

August 12, 2013

Ombudsman for Banking Services and Investments
c/o Tyler Fleming
401 Bay Street
Suite 1505, P.O. Box 5
Toronto, ON M5H 2S6
Email: governance@obsi.ca

Dear Mr. Fleming:

Re: Consultation on Proposed Changes to OBSI's Terms of Reference

FAIR Canada is pleased to offer comments on the Ombudsman for Banking Services and Investments' ("**OBSI**") proposed revised Terms of Reference as set out in its consultation document dated June 12, 2013 (the "**Consultation**").

The Consultation follows several important developments in the area of financial consumer dispute resolution:

- the release of the report¹ by the independent reviewer of OBSI (The Navigator Company of Australia) in 2011 (the "**Khoury Report**"), which recommended a number of important, interconnected reforms;
- the Canadian Securities Administrators' ("**CSA**") consultation dated November 15, 2012 proposing amendments to National Instrument 31-103, proposing that all registered dealers and registered advisers outside of Quebec be required to utilize OBSI as their service provider in respect of their dispute resolution or mediation services obligations;
- 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 are effective September 2, 2013); and
- the publication (or "name and shame") of a number of refusals by OBSI Participating Firms to compensate consumers as recommended by OBSI.

¹The Navigator Company, "Ombudsman for Banking Services and Investments Report 2011 Independent Review (2011), available online: http://www.obsi.ca/images/Documents/Ind_Rev/independent_review_of_obsi_2011.pdf.

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investor protections in regulation. Visit www.faircanada.ca for more information.

FAIR Canada continues to believe that regulators and governments should have as a goal for Canadians, a single, national ombudservice that meets international standards for all investment complaints. FAIR Canada believes that this is vital to the integrity of the Canadian financial services market and the protection of Canadian consumers.

As discussed in our submission to the CSA dated January 25, 2013, **we recommend that OBSI's accountability be strengthened in the public interest through a more formal recognition of OBSI, through recognition orders issued by CSA members, and that steps be taken to have one single, national statutory ombudservice that has the power to make binding decisions.**²

FAIR Canada provides comments on the proposed changes to OBSI's Terms of Reference below.

1. Segregated Fund Complaints Should Remain Within OBSI's Mandate

- 1.1. **FAIR Canada does not support the modification that will result in OBSI referring the investigation and analysis of segregated fund complaints to the Ombudsman for Life and Health Insurance ("OLHI"). FAIR Canada does not believe that it makes sense to review one collective investment fund in isolation from the rest of the consumer's investment portfolio.** Indeed OBSI, in its notification of approval by its board of directors of OBSI's suitability and loss assessment process, stated:

"We also accept that a portfolio-based approach to investing is an accepted method and commonly used by advisors. If there is evidence that a portfolio approach was taken with the accounts at the firm we will certainly consider it. We always look at both individual securities and the portfolio at the firm in our suitability assessments.

OBSI will consider the broader portfolio of investments held at the firm if the firm and/or advisor can demonstrate:

- A portfolio-based plan that was prepared.
- How it was reviewed and discussed with the investor.
- Any other related information such as the portfolio-level reporting that was provided by the firm or advisor to the investor."³

² Letter from FAIR Canada to the CSA dated January 25, 2013, available online: <<http://faircanada.ca/wp-content/uploads/2011/01/FAIR-Canada-comments-re-Dispute-Resolution-Service.pdf>>, in response to Proposed Amendments to National Instrument 31-103: Registration Requirements, Exemptions and Ongoing Registrant Obligations and to Companion Policy 31-103CP dated November 15, 2012 regarding Dispute Resolution Service.

