

November 29, 2010

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## **RE: Request for Comment – Proposed Revisions to OBSI Terms of Reference**

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### **1. Introduction**

- 1.1. We are pleased to provide you with the following comments of the Canadian Foundation for Advancement of Investor Rights (FAIR Canada), in response to the request for comment (“RFC”) on the proposed revisions (the “Proposed Revisions”) to OBSI’s Terms of Reference (the “Terms of Reference”).
- 1.2. FAIR Canada is a non-profit, independent national organization dedicated to representing the interests of Canadian investors. FAIR Canada’s mission is to be a voice for investors in securities regulation and a catalyst for the enhancement of the rights of Canadian shareholders and retail investors. Please visit [www.faircanada.ca](http://www.faircanada.ca) for more information.

### **2. Specific Comments about Proposed Revisions**

- 2.1. In general, we agree with the Proposed Revisions. In particular, we support the revisions that are truly of a housekeeping nature (that is, the proposed revisions to sections 8(b)(ii), 8(c), 17(c), 17(d), 18, and 27). We have additional comments to make regarding the proposed revisions to section 26, and we have a minor comment regarding the wording of section 27. We would also like to provide general comments regarding the Terms of Reference and their application to OBSI’s role in resolving complaints.
- 2.2. Regarding section 26, we are entirely in agreement with the statement in the RFC, that “this sentence was confusing and was seen to contradict OBSI’s objective of making the client whole based on what is fair in the circumstances, should a recommendation in favour of the client be made.” We consider that the statement that OBSI should resolve complaints “satisfactory.. to the Participating Firm” provides an unnecessary and investor-unfriendly counterweight to full restitution or redress to clients whose investor complaints have been vindicated. We support the removal of this language.

2.3. However, we are also concerned that OBSI's objective of fairness, as stated in section 25 of the Terms of Reference, is not specifically repeated as a directive about the determination of compensation within section 26 of the Terms of Reference. We would therefore recommend adding further language to section 26, after the existing text of the section, that would read as follows:

A recommendation of the Ombudsman, including any recommendation of compensation, should fulfil the objectives of resolving the Complaint and making the Complainant whole based on what is fair to the Complainant and the Participating Firm in all the circumstances.

- 2.4. We suggest this additional language in order to ensure that fairness is clearly understood by all to be the paramount objective of OBSI in making recommendations, particularly recommendations of compensation, to resolve complaints. As OBSI wishes to clarify the primary importance of fairness in resolving Complaints, we feel that this would be better if it were made explicit (especially regarding recommendations of compensation) rather than simply removing the existing language regarding “satisfactory” compensation, as OBSI has proposed.
- 2.5. The deliberate inclusion of a standard of fairness in setting compensation, as a term of reference, would also have a positive effect on the establishment of fair and clear practices in setting compensation. We will return to this point later in our comments.
- 2.6. Regarding section 27, we would consider it helpful and clearer if the proposed revision were to read “and details of the investigation and” rather than “the investigation and”. We consider the use of “details” to properly clarify the fact that detailed information about the investigation and the case may be made public, and not merely the existence of the investigation or the case.

### **3. General Comments regarding Terms of Reference**

- 3.1. We also have some general comments regarding the Terms of Reference and their application to OBSI's role in resolving complaints. In particular, we would recommend the following:
- a) that OBSI seek, as far as possible, to make public its criteria for establishing and calculating redress and restitution compensation;
  - b) that OBSI resist attempts by the investment industry to narrow its mandate or to impose expensive procedural limitations on its activity;
  - c) that OBSI consider a revision to its Terms of Reference specifying certain goals and objectives for its Board, including an objective to fulfil specific mandates in the composition of the Board itself; and
  - d) that OBSI consider publishing guidelines about the application of the suitability concept in its dispute resolution process.
- 3.2. First, we would like OBSI to consider revisions to its Terms of Reference or to its practices in resolving complaints, that would publicly disclose the methodology it uses in calculating redress or compensation amounts where such determinations are needed. We understand that the methodology is understood by the industry. However, investors and complainants are usually not familiar with the methodology, and are often unaware of the potential compensation they may

be entitled to.

