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RE: Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations

FAIR Canada is pleased to offer comments on Proposed Regulatory Text – Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations¹ published in Part I of the *Canada Gazette* on July 14, 2012 (the “**Proposed Regulations**”). FAIR Canada is also providing initial comments on the proposed Application Guide for External Complaint Bodies (the “**Proposed Guidelines**”) that the Financial Consumer Agency of Canada issued for comment on July 27, 2012 with a comment deadline of 45 days or until September 10, 2012². We are of the view that the 30 day consultation period for the Proposed Regulations is too short. Given the interaction of the Proposed Regulations and Proposed Guidelines the comment period should be extended to the same September 10, 2012 deadline for comments on the Proposed Guidelines.

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 securities regulation. Visit www.faircanada.ca for more information.

¹ Proposed Regulatory Text (Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations), C. Gaz. 2012.I.2084 (*Bank Act*).

² FAIR Canada reserves the right to provide further comments on the Proposed Guidelines as well as the Proposed Guidance for Internal Dispute Resolution by separate letter to the FCAC prior to the deadline for comments.

1. FAIR Canada Overview

- 1.1. **The Federal Government’s Proposed Regulations³ for banking complaints represent progress in that they: (1) set standards for external dispute resolution services for banks that have left OBSI, where no such standards existed previously, and (2) provide for government oversight of these entities.**
- 1.2. FAIR Canada previously provided the Ministry of Finance (“Finance”) with its views on how the consumer complaint system for banking complaints should be strengthened.⁴ **FAIR Canada is of the view that Finance would have created a pro-consumer framework if it had mandated OBSI as the sole dispute resolution provider for financial institutions or if it had created a single statutory ombudsman for financial services.** FAIR Canada provided Finance with a chart which compared OBSI to for-profit external dispute resolution services (currently provided by ADR Banking Chambers (“ADRBO”)) which we attach as Appendix A to this submission. The chart clearly shows the deficiencies of commercial EDR services when compared to OBSI.
- 1.3. FAIR Canada is disappointed with the direction that the Ministry of Finance has taken with the Proposed Regulations and reiterates its concerns in Part 3 below.
- 1.4. In the event that Finance does not reconsider the direction taken in allowing multiple external complaint bodies (“ECBs”), we provide you with our comments on the Proposed Regulations and Proposed Guidelines to the extent it is possible to improve a flawed system. Our recommendations for improvement are in Part 2 below. We are of the view that the Proposed Regulations and Proposed Guidelines require major improvement to properly establish and regulate a regime of multiple ECBS. Considerable revision is necessary in order to meet their stated purposes and to meet international standards supported by Canada’s Finance Minister.
- 1.5. It has often been said that Canada has one of the best banking systems in the world and, as a result, weathered the recent financial market crisis better than other countries. The Proposed Regulations do not create a system of world-class consumer dispute resolution and, accordingly, need substantial revision.

2. Comments on Proposed Regulations, Proposed Guidelines and FAIR Canada Recommendations

Stated Purpose in Proposed Regulations Too Narrow

- 2.1. The Purpose set out in the Proposed Regulations is not sufficiently comprehensive. It provides at section 2:

The purpose of these Regulations is to enhance the process for dealing with complaints under the Act by establishing a scheme for external complaints bodies

³ Proposed Regulatory Text (Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations), C. Gaz. 2012.I.2084 (*Bank Act*).

⁴ Letter to Minister of Finance dated November 15, 2011, available in FAIR Canada’s November Newsletter online at <http://archive.constantcontact.com/fs070/1102284477892/archive/1108669593760.html>; Letter to Minister of Finance dated March 21, 2012 referenced in our April 2012 Newsletter, available online at <http://archive.constantcontact.com/fs070/1102284477892/archive/1109856472952.html>.

that are accessible, accountable, impartial and independent and that discharge their functions and perform their activities in a transparent, effective, timely and cooperative manner.⁵

