

## **OMBUDSMAN FOR BANKING SERVICES AND INVESTMENTS**

### **TERMS OF REFERENCE**

*This draft amends the Terms of Reference approved December 5, 2006.*

- *Changes are indicated by underlined text where text is added.*
- *Text that has been deleted is indicated by ~~struck-through text~~.*
- *Explanatory notes to significant changes are introduced by ►.*

*For ease of reference, sections have not been renumbered.*

#### ***Purpose***

1. These terms of reference describe the principal powers and duties of the Ombudsman, the duties of Participating Firms, the scope of the Ombudsman's mandate, and the process of the OBSI for receiving, considering, investigating and seeking a resolution of a Complaint against a Participating Firm.

#### ***Definitions***

2. In these terms of reference:

- (a) the following expressions have the following meanings:

“Affiliate” means an entity that is controlled by another entity or entities that are controlled by the same person;

“Board” means the board of directors of the OBSI;

“CLHIO” means the Canadian Life and Health Insurance OmbudService;

“Commercial Judgement” means assessments of risk (such as in lending, taking security or insurance underwriting), and assessments of financial and commercial criteria or of character of a Customer;

“Complainant” means any small business or individual Client of an FSP or its Representative making a Complaint to the Ombudsman and includes the authorized representative(s) of the Customer, such as a personal representative, guardian, trustee or executor;

“Complaint” means a complaint about the provision within Canada of a Financial Service by an Participating Firm ~~or its Representative~~ to a Customer;

“Customer” means an individual who, or small business that, applied for or received a Financial Service from a Participating Firm ~~or its Representative~~;

“Financial Service” means a ~~retail~~ financial product or service, or advice about a ~~retail~~ financial product or service;

“FSON” means the Financial Services OmbudsNetwork, which includes the OBSI, the CLHIO and the GIO, ~~and Participating Firms~~;

~~“FSP” means a financial services provider that is a Member of the OBSI and any Affiliate of an Participating Firm that provides Financial Services to individual and small business Customers (unless that Affiliate is a member of another Industry OmbudService), but does not mean an entity controlled by a Representative that is the vehicle through which the Representative acts as an agent or third party contractor of the Participating Firm;~~

“GIO” means the General Insurance OmbudService;

“Industry OmbudService” means any of the OBSI, the CLHIO and the GIO;

“Member” means any Participating Firm admitted as a member of the OBSI;

“OBSI” means the Ombudsman for Banking Services and Investments;

“Ombudsman” means the individual appointed by the Board to exercise the powers and duties of that office of the OBSI;

“Participating Firm” means a financial services provider that is a Member of the OBSI and any Representative or Affiliate of a financial services provider (unless that Affiliate is a member of another Industry OmbudService); -

“Representative” means any individual who dealt with the Complainant or supervised the dealing with the Complainant in the provision of the Financial Service that gave rise to the Complaint, whether the individual is an employee, agent, or third party contractor of the Participating Firm;

“Standards” means any standards adopted by the Board for the handling and resolution of Complaints; and

“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;

- (b) references to the provision of Financial Services include, where the context admits, references to their non-provision;

- (c) references to the male gender include, where the context admits, the female gender and vice versa and references to the singular number include, where the context admits, the plural number and vice versa; and
- (d) references to sections and paragraphs are to sections and paragraphs of these terms of reference; ~~and footnotes are not part of the terms of reference.~~

***The Ombudsman's Principal Powers and Duties***

3. The Ombudsman shall at all times serve as an independent and impartial arbiter of Complaints and shall not act as an advocate for the Participating Firm, the Complainant or any other person. The Ombudsman shall:
  - (a) act within these terms of reference;
  - (b) adhere to the Standards adopted by the Board;
  - (c) receive Complaints;
  - (d) subject to sections 8 to 13, evaluate ~~investigate~~ Complaints with a view to their resolution through appropriate dispute resolution processes;
  - (e) if appropriate in the circumstances, make recommendations to Participating Firms and Complainants to resolve Complaints or reject Complaints on their merits;
  - (f) advise the public about the procedures for making ~~a~~ Complaints to the OBSI, a Participating Firm or other appropriate body;
  - (aa) assist Complainants with the Complaint process, including helping them articulate their Complaint where necessary, and
  - (g) ~~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.~~