- 3.3. We consider this situation of asymmetric information to be unfair to complainants. A short guide to the calculation of these amounts, such as the one created by the United Kingdom's Financial Ombudsman Service<sup>1</sup>, would provide complainants with the information they need to properly evaluate their case, and to properly evaluate the methods by which their own case has proceeded. Furthermore, such a guide would increase public and investor confidence in OBSI by ensuring that OBSI's procedures are transparent.
- 3.4. Second, we would like to encourage OBSI to resist, and continue to resist, attempts by the banking and especially the investment industries to narrow its mandate or reduce its usability from a retail investor perspective.
- 3.5. We consider the comments that IIROC received in response to its Notice 09-0359 *Review of IIROC Arbitration Program* to be instructive in this regard. Responses were received from the Investment Industry Association of Canada and at least one of its members, seeking to have OBSI's maximum award reduced from \$350,000 to \$100,000. Another member of IIAC identified "problems" with OBSI's procedures in resolving complaints and establishing compensation.
- 3.6. We consider the alternative dispute resolution offered by OBSI to be a cornerstone of the investor protection system. Reducing the alternatives open to investors for resolving disputes is not adhering to the principles of an open and responsible market, nor is it likely to reduce the expense and efficiency of dispute resolution.

As noted in the January 2009 Expert Panel Report<sup>2</sup>:

Although many mechanisms have been put in place to provide investors with simpler, more cost-effective alternatives to the courts, the numerous organizations, the multi-step processes, and the lack of uniformity across Canada pose challenges for investors to properly understand and achieve a proper conclusion in an expeditious manner. Based on some of the personal accounts, it appears that investors are often not provided with the information required to understand the full range of options available to seek redress.

- 3.7. OBSI remains an inexpensive alternative for retail investors compared with other formal processes or the courts, although it is a system where the member firms hold a great deal of power, expertise and knowledge. The less complex and expensive a dispute resolution process, the better the system becomes not only for retail investors but for member firms as well.
- 3.8. Our third general comment regarding the Terms of Reference relates to OBSI's Board of Directors. We recommend that OBSI consider a revision to its Terms of Reference specifying certain goals and objectives for its Board of Directors, including an objective to fulfil specific mandates in the composition of the Board itself. We acknowledge that the governance procedures of OBSI and its Board provide for the selection of Independent Directors by the Independent Directors themselves, and specify that Independent Directors shall have been

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<sup>1</sup> The UK Financial Ombudsman Service's document is entitled "A Quick Guide To... Calculating Redress in Investment Complaints". It is available online at [http://www.financial-ombudsman.org.uk/publications/technical\\_notes/QG5.pdf](http://www.financial-ombudsman.org.uk/publications/technical_notes/QG5.pdf).

<sup>2</sup> Expert Panel on Securities Regulation, "Final Report and Recommendations" (January 2009) at pages 33 to 35.

independent from industry or government for five years.

- 3.9. However, we consider that the presence of the Industry-appointed directors on the Board is not sufficiently counterweighed by the presence of directors who represent the interests of ordinary investors. As such, we would encourage OBSI to consider appointing directors who represent the perspective of retail investors, particularly since retail investors represent the largest body of actual and potential complainants to OBSI.
- 3.10. Fourth, we agree with the November 18, 2010 Kenmar submission regarding the publication of suitability guidelines. We would encourage OBSI to consider publishing a clear set of guidelines (ideally to be incorporated via reference in the Terms of Reference) that would clarify OBSI's interpretation of the "suitability" requirement within the context of its dispute resolution process.
- 3.11. We understand that, in a large number of investment case files, the question of the suitability of particular investments can be a significant determining factor in whether or not OBSI makes a finding in favour of a complainant. OBSI's own figures from its 2009 Annual Report provide that 49% of its investment case files deal with suitability issues. As such, the process that OBSI uses to interpret and determine "suitability" questions would of enormous interest to complainants.
- 3.12. The increased complexity and range of financial products make questions of suitability more relevant than ever to ordinary investors. Clients also often believe that their dealers and advisors have legal requirements such as fiduciary duties that require them to act with their clients' best interests.
- 3.13. As such, we consider it more incumbent than ever upon OBSI to provide increased guidance to investors about the meaning of "suitability" as it relates to the OBSI dispute resolution process. This guidance would essentially be a distillation of the principles and practical analysis that OBSI has applied in its hundreds of successful facilitated settlements. It would be of most use to investors, but such guidance would also be useful as a check and balance to OBSI's member firms, allowing them to properly assess their own internal suitability requirements and rules.
- 3.14. Similarly, FAIR Canada has recommended to IIROC that it produce a handbook for retail investors providing guidance about suitability obligations, including information about the rights of investors within the "suitability" framework.

We welcome the publication of these comments by OBSI either as is or in summary form, and we would also be happy to speak to you further about this submission. Please do not hesitate to contact Ermanno Pascutto at 416-572-2282/[ermanno.pascutto@faircanada.ca](mailto:ermanno.pascutto@faircanada.ca) or Ilana Singer at 416-572-2215/[ilana.singer@faircanada.ca](mailto:ilana.singer@faircanada.ca).

With thanks and regards,

Canadian Foundation for Advancement of Investor Rights

Copy to: Susan Wolburgh Jenah, IIROC