- 2.2. As acknowledged in the G20 High Level Principles on Financial Consumer Protection (the “**G20 High Level Principles**”), which were endorsed by the G20 Finance Ministers, including Canada’s Finance Minister, at their meeting on October 14-15, 2011: “[c]onsumer confidence and trust in a well-functioning market for financial services promotes financial stability, growth, efficiency and innovation over the long term.”⁶ **It is generally recognized that key components of consumer confidence are accessible and user-friendly arrangements to resolve disputes.**⁷
- 2.3. The G20 High-Level Principles were formulated in recognition of the need for better financial consumer protection in light of “recent and more structural developments”. Such developments include the increased transfer of opportunities and risks to individuals and households; increased complexity of financial products; and rapid technological change at a time when financial literacy remains low and financial service providers may not be adequately supervised and are subject to misaligned incentives which increases the risk that consumers face fraud, abuse and misconduct.⁸
- 2.4. Canada’s financial institutions sell a wide range of increasingly complex financial products to consumers, including principal protected notes, index-linked GICs, fixed and variable, open and closed mortgages, mutual funds, insurance products, and secured and unsecured lines of credit, among other products.
- 2.5. **Therefore, the Purpose should be expanded to include improving consumers’ access to consumer friendly redress from financial service providers and thereby promote confidence in financial service providers.**
- 2.6. **The Purpose should also include, as one of the list of guiding principles for ECBs, the fundamental guiding principle of fairness (discussed further below).**

Include the Principle of Fairness

- 2.7. The G20 High Level Principles includes fairness as one of its principles.¹¹ The International Ombudsman Association Code of Ethics provides that “The Ombudsman shall be truthful and act with integrity, shall foster respect for all members of the organization he or she serves, and shall promote procedural fairness in the context and administration of those organizations’ practices, processes, and policies.”¹² The

⁵ Proposed Regulatory Text (Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations), C. Gaz. 2012.I.2084 (*Bank Act*).

⁶ G20 High Level Principles on Consumer Financial Protection, Framework at page 4.

⁷ See World Bank Report issued January 2012 “Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman” at page 9.

⁸ G20 High Level Principles, at page 4.

¹¹ Principle 9 of the G20 High-Level Principles on Financial Consumer Protection states that “Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, **fair**, accountable, timely and efficient.” [our emphasis]

¹² International Ombudsman Association, “Code of Ethics”, accessed August 10, 2012 at <http://www.ombudsassociation.org/sites/default/files/Code_Ethics_1-07.pdf>.

International Ombudsman Association Standards of Practice also includes the principle of fairness.¹³

- 2.8. OBSI makes recommendations with reference to what is, in the Ombudsman's opinion, fair in all the circumstances.¹⁴ Fairness guidelines dictate that an ombudsman is not bound by the formality of the rules of evidence or procedures of a court of law and is rather an alternative to the legal system.¹⁵
- 2.9. In New Zealand¹⁶, which does allow competition in external dispute resolution services, the principle of fairness is included in the Purpose set out in the legislation, and an ECB will only be approved if its rules are adequate and comply with the guiding principles, including fairness.¹⁷
- 2.10. The fairness principle is expanded upon in New Zealand's "Guidelines for applying to become an approved dispute resolution scheme" including a note that the guiding principle of fairness is an international best practice and the following definition: "The scheme promotes decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based...".¹⁸
- 2.11. **The Purpose of the Proposed Regulations and Proposed Guidelines do not purport to create a scheme that includes the principle of fairness. The principle is omitted in its entirety. In order to have a system which provides an acceptable level of consumer protection, fair processes must be observed and decisions which are fair (and which include fair and reasonable outcomes) need to be promoted. Fairness therefore, needs to be included in the Proposed Regulations and Guidelines.**
- 2.12. There are a number of rules or requirements that will necessarily flow from the principle of fairness and which should be included in the Proposed Regulations and/or Proposed Guidelines. We recommend that rules that stipulate key aspects of the principle of fairness should not be left to the Terms of Reference of the applicant ECB – they should be included in the Proposed Regulation and/or Proposed Guideline. Such requirements include:
 - The ECBs must take into account relevant law and regulations, regulators' rules, policies and guidance, applicable professional body standards, codes of practice or conduct and general principles of good

¹³ For example, see 2.2 "The Ombudsman strives for impartiality, fairness and objectivity in the treatment of people and the consideration of issues. The Ombudsman advocates for fair and equitably administered processes and does not advocate on behalf of any individual within the organization."