► ***These changes align the section with current practice and the Framework for Cooperation.***
4. As the Board may direct, the Ombudsman may delegate certain of the Ombudsman's powers and duties, including the powers to investigate matters and request information from Complainants, and from Participating Firms and their Representatives. The Board or, if so authorized by the Board, the Chair of the Board may delegate to a designated senior deputy ombudsman the Ombudsman's powers to make recommendations and to reject Complaints. A delegate cannot further delegate any of the Ombudsman's powers and duties.

5. The Ombudsman is responsible for compliance by the OBSI with all applicable legislation protecting the privacy of personal information as well as the privacy policies and procedures of the OBSI.
6. The Ombudsman shall ensure that all officers, employees, consultants, independent contractors, and agents of the OBSI periodically acknowledge their understanding and compliance with the Code of Conduct and privacy policies and procedures adopted by the Board.
7. The Ombudsman shall report to a Participating Firm information about any threat to Participating Firm staff or property of which the Ombudsman becomes aware in the course of the Ombudsman's duties.

### ***Ombudsman's Mandate***

8. Subject to sections 9 to 13, the Ombudsman may investigate any Complaint received if the Ombudsman is satisfied that:
  - (a) the Complaint is made to the Ombudsman by the Complainant ~~or its Representative~~. It is desirable that all persons with an interest in the Complaint make the Complaint. Nevertheless, the Ombudsman may decide that the non-participation of a person with an interest in the Complaint does not prevent the Ombudsman from considering the Complaint, provided that all necessary consents to release confidential information have been obtained;
  - (b) the Participating Firm has received a Complaint and:
    - (i) has rejected the Complaint or made a recommendation for resolution of the Complaint, but the Complainant has not accepted the recommendation proposed by the Participating Firm; or
    - (ii) 90 days have elapsed since the Complaint was received by the Participating Firm;  
  

► ***This introduces the 90-day time frame for internal complaint-handling, part of the IDA and RRP rule changes, as a consistent standard for all Customers of OBSI participating firms. The effect of this change will be to give Customers who have a complaint with a Participating Firm a choice at the 90-day mark to bring an unresolved complaint to OBSI or continue with the firm's internal process.***
- (c) 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. ~~in the opinion of the Ombudsman, reached deadlock with the Complainant in the resolution of the Complaint or has otherwise been unable to resolve the Complaint to the Complainant's satisfaction within a reasonable time period;~~ the time period<sup>†</sup> established by

~~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);~~

► ***This brings into the Terms the 180-day period in which a Complainant has to bring a Complaint to OBSI.***

- (d) the subject matter of the Complaint by the same Complainant (or any one or more of them) was not previously considered by the Ombudsman. Where a Complaint has been previously considered but, in the opinion of the Ombudsman, relevant new information is available, the Ombudsman may request that the Participating Firm reconsider the Complaint in light of the new information. After the Participating Firm reconsiders the Complaint or if the Participating Firm refuses to reconsider the Complaint, the Complainant may request that the Ombudsman reconsider the Complaint;
- (e) 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;

► ***This clarifies the current provision to permit the discretion to accept complaints where a legal action has been started but the client does not wish to continue to pursue it. We find this arises when clients are not aware of OBSI until after their legal action has started.***

- (f) the Ombudsman has received appropriate consents concerning the release and treatment of confidential information from all necessary parties and any other agreements or releases that the Ombudsman considers appropriate in the circumstances; and
- (g) the Complaint is being pursued reasonably by the Complainant and not in a frivolous, vexatious or threatening manner.