³ Approved Changes to OBSI's Suitability and Loss Assessment Process, and Summary of Public Comments, November 2, 2012, at page 5, available online:

- 1.2. Accordingly, if segregated funds are part of the client's investment portfolio, they must be considered when dealing with the complaint. In FAIR Canada's view, they must be investigated and analyzed in order to be considered. This approach makes sense from the perspective of all financial stakeholders, as otherwise perverse findings could result if particular investments were viewed in isolation.
- 1.3. Consumers do not want to have to take the segregated fund aspect of their investment complaint to a different ombudservice – i.e. OLHI - when it can be addressed at OBSI on a fair and efficient basis as part of a portfolio of investments rather than in isolation. The extra burden this would place on consumers is unwarranted. The use of two dispute resolution processes is more burdensome, time consuming, inefficient, confusing to consumers and creates greater barriers to access to redress than a single process.
- 1.4. There are other important reasons to have the segregated fund aspect of a complaint investigated, analyzed, and resolved by OBSI. Firstly, if the fact situation involves an independent insurance agent or a managing general agency, OLHI may not have the mandate to review the complaint as only insurance companies are required to participate in OLHI. Entities or individuals who distribute insurance are not required to participate. For example, if the complaint relates to the insurance agent's activities it will not fall within the scope of OLHI's mandate and the consumer will be left without any form of redress through OLHI and will have to resort to the court system. The second (and recent) independent review of OLHI discusses this serious gap in redress for consumers using OLHI.⁴ OBSI does not suffer from this flaw and is able to review the actions of the firm's representatives, including advisors. It is, therefore, a preferable forum if the actions of the financial advisor (insurance agent and registered representative) who sold the segregated fund are at issue.
- 1.5. Secondly, it is undoubtedly the case that insurers want consumers of their products to have fair and effective dispute resolution services and do not want consumers to have to take their complaint to multiple forums in order to obtain redress or have one investment reviewed in isolation from the consumer's portfolio.
- 1.6. Thirdly, some CSA members have one provincial regulator that is responsible for pensions, insurance, financial planning, securities, consumer affairs, credit unions and loan and trust companies (for example, in Quebec, New Brunswick and Saskatchewan). The integrated approach to the regulation of consumer financial products and services should be encouraged and enhanced rather than lessened in order to strengthen investor protection. Providing consumers and industry with one point of access for the resolution

<http://www.obsi.ca/images/Documents/Consultations/Gov_Reform_2/R/final_position_statement_on_investment_suitability_loss.pdf>.

⁴ Robert Wells, "Independent Review Report" prepared for OmbudService for Life & Health Insurance (November 2012), available online <<http://www.olhi.ca/downloads/pdf/Independent%20-eview-Report-OLHI.pdf>> at pages 18 to 19.

of consumer complaints through one ombudservice would enhance integration and reflect the reality of the convergence of investment products between insurance and securities sectors.

- 1.7. Fourthly, a consumer's complaint is about the advice or recommendations that were made by the registered representative (who, in the case of segregated funds, is also licensed as an insurance agent) and his or her investment firm. OBSI should be given the power to deal with the complaint including that portion of the complaint that involved the advice to purchase a segregated fund.
- 1.8. Finally, OBSI has set out no substantive reason why it might be in the interest of consumers to make this change to the Terms of Reference, relative to the guiding principles of fairness and informality that inform the operations of an ombudsman. We do not see any rationale for this change, and as a result, we do not support the change.

2. Widespread or Systemic Issues Must Be Addressed

- 2.1. **FAIR Canada believes that it is important that widespread or systemic issues that are uncovered by OBSI as a result of its review of individual complaints are properly addressed by the financial system in order to adequately protect investors and retain consumer confidence in the financial system.**

- 2.2. A systemic issue is defined in the current Terms of Reference as follows:

“Systemic Issue” means a matter such as undisclosed fees or charges, misleading communications, administrative errors or product flaws discovered in the course of considering a Complaint against a Participating Firm which may have caused loss, damage or harm to one or more other Customers of the Participating Firm in a similar fashion to that experienced by the original Complainant”.

It should be noted (and was pointed out in the Khoury Report) that the current Terms of Reference do not contemplate OBSI investigating issues that are systemic across a sector; that is, beyond the Participating Firm at issue in the complaint although this is a common practice for external dispute resolution schemes in other jurisdictions.⁵

- 2.3. We recognize that the federal regulations governing ECBs for banking complaints were intended to limit approved ECBs' ability to address systemic issues relating to banking complaints. The banking regulations specify that an ECB must “...advise the Commissioner [of the FCAC] in writing and without delay if it determines that a complaint raises a systemic issue”.⁶ Further, the FCAC's Application Guide for External Complaint Bodies⁷

⁵ *Supra* note 1 [Khoury Report] at pages 44 to 45.