¹⁴ OBSI's Terms of Reference, online: <http://www.obsi.ca/images/document/Dec2010_English.pdf> at section 25.

¹⁵ Joint Forum of Financial Market Regulators, "The Financial Services OmbudsNetwork – A Framework for Collaboration" (August 10, 2007), at Guideline No. 4, online: <<http://www.olhi.ca/downloads/pdf/FrameworkforCollaboration-Joint%20Forum.pdf>>.

¹⁶ New Zealand's *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (N.Z.) 2008/97.

¹⁷ *Financial Service Providers (Registration and Dispute Resolution) Act 2008* (N.Z.), 2008/97, at ss. 47, 52(1)(g) and 52(2).

¹⁸ See New Zealand's Guidelines for applying to become an approved dispute resolution scheme, at page 4, available online at <http://m.consumeraffairs.govt.nz/for-business/compliance/financial-dispute-resolution/guidelines-dispute-resolution-scheme/multipagedocument_all_pages>.

financial services and business practices when determining what is fair and reasonable in all the circumstances.

- The ECB is not bound by any legal rules of evidence nor any previous decision made by it.
- The ECB should provide advice to consumers regarding their rights to access the legal system or another redress mechanism at the various stages of the process, including if the consumer rejects the resolution of the complaint by the ECB.
- The ECB must receive, pursuant to specific procedural rules, all relevant information in respect of the complaint to the ECB unless prohibited by law, or unless the information identifies a third party to whom a duty of confidentiality or privacy is owed (with the ability of the ECB to seek permission of the third party to release that information to the ECB, as appropriate).
- The ECBs should make public all of the methodology or criteria used in making decisions or recommendations.
- The ECBs must notify the parties concerned of the decision and the reasons for it.
- The ECBs must notify the complainant if the ECB decides not to accept the complaint for investigation (this is required in section 4(e) of the Proposed Regulations) along with the reasons for the decision (this is not included in the Proposed Regulations).
- All procedural rules should be made transparent to the parties and to the public.

Regulations Create Multiple ECBs and not Ombudsmen

- 2.13. **The Proposed Regulations will create a system of ECBs rather than ombudsmen. An ombudsman, such as OBSI, has a responsibility to assist consumers with the complaints process, including the articulation of their complaint. Given the significant imbalance of power and knowledge between the consumer and the bank, this is a critical component of any consumer friendly dispute resolution service. Currently, private for-profit ECBs (for example, ADRBO) do not provide this necessary support to consumers and are not consumer friendly nor are they true ombudsmen.**
- 2.14. **Most consumers are not equipped with the financial, numeracy and legal literacy skills to be able to properly present their complaints in a manner demanded by a non-ombudsman system. Consumers, including vulnerable seniors and immigrants, will abandon legitimate complaints due to the barriers they face in articulating their claims. Consumers may also not get a fair hearing of their complaint due to inability to articulate their complaint or to respond to the legal and other arguments of the lawyers and other experts representing the bank.**

- 2.15. In order to improve the principle of accessibility, the Proposed Regulations need to include a requirement to have a process which provides consumers with assistance in articulating their complaint and how it came about, and provides interpretation services if needed since many Canadians do not have the Canadian official language skills necessary to pursue their complaint.
- 2.16. The consumer should be able to contact the ECB by telephone, in writing, by email, or fax with respect to their complaint, and have access to a translator if needed in order to have the complaint articulated.
- 2.17. **We recommend that the Proposed Regulations require that ECBs assist consumers with their complaints and provide similar services to an ombudsman. Any ECB that does not act like a true ombudsman should be prohibited by the Proposed Regulations from holding itself out as an ombudsman.**