9. The Ombudsman shall not investigate or shall cease to investigate Complaints:

- (a) to the extent that their subject matter materially relates to
  - (i) the general interest rate and risk management policies and practices of a Participating Firm,
  - (ii) the pricing of Financial Services by a Participating Firm,
  - (iii) the scale of fees or charges generally applicable to Financial Services offered to Customers of the Participating Firm in similar circumstances, or

- (iv) the Commercial Judgement of a Participating Firm.

Nevertheless, the Ombudsman may investigate a Complaint that the process by which the Participating Firm implemented its policies and practices ~~made a Commercial Judgement~~ was biased, incomplete, not in accordance with the Participating Firm's policies and procedures or was otherwise unfair;

► *This clarifies that while OBSI does not investigate matters concerning general rates, fees or charges, we do look at complaints about their implementation or application in individual circumstances if there may be issues of fairness in the particular case.*

- (b) the subject matter of which the Ombudsman has or may reasonably be perceived to have a material interest. In those circumstances, the Ombudsman shall notify the Complainant, the Participating Firm and the Chair of the Board of that interest, and shall refer the Complaint to a senior deputy ombudsman designated by the Board or the Chair in accordance with section 4. The Ombudsman thereafter shall not have any further involvement in the investigation or settlement of the Complaint;

- (e) ~~made by unrelated Complainants based on different facts that raise the same or similar issues with the object of making a "class action type" recommendation;~~

► *See the NS (New Section) below on systemic issues.*

- (d) where the subject matter of the Complaint by the same Complainant (or any one or more of them) has been the subject of any proceedings in or before any court of law, tribunal or arbitrator, or any other independent dispute resolution body, and those proceedings have concluded with a decision or finding; or

► *This clarifies that clients cannot bring a concluded matter from a court, arbitrator, or other independent ADR body to OBSI.*

- (e) where the Ombudsman decides that there is a more appropriate place for them to be dealt with, such as a court of law, a regulator, an arbitration procedure or any other dispute resolution process.

- 10. The Ombudsman may proceed with an investigation of a Complaint which is also being investigated by any regulator having authority over the Participating Firm. Should the Ombudsman defer consideration of or decline to consider the Complaint, he shall notify the Complainant and the Participating Firm of his decision, any further steps that the Ombudsman may consider taking following the completion of the regulatory investigation, and any other dispute resolution alternatives that may be available to the Complainant.

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

- (a) 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;
  - (b) once confirmed, the Ombudsman may recommend the Participating Firm:
    - (i) compensate all affected individuals or small businesses appropriately; and
    - (ii) adopt measures to prevent a future occurrence of the issue;
  - (c) a failure to co-operate in the investigation of a potential Systemic issue, or to follow the recommendation of the Ombudsman on a Systemic issue, shall be subject to the provisions of section 25; and
  - (d) 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.
11. The Ombudsman may investigate a Complaint involving a claim for any monetary amount, provided that the Complaint falls within the Ombudsman's mandate under these terms of reference. The Ombudsman, however, may not make a recommendation that a Participating Firm pay an amount greater than \$350,000 in respect of any single Complaint or, in a Systemic Issue, any single affected individual or small business. 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.~~ A Complaint shall not be divided into two or more Complaints about the same subject matter for the purpose of bringing it within the Ombudsman's mandate under this section. The limit on the amount of the Ombudsman's recommendation does not apply to separate Complaints made by a Complainant about unrelated subject matter.