⁶ Complaints (Banks, Authorized Foreign Banks and External Complaints Bodies) Regulations, S.O.R./2013-48, s. 7(i).

⁷ Financial Consumer Agency of Canada, Application Guide for External Complaint Bodies (April 10, 2013), available online: <<http://www.fcac-acfc.gc.ca/eng/industry/commissioner/guidance/PDFs/CG-13-eng.pdf>>.

states that an applicant for approval as an ECB “...must show: ...its process for notifying and providing supporting information to FCAC on systemic issues, *leaving the role of investigation of such issues to FCAC.*”⁸ Therefore, on the banking side, OBSI’s obligations are effectively limited to identifying a potential systemic issue and reporting such to the FCAC.

- 2.4. We do not agree with OBSI’s view that this limitation on the banking side, “...eliminates OBSI’s ability to investigate systemic issues on the investment side of our mandate as well.”⁹ OBSI explains that its Board believes that there should be one policy on systemic issues for the entire organization. It does not provide an explanation as to why it reached this decision. FAIR Canada suggests that it could continue to investigate systemic issues that may potentially arise on the investment side. Given their proximity to financial consumer complaints, they are well-placed to continue to have this responsibility.
 - 2.5. Given that it is quite possible that a systemic issue within a Participating Firm may also be an issue at other firms as well, **regulators may be better-placed to address systemic issues as regulators (but not OBSI) can investigate on a sector-wide basis and not simply in respect of one firm. FAIR Canada, therefore, recommends that the revised Terms of Reference explicitly specify that OBSI has an obligation to identify and report any potential systemic issue to the appropriate regulator(s), both in respect of banking-related complaints to the FCAC and investment-related complaints to the appropriate provincial securities regulators.** Securities regulators will have to ensure that they investigate any and all systemic issues brought to their attention by OBSI.
 - 2.6. In order to ensure transparency, **FAIR Canada further recommends that OBSI set out in its Annual Review 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 issues identified.** We do not suggest that OBSI should identify the firms involved, but simply indicate the number of potential systemic issues it reported.
 - 2.7. **FAIR Canada also recommends that the revised Terms of Reference specify an obligation for OBSI to refer matters which may involve regulatory, criminal, fraudulent or other wrongdoing to the appropriate regulatory or other law enforcement agencies.**
3. **180-day Deadline to Bring a Complaint to OBSI**
 - 3.1. **FAIR Canada recommends that it be made explicit that OBSI reserves the right to accept a complaint beyond the 180 days “if it is fair to do so, in all of the circumstances” and then specify that this includes the manner in which the complainant was notified of the right to bring the complaint to OBSI.** The language appears to be broadly worded in

⁸ *Ibid.*, at s. 4.5.2. [emphasis added]

⁹ Consultation at page 2.

terms of fairness to the Participating Firm and narrowly worded in respect of the consumer.

4. **Six Year Limitation Period**

4.1. Section 11 of the revised Terms of Reference should make it clear that a subjective standard, taking into account the particular characteristics of the client, is to be used to determine when the consumer ought to have known of the problem or issue giving rise to the complaint, rather than a purely objective reasonable person standard. **FAIR Canada recommends that the wording be revised as follows: “...the Complainant knew or ought to have known of the problem...” and should specify that the characteristics of the complainant will be taken into account (such as age, knowledge, degree of reliance on the advisor) as specified by OBSI in its November 2012 News Release¹⁰, including:**

- the nature of the relationship between the investor, the advisor and the firm;
- the investor’s level of investment experience, knowledge and sophistication;
- the degree to which the investor trusted or relied on the advisor, including consideration of the skills, knowledge, expertise and services that the firm or advisor represented they would provide compared to the advice or services the investor actually received;
- the timing, form and nature of the information provided to the investor and their ability to understand it; and
- whether and when the investor raised any concerns with the advisor or firm about the investments in the account, what advice they received and what action, if any, was taken.

