subject of any proceedings in or before any court of law, tribunal or arbitrator, or any other independent dispute resolution body, the Complainant has agreed not to proceed with the action pending the completion of the Ombudsman's consideration of the Complaint;

Kenmar believe that a complaint to an SRO should not be considered under the provisions of this paragraph. SRO's do not provide restitution. Specifically we are asking OBS I to proceed with the case whether or not an SRO has been alerted to the

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alleged wrongdoing. The reason for this of course is the length of time this would add to the resolution of a dispute if done sequentially and the potential adverse impact on any statute of limitation clock running in a particular province. In order to protect his privacy, a complainant should not be compelled to disclose whether or not he is a participant in a class action. Furthermore , such participation is related more to corporate fraud and wrongdoing than to unsuitable investments based on defective advice .

The Ombudsman may identify Systemic Issues in the course of dealing with individual complaints, and shall deal with them in the following manner:

if a potential Systemic Issue is identified, the Participating Firm shall provide the OBSI with information to assist the Ombudsman in determining whether the issue is systemic, and, where necessary, information regarding the individuals or small businesses affected;

once confirmed, the Ombudsman may recomme...

As we have done since 2003, we wholeheartedly agree that systemic issues should be an integral part of the OBS I mandate

Appeals

In relation to individual complaints,

The Board shall not:

consider a request to hear an appeal of any recommendation made by the Ombudsman, or of the rejection of a Complaint by the Ombudsman;

seek the identity of any Complainant who has made an inquiry or Complaint to the Ombudsman;

No rationale is provided for the lack of an appeal process on individual complaints. We would add that *The Board shall consider an appeal to a recommendation where it is supported by a legal opinion or precedent.* We would also ask that the Board consider any appeal for a Denial of service by the Ombudsman. Where the Ombudsman decides that there is a more appropriate place for a complaint to be dealt with, such as a court of law, a regulator, an arbitration procedure or any other dispute resolution process, the rationale shall be provided to the complainant in writing. Where a Participating firm has referred a complainant to OBSI , OBSI shall take on the case .The Annual Report shall disclose all Denials of service and the ultimate destination recommended for resolution in summary form.

Referrals

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“matters which in the judgement of the Ombudsman involve potential regulatory or criminal breaches may be referred to the appropriate regulatory or law enforcement agency.”

We would delete the word “may” and replace it with **shall**. This is most important in light of the extension of the OBSI's services to include Systemic Issues

### Communications

#### *Reporting*

The Ombudsman shall prepare and provide an annual report as well as other reports containing statistics, anonymized case studies of Complaints for educational purposes (~~with all personal identifiers removed~~), other information that the Board considers

We have found the OBSI Annual Report to be light on information and trends. Specifically, we have recommended that statistics be multiyear, that audited financial data be provided on OBSI operations, that key metrics such as average value of a recommendations be provided, that cycle time statistics be provided, that complainant satisfaction metric be disclosed and that quarterly reports and/or investor Alerts be periodically distributed via an e-mail service. [ FIDO would be a good example] and also posted on the OBSI website. Sample Investigation reports suitably edited for public release should be posted as models for complainants in preparing their complaint and understanding how it will be assessed. The Annual report should include a section dedicated to the priorities for the coming year and how they were established.

We believe OBSI should acquire the capability to enable supervisory monitoring of telephone calls for quality control purposes. This is consistent with the Navigator Report.

#### Dollar Ceiling on restitution

For 5 years the restriction that the Ombudsman may not make a recommendation that a Participating Firm pay an amount greater than \$350,000 in respect of any single Complaint has been in place. This should be raised to \$400, 000 and updated annually by use of the CPI index.

Also, we cannot agree with “ Where the amount claimed by a Complainant in respect of a Complaint exceeds \$350,000, the Ombudsman will not investigate the Complaint unless the Complainant and the Participating Firm in writing acknowledge the Ombudsman’s recommendation limit and agree to release the Participating Firm from liability for any amount greater than \$350,000 regardless of the outcome of the Ombudsman’s consideration of the Complaint. ” ~~and accepted by both the Complainant and the Participating Firm.~~ There is no logical reason for this. If a complainant moves on to civil litigation the firm can and often does remove the offer from the table It’s square one and basic Human Rights should be respected. We also disagree that a complaint may not be divided into two or more Complaints about the same subject matter for the purpose of

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bringing it within the Ombudsman's mandate under this section. Complainants may file separate complaints for each account regardless if the subject matter is the same for each distinct account ( say a trading account and an RRSP account). Similarly , the limit on the amount of the Ombudsman's recommendation should not apply to separate Complaints made by a Complainant where different aspects of abuse e.g. theft vs. unsuitable investments are apparent , each contributing uniquely to losses.