► ***This is introduced to reinforce that OBSI is meant as a forum for informally resolving disputes below a certain monetary size.***

12. In relation to individual complaints,
- (a) The Board shall not:
    - (i) consider a request to hear an appeal of any recommendation made by the Ombudsman, or of the rejection of a Complaint by the Ombudsman;
    - (ii) seek the identity of any Complainant who has made an inquiry or Complaint to the Ombudsman;

- (iii) seek information relating to any inquiry or Complaint to the Ombudsman;
  - (iv) make any representation relating to an inquiry or a Complaint to a Participating Firm or a Complainant; or
  - (v) act on any information received that reveals the identity of a Complainant or any information described in paragraph (ii) or (iii) above.
- (b) The Chair of the Board may, in a manner that the Chair deems appropriate, consider any concerns about the general complaint-handling process or the conduct of an employee or officer of the OBSI.
  - (c) The Chair of the Board shall be provided with a copy of any Complaint addressed to a director or the Board or of any Complaint that a Complainant has requested be forwarded to, reviewed by or appealed to the Board. The Chair shall respond to the Complainant on behalf of the Board indicating the limits of the Board's authority.
13. Where, in the opinion of the Ombudsman, the subject matter of a Complaint (in whole or in part) is one in which another Industry OmbudService has expertise and the Complainant and the Participating Firm consent, the Ombudsman may co-operate with that Industry OmbudService in the investigation of the Complaint and may, if appropriate, make a recommendation jointly with the other Industry OmbudService for the resolution of the Complaint. Similarly, the Ombudsman may co-operate with another Industry OmbudService in the investigation and resolution of a Complaint referred to the Ombudsman by that Industry OmbudService.

### ***Procedure***

14. The Ombudsman may determine the procedures for filing a Complaint with the OBSI and for investigating Complaints, having regard for these terms of reference and the Standards. The Ombudsman shall not be bound by the rules of evidence.

The Ombudsman shall also decide whether a Complaint falls within the mandate of the Ombudsman under these terms of reference and, in reaching this decision, may consider representations from the Complainant and from the Participating Firm.

### ***Duties of Participating Firms***

15. Participating Firms shall:
- (a) appoint a senior official to act as the final internal decision-maker ~~arbitrator~~ on unresolved Customer complaints;



- (b) promote its internal and external complaint-handling processes through websites, brochures, mailings, emails and other means necessary to ensure clients have ready access to them in the event of a complaint;
- (c) at the receipt of a Complaint, bring to the Customer's attention the details of their internal complaint-handling processes and inform them they may refer an unresolved Complaint to the Ombudsman after 90 days;
- (d) fully co-operate with and assist the Ombudsman and his designated staff in the investigation of a Complaint accepted by the Ombudsman, including:
  - (i) Complaints where the Participating Firm has relevant information about a file even if the Complainant is the Customer of another firm, where appropriate releases are obtained; or
  - (ii) Complaints not directly involving the Participating Firm where the Ombudsman is seeking information on general industry practice or standards;
- (e) provide on request all ~~non-privileged~~ information such as notes, correspondence including emails and facsimiles, account statements, Customer records from internal databases, transaction records, opening agreements, internal policies, internal security and investigation files or reports, and the like relating to the subject matter of the Complaint in its possession or control ~~as soon as is reasonably practical~~ unless the Participating Firm or its Representative demonstrates to the Ombudsman's satisfaction that the disclosure of the information would likely place the Participating Firm or its Representative in breach of the law or its duty of confidentiality to a third party where consent to disclose has not been obtained, despite its best endeavour to obtain that consent;
- (f) within 90 days of the receipt of a Complaint, provide to the Customer a letter outlining the original Complaint, the analysis of the Complaint by the Participating Firm, the Participating Firm's proposed resolution of the matter, if any, and a statement that if the Customer is not satisfied they have the option of taking the Complaint to OBSI in a manner determined by the Ombudsman;
- (g) where permitted by law and requested by OBSI, enter into an agreement with the Complainant and OBSI to suspend the applicable limitations period while OBSI considers a Complaint; and
- (h) inform all individual and small business Complainants of their right to bring their unresolved Complaint to OBSI regardless of whether the Participating Firm views the Complaint as in its or OBSI's mandate.

