

FAIR

Canadian Foundation for
Advancement of Investor Rights
Fondation canadienne pour l'avancement
des droits des investisseurs



October 11, 2017

OBSI Joint Regulators Committee
c/o Grant Vingoe
Vice-Chair, Ontario Securities Commission
Suite 2000, 20 Queen Street West Toronto ON M5H 3S8

Sent via email to : gvingoe@osc.gov.on.ca

Dear Mr. Vingoe:

Re: Use of “Internal Ombudsman” by Registered Firms When Responding to Investment Complaints

We are writing to you on behalf of the Public Interest Advocacy Centre (PIAC) and the Canadian Foundation for Advancement of Investor Rights (FAIR Canada) to raise our concerns about the use of “internal ombudsman” by registered dealer firms.

PIAC is a national non-profit organization and registered charity that provides legal and research services on behalf of consumer interests, concerning the provision of important public services. PIAC has been active in consumer protection matters in financial services for the last several years.

FAIR Canada is an independent national charitable organization. As a voice for Canadian investors, FAIR Canada provides information and education to the public, governments and regulators about investors’ rights and protections in Canada’s capital markets.

The use of “internal ombudsman” by certain registered firms when responding to investment complaints, as contemplated by section 19 of the Terms of Reference of the Ombudsman for Banking Services and Investments (OBSI), Rule 2500B, Client Complaint Handling, of the Investment Industry Regulatory Organization of Canada (IIROC) and Policy No. 3, Complaint Handling, Supervisory Investigations and Internal Discipline, of the Mutual Fund Dealers Association of Canada (MFDA), is resulting in non-compliance with the sections 13.6(3) and (4) of National Instrument 31-103 *Registrant Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103). Investor complainants are not being given the clear option of seeking

independent dispute resolution by OBSI after 90 days of filing a complaint. Rather, investors are being diverted to “internal ombudsman” while critical OBSI-related time periods and civil action limitation periods continue to run to the prejudice of investor complainants.

As you are aware, sections 13.16(3) and (4) of NI 31-103 require registered firms within 90 days of receipt of a complaint to provide a written notice of a decision and/or written information about the steps the client must take to access OBSI’s independent dispute resolution services (which steps the client must pursue within 180 days of receipt of the written notice of the firm’s decision).

In practice our understanding is that registered firms having “internal ombudsman” (i.e. bank-owned registered firms) are using the “internal ombudsman” services to: (i) extend NI 31-103’s 90 day internal decision period; or/and (ii) divert investor complainants who receive a notice of decision within 90 days to a second internal process rather than informing complainants of and providing access to OBSI’s independent dispute resolution services (all the while OBSI-related time periods and civil action limitation periods prejudicial to investor complainants continue to run).

The use of “internal ombudsman” services is detrimental and prejudicial to investor complainants and is contrary to sections 13.16(3) and (4) of NI 31-103. As set out below, their use is contemplated by OBSI’s Terms of Reference and the provisions of applicable IIROC Rules and MFDA Policies:

- Section 19 of OBSI’s Terms of Reference, which details Complaint Procedures (including a 90 day internal review and delivery of a substantive written response requirement), provides in part:

All Participating Firms are expected to have in place an effective complaint-handling system. Participating Firms that are **members of the Investment Industry Regulatory Organization of Canada (IIROC) or the Mutual Fund Dealers Association of Canada (MFDA) are required to follow complaint-handling rules established by IIROC or the MFDA, as applicable, and are not subject to this section 19. [Emphasis added]**

- In IIROC’s complaint-handling rule, Rule 2500B, the use of internal ombudsman services beyond NI 31-103’s 90 day period is expressly contemplated:

Complaint substantive response letter

The Dealer Member must send a substantive response letter to the complainant. The substantive response letter must be accompanied by a copy of [an IIROC] approved complaint handling process brochure.