4.2. As noted, in our submission to OBSI on this issue dated July 9, 2012,

It is unfair to vulnerable consumers, including persons with limited language skills, low financial literacy, and seniors who may have reduced mental abilities, to apply a limitation period without a full appreciation of these characteristics. Fifty-three percent (53%) of OBSI clients are sixty (60) years of age or older; as noted in OBSI’s 2011 Annual Report, three of the top five seniors issues observed by OBSI include delegation of control of financial affairs, missing financial records, and unsuitable investments. These types of issues should weigh heavily in determining whether a consumer knew or ought to have known there was a problem with their investments, and if so, when they knew or ought to have known.¹¹

¹⁰ See

<http://www.obsi.ca/images/Documents/Consultations/Gov_Reform_2/R/final_position_statement_on_investment_suitability_loss.pdf>.

¹¹ FAIR Canada Letter “RE: Request for Comments on Proposed Changes relating to OBSI’s Suitability and Loss Assessment Process (July 9, 2012), available online: <<http://faircanada.ca/wp-content/uploads/2011/01/120709-FAIR-Canada-comments-re-OBSI-suitability-and-loss-assessment-consultation.pdf>>. According to OBSI’s 2012 annual report, available online at

Investment complaints increased 10% in 2012 with the largest complaint involving unsuitable investments and investment advice.¹²

- 4.3. Given that OBSI's process is not a court proceeding, and it is not subject to statutory limitation periods, FAIR Canada recommends that OBSI explicitly provide in its revised Terms of Reference that it "reserves the right to waive the limitation period in exceptional cases where it is fair and reasonable to do so."

5. OBSI's Consumer and Investor Advisory Panel

- 5.1. **FAIR Canada recommends that OBSI include the mandate and structure of its Consumer and Investor Advisory Panel in its revised Terms of Reference.** FAIR Canada believes that while industry has the resources to make its views on policy issues known to OBSI, consumers are far less equipped and motivated to do so. The proper functioning of the Consumer and Investor Advisory Panel allow OBSI's Board of Directors to obtain the consumer/investor perspective and its role should be formally recognized and explained in the Terms of Reference.

6. Compensation Limit

- 6.1. FAIR Canada believes that all ECBs in the Canadian financial system should have the same compensation limit. The compensation limit should not depend on which ECB a financial institution has either chosen to participate in (on the banking side), is mandated to participate in (for IIROC and MFDA dealers) or may be required to participate in, in the future. Consumers should not be subject to different compensation limits depending on which ECB their financial institution or dealer has chosen or is required to deal with. All Canadian financial consumers should have access to the same redress mechanisms (including compensation limits) regardless of which financial institution they may have a complaint about.
- 6.2. **FAIR Canada recommends that the compensation limit for any ECB, including OBSI, should not be lower than the current OBSI limit of \$350,000.**
- 6.3. If the compensation limit is not mandated and ECBs are allowed to set their own compensation limit, firms may choose to join the ECB with the lowest cap, which would encourage a race to the bottom that is not in the interest of consumers.

http://www.obsi.ca/images/Documents/Annual_Report/EN/obsi_ar2012_en.pdf, 48% of clients were age 60 or over.

¹² OBSI 2012 Annual Report (*ibid*) at page 35. The top 5 senior issues were not identified in the 2012 Annual Report. **FAIR Canada recommends that such information be consistently disclosed in the annual report.**