► *These changes are being introduced to promote a common standard for financial services consumers by aligning OBSI procedures with certain industry standards and the Framework for Cooperation. The changes also clarify the obligations of Participating Firms in the complaint-handling process.*

### ***Confidentiality and Disclosure***

16. The dispute resolution process is confidential to the parties to the Complaint and the OBSI. The discussions and correspondence of the Complainant, the Complainant's representatives, the Participating Firm, the Participating Firm's representatives and the Ombudsman that form part of the dispute resolution process will not be disclosed or used in any subsequent legal or other proceedings. The files of the OBSI are confidential and are protected from disclosure for all purposes unless mandated by law or a regulatory authority. In addition, the Ombudsman and OBSI staff will not be called to testify in any subsequent legal or other proceedings.
17. If any person discloses information to the OBSI and requests that it not be disclosed to another person, the OBSI shall not disclose the information to any other person except with the consent of the person who disclosed the information to the OBSI or as required by law or a regulatory authority. If consent is not given and the information is prejudicial to a party to the Complaint, the Ombudsman shall not use that information to make a recommendation adverse to any person to whom the information is denied, except as provided in section 18.
18. The Ombudsman may take account of a Participating Firm's proprietary systems and security measures of which the Ombudsman has knowledge, even though no disclosure of those systems and measures has been or will be made to the Complainant.

### ***Recommendations and Rejections of Complaints***

19. The Ombudsman shall not make a recommendation or reject a Complaint, except in accordance with the provisions of sections 20 to 25.
20. After the investigation of a Complaint, the Ombudsman shall make a recommendation for compensation or action to the Complainant and the Participating Firm if, in the opinion of the Ombudsman, the Complainant has suffered loss or inconvenience, ~~damage or harm~~ because of an act or omission of the Participating Firm or its Representative in the provision of a Financial Service.

► ***This change is clarify OBSI's role in dispute resolution, and to avoid generating false expectations about compensation for general damages, pain and suffering and other awards that are more appropriately considered in venues such as the courts.***

21. While the Ombudsman is investigating a Complaint, the Ombudsman may seek to promote a resolution of the Complaint by agreement between the Complainant and the Participating Firm. While the Ombudsman is investigating a Complaint, the Participating Firm and the Complainant may continue to seek to resolve the Complaint themselves. If the Participating Firm and the Complainant do not resolve the Complaint, the Ombudsman shall complete the investigation of the Complaint and either make a recommendation for the resolution of the Complaint or reject the Complaint.
22. The Ombudsman's recommendation

- (a) shall be in writing;
  - (b) shall include a summary of the Ombudsman's reasons;
  - (c) may be made jointly with another Industry OmbudService in the circumstances described in section 13; and
  - (d) is not binding on the Participating Firm or the Complainant; and
  - (e) is subject to the monetary limits described in section 11.
23. The Ombudsman shall make a recommendation or reject a Complaint with reference to what is, in the Ombudsman's opinion, fair in all the circumstances to the Complainant and the Participating Firm. 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.

► *This addition aligns the section with current practice.*

24. ~~A recommendation of the Ombudsman should seek to achieve a resolution of a Complaint that is satisfactory to the Complainant and the Participating Firm.~~ Subject to section 11, the Ombudsman shall not recommend compensation that would be greater than an amount that the Ombudsman considers to be appropriate to compensate the Complainant for loss, ~~damage or harm~~ or inconvenience suffered by the Complainant by reason of the acts or omissions of the Participating Firm in the provision of a Financial Service.
25. If a Participating Firm does not accept the recommendation of the Ombudsman or fails to co-operate with the Ombudsman in accordance with section 15 (d) and (e), the Ombudsman shall make public the name of the Participating Firm, the recommendation or details concerning the Participating Firm's non-cooperation and the circumstances of the case in a manner considered appropriate by the Ombudsman. Where a Participating Firm is obliged by legislation or rules to cooperate, OBSI may inform the regulating authority of non-cooperation by a Participating Firm.

► *This addition aligns the section with the Framework for Cooperation.*

### **Reporting**

26. 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

appropriate to the interests of interested parties and the general public, and information required by law or regulation.