#### Basis for evaluation and decision

In determining what is fair, the Ombudsman shall 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. To identify principles of good financial services and business practice, the Ombudsman may, where appropriate, consult within the financial services industry or elsewhere. The Ombudsman shall not be bound by any previous recommendation made by the Ombudsman or by any predecessor in that office.

We suggest the word *good* be replaced by **best** or delete the words “general principles of good financial services and business practice” . Another possibility is to hold the firm to its disclosed marketing materials as it relates to client-firm relations to the extent a reasonable client acting rationally would rely on such disclosure .Additionally, we would add ISO 10003 as the primary standard and that it is of higher precedence than good industry practice in the event of a conflict. We would also recommend that the words **consumer groups** be added after financial services industry .

#### Recommendations

Recommendations if accepted by a complainant shall not be constrained by a confidentiality agreement or any other constraint on the complainant. If a complainant accepts an OBSI restitution recommendation but the firm insists that a Gag order be signed before it can be executed, OBSI shall determine that in effect the firm has rejected its recommendation and publicly disclose these facts. The intent here is to retain the ability to warn clients and citizens of the potential hazards. In any event , OBSI should have within its mandate the right to require firms to have their compliance officer review all related files.

#### Other points

We believe OBSI could be more effective if the industry adopted a standard NAAF and associated plain language terminology . Thus, we urge OBSI's board to introduce a provision in the Terms of Reference requiring OBSI to continuously improve the dispute resolution process and report on this activity in the Annual Report.

We think it is very important to highlight that all of the deficiencies cited in the Navigator Report have been well-known since approximately 2003. The real question is why OBSI's governance system failed to address critical issues such as systemic abuse pattern problems for so long. This leads to the whole question of governance which is

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beyond the scope of the immediate commentary on the Terms of reference. As an absolute minimum we believe the OBSI Board should provide an annual meeting[ e.g. a webinar] of stakeholders where concerns and issues can be addressed and resolved. This type of transparency will go a long way towards enhancing the trust that should accompany a national dispute resolution service. We quote from the Navigator Report ( page 35):

"We think that OBSI cannot risk BEING SEEN to be doing nothing where a clear flaw in the consumer protection framework exists."

In this regard we ask OBSI to reconsider the constraint that none of the documents can be used in court and OBSI cannot be asked to testify in any subsequent legal or other proceedings. We consider this a fatal flaw. Such documents could prove invaluable to small unsophisticated investors seeking justice against strong well-heeled financial institutions.

OBSI should establish a Governance policy and make it publicly available .Stakeholders are particularly interested as to how Directors are selected, evaluated, their compensation, the criteria used to determine independence and their maximum terms of office On the latter point specifically we believe any term greater than 5 years is not good governance. As to specific cases, we believe any case that is in excess of 6 months should be flagged for board attention. An independent review of OBSI should be required every 3 years at a maximum.

One issue we hear all the time is the lack of case progress reporting. OBSI should develop a feedback system to ensure that complainants are kept informed of the progress of their case.

To the extent the OBSI chooses to provide links from its website, consideration should be given to including sites that are educational and financial consumer focused. This would include InvestorEd.ca , SIPA.ca and investorvoice.ca .We note that several web links are currently to registered industry lobbyists -we believe this is wholly inappropriate.

Finally, there needs to be a means for monitoring participating firm compliance. It is not clear to us who will do this. Whichever agency it is, it must have the human, financial and technical resources to provide effective oversight .

Kenmar encourages OBSI to post Comments received on an *as received* basis on its website.

We sincerely hope that the comments included herein will motivate and inspire the OBSI board to provide the necessary leadership. The result will be a stronger economy, a welcoming investment environment and more Canadians better able to control their own financial destiny.

We hope this gives you some useful feedback as it regards the “public interest ”. It would be our pleasure and honor to meet you and/or your staff to discuss this further.

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