7. Refusal to Accept OBSI's Recommendation

- 7.1. **FAIR Canada strongly recommends that OBSI be given the power to make binding decisions over all participating firms. In the UK, Australia and New Zealand, decisions are binding if the consumer accepts the recommendation. We see no reason for a less consumer-friendly system in Canada. FAIR Canada notes that the Khoury Report's strategic recommendations included binding decision-making authority for OBSI, along with a limited appeal mechanism.**
- 7.2. The recent stuck cases in which certain investment firms have refused to accept OBSI's recommendations, and who have been "named and shamed" as a result, demonstrate that reputational risk is an insufficient deterrent for many registrants and that OBSI needs to be placed on a stronger footing by having binding decision-making powers.
- 7.3. **The recent stuck cases also demonstrate that there has been a lack of any credible basis upon which firms have refused to accept OBSI's recommendation.** The consumer redress system will not work effectively and trust in the integrity of our system of securities regulation will be undermined if registrants are permitted to refuse OBSI's recommendations and consumers are left without any compensation.
- 7.4. **FAIR Canada strongly believes that binding decision-making authority over investment cases should be given to OBSI prior to or concurrently with the expansion of the types of firms that are required to participate in OBSI, which will include all registered dealers and registered advisers outside of Quebec.** Reputational risk is less likely to have a deterrent effect with less well-known and smaller firms who operate in markets such as the exempt market that are not well-understood by many financial consumers. Many of the non-SRO registrants that would be required to offer OBSI's services to their clients would fit into this category. In the absence of binding decision-making authority, OBSI's credibility may be further weakened through increased refusals of its recommendations.
- 7.5. Refusal by an OBSI Participating Firm to accept a recommendation without a legitimate justification should be considered to be a failure to participate in the dispute resolution system in good faith, and, therefore, should be considered to be an act in violation of the securities rules. The relevant securities regulator should review the matter to determine whether or not the Participating Firm had a legitimate reason for not accepting the recommendation. If there was no legitimate reason and the securities regulator determines that the firm is acting not in good faith, then the regulator should take disciplinary action against the firm for not acting in good faith in its participation in OBSI. For a Participating Firm to be in compliance with the requirement that it participate in OBSI, it cannot be sufficient for the Participating Firm to do so in name only.
- 7.6. The OSC's Investor Advisory Panel, by letter dated January 29, 2013, wrote to the OSC's Office of the Investor stating that "OBSI does not have the power to enforce its

recommendations for restitution. The regulators do, can and should.”¹³ FAIR Canada agrees.

8. Time Period for Resolution of Complaints

- 8.1. **FAIR Canada recommends that OBSI specify in its revised Terms of Reference any time limits for making a recommendation to resolve a complaint.** The *Bank Act* regulations require an ECB to “make a final written recommendation to the parties no later than 120 days after the day on which the information that it requires to deal with the complaint, as set out in its terms of reference and procedures, is complete”¹⁴. While we do not suggest that investment complaints should have the same time limit, it may be advisable to have language setting out OBSI’s guidelines for resolving investment complaints in its revised Terms of Reference along with the *Bank Act* regulations time limit.
- 8.2. FAIR Canada notes that OBSI’s 2012 Annual Report indicates that straight forward investment complaints take an average of 196.6 days and if all investment complaints are included, it took an average of 325.9 days. Of the investment files, only 20.2% took 180 days or less and 79.8% took more than 180 days. A number of factors are stated to have contributed to these long cycle times including delays in obtaining consents, delays in obtaining documentation, insufficient staff resourcing, and delays associated with “stuck cases”.¹⁵ If the recommendations made by FAIR Canada in this submission are implemented by the securities regulators, cycle times should improve.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Please feel free to contact Ermanno Pascutto at 416-214-3443 (ermanno.pascutto@faircanada.ca) or Marian Passmore at 416-214-3441 (marian.passmore@faircanada.ca).

Sincerely,



Canadian Foundation for Advancement of Investor Rights

¹³ Available online: <http://www.osc.gov.on.ca/en/Investors_iap_20130129_letter-to-efarrell-re-obsi.htm>.

¹⁴ Complaints (Banks, Authorized Foreign Banks and External Complaints Bodies) Regulations, S.O.R./2013-48, s. 7(l).

¹⁵ OBSI’s 2012 Annual Report at page 78 and 79, available online: <http://www.obsi.ca/images/Documents/Annual_Report/EN/obsi_ar2012_en.pdf>.

cc: British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
Prince Edward Island Securities Office
Office of the Superintendent of Securities, Government of Newfoundland and Labrador
Department of Community Services, Government of Yukon
Office of the Superintendent of Securities, Government of the Northwest Territories
Legal Registries Division, Department of Justice, Government of Nunavut