Dealer Members must respond to client complaints as soon as possible and no later than ninety (90) calendar days from the date of receipt by the firm. The ninety (90) days timeline must include all internal processes (**with the exception of any internal ombudsman processes offered by an affiliate of the firm**) [Emphasis added] of the Dealer Member that are made available to the client. The client must be advised if he/she is not to receive a final response within the ninety (90) days time frame, including the reasons for the delay and the new estimated time of completion.

The Dealer Member is required to advise the Corporation if it is unable to meet the ninety (90) days timeline and must provide reasons for the delay.

- They are also tangentially mentioned in MFDA Policy No. 3:

Substantive Response – The substantive response letter, which Members must provide to the complainant, may be accompanied by a summary of the Member's complaint handling procedures and must include a copy of the [Client Complaint Information Form]. The substantive response letter to complainants must also include the following information:

- An outline of the complaint;
- The Member's substantive decision on the complaint, including reasons for the decision; and
- A reminder to the complainant that he/she has the right to consider: (i) presenting the complaint to the Ombudsman for Banking Services and Investments which will consider complaints brought to it within six months of the substantive response letter; (ii) making a complaint to the MFDA; (iii) litigation/civil action; or (iv) any other applicable options, such as **an internal ombudservice provided by an affiliate of the Member. [Emphasis added]**

We strongly recommend that OBSI's Terms of Reference and the internal complaint handling rules (be they policies or rules) of IIROC and the MFDA be amended to conform with NI 31-103. OBSI's Terms of Reference and the SRO complaint handling rules should be revised to require firms to provide a substantive response to a complaint within 90 days, whether they use a second review process (an "internal ombudsman") or not. Within the 90 days, firms may choose to provide a second level of review. However, they should not be permitted to take more than 90 days to do so.

PIAC and FAIR Canada also wish to bring to the OBSI Joint Regulators Committee's attention as a matter of regulatory oversight, the confusing and misleading nature and use of the term "internal ombudsman services" by registered firms subject to the dispute resolution service requirements of section 13.16 of NI 31-103. Internal ombudsman services involve and are delivered by officers or employees of institutions affiliated with the registered firm. These employees are not independent and they are in a clear conflict of interest position, which is inconsistent with the concept of an ombudsman. **We believe that registered firms should not be able to confuse consumers by calling any of their internal complaint handling procedures "ombudsman"**. Such processes do not meet international criteria to be called an "ombudsman" nor can be said to be "impartial" in accordance with international criteria.¹ We are advised that, in particular, they would not meet the standards set by Australian and U.K. regulators for the use of the title "ombudsman".

These services are limited to offering non-binding liaison or mediation assistance which typically only lengthens the duration of the registered firm complaint process, usually without changing it, in substance. The use of this procedure discourages investor complainants from continuing with their complaint due to lack of resources, attrition and fatigue. Fewer individuals, therefore, carry on to the legitimate ombudsman services of OBSI (in addition to limitation clocks and time limits set by OBSI running down and possible running out). Time is lost. Investors give up.

On behalf of investor complainants, PIAC and FAIR Canada seek the assistance of the OBSI Joint Regulators Committee to require:

- (i) the complaint handling regime contemplated by IIROC Rule 2500B and MFDA Policy No. 3 to be amended so as to result in internal registered firm complaint handling processes that comply with sections 13.16(3) and (4) of the NI 31-103 ninety day internal review period. It should be required that all internal processes, including internal ombudsman services, be completed within the ninety day period; and

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

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- (ii) Registered firms to discontinue the misleading and confusing use of the term “internal ombudsman services” in connection with their dispute resolution services.

We are pleased to meet with you or any other representatives of the OBSI Joint Regulators Committee on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Lawford', with a stylized, looped end.

John Lawford
Executive Director and General Counsel
PIAC

A handwritten signature in black ink, appearing to read 'Frank Allen', with a stylized, looped end.

Frank Allen
Executive Director
FAIR Canada

Cc: Andrew Kriegler, IIROC
Mark Gordon, MFDA
Sarah Bradley, Ombudsman, OBSI
Fern Belisle, Chair, OBSI