Principle of Accessibility Needs to be Strengthened

- 2.18. An effective dispute resolution system is one that people knows exists and, when someone wants to use it, its processes are accessible. **FAIR Canada recommends that the Proposed Regulations stipulate that ECBs promote knowledge of their existence to customers of the member banks of the ECB and require that they be easy for customers to access and use.**
- 2.19. The requirement in section 5 of the Proposed Regulations that the bank display and make available a copy of a written statement disclosing the name of the ECB of which it is a member and the contact information is not adequate to ensure that Canadians know where to go when they have not been able to resolve a complaint internally within the bank to their satisfaction.
- 2.20. The member of the ECB should be required to promote the existence of its ECB to customers in the media (including social media) and by other means, such as on any promotional material available at the bank, bills or statements, disclosure statements or other correspondence provided to consumers.
- 2.21. The member and the ECB should also be required to produce readily available material in simple terms explaining how to access the ECB's services, how the process works, and the types of complaints it will handle. Members of the ECB should be required to inform consumers about the ECB in writing, at various stages of the relationship between the consumer and the member, and in particular, when first entering into an arrangement with a consumer and when a complaint is first made.
- 2.22. It should be made clear to the consumer when it can refer a complaint to the ECB to prevent cases being left in a deadlock situation within the internal complaints procedure system.
- 2.23. What will be considered a "complaint" within the mandate of an ECB should also be stipulated by the Proposed Regulations and/or Proposed Guidance with a view to not allowing complaints to fall between the cracks of the disparate entities that are in place to resolve various types of complaints.

- 2.24. Accessibility requires that the ECB be easy to deal with (in addition to being one that consumers know exists). **The Proposed Regulations and Proposed Guidelines should therefore ensure that the bank members of the ECB provide information in a timely fashion and also cooperate fully with the ECB.**

Accountability Needs to be Stronger

- 2.25. The G20 Principles require that, at a minimum, aggregate information with respect to complaints and their resolutions should be made public. Neither the Proposed Regulations nor the Proposed Guidelines require an ECB to disclose any statistical, aggregate information about the complaints it receives.
- 2.26. An ECB should be required in the Proposed Regulations and Proposed Guidelines to provide to its members and the public sample decisions. The ECB should also be required to have, in its annual report, statistics about its caseload and the types of complaints it receives (i.e. geographical location and product and issue complained of), number of resolved cases, amount of time taken to resolve complaints, examples of typical cases, a list of firms who are members of the ECB (together with any changes to the list during the year), and the results of the feedback survey that determines level of service (the last item, as required in the Proposed Regulations and Guidelines¹⁹).
- 2.27. The independent evaluation of the ECB that is required to be performed every five years as set out in the Proposed Regulations (at section 4(m)) is not frequent enough for entities that are newly approved under the Regulations.
- 2.28. OBSI, the Canadian Life and Health Insurance OmbudService (“CLHIO”) and the General Insurance OmbudService, in accordance with the Guideline 7 to the Framework for Collaboration, which was endorsed by a Dispute Resolution Committee established by the Joint Forum of Financial Market Regulators and Finance Canada, requires that OBSI (and the others) be reviewed every three years²⁰. OBSI was the subject of a review by an international expert in the last year.
- 2.29. **We recommend that the Proposed Regulations mandate that newly approved entities be subject to an independent evaluation one year after their approval to ensure that they are performing their functions properly and in a manner that supports the defined purposes of ECBs (as discussed above). If there are no major issues, thereafter, an independent review every three years should be undertaken.**

¹⁹ Section 4(k) of the Proposed Regulations provides that the ECB “consult at least once a year with its members, and with persons who have made complaints since the previous consultation, with respect to the discharge of its functions and performance of its activities as an external complaints body” and section 4(l) of the Proposed Regulations provide that the ECB submit an annual report to the Commissioner”including a summary of the results of any consultation with its members and with persons who have made complaints, and make the report available without delay;” and 4.4.3 of the Guidelines which provide: “Annually, external complaints bodies must undertake a consultation with consumers and member banks that have used their services [bullet] to determine satisfaction with the level of service [bullet] make the findings of these consultations publically available.

²⁰ See Guideline 7 in The Financial Services OmbudsNetwork - A Framework for Collaboration, August 10, 2007 at page 13, available online at <http://www.obsi.ca/UI/Resources/FrameworkWithTheRegulators.aspx>.

Binding Decisions Are Needed

- 2.30. **The Proposed Regulations in 4(j) indicate that ECBs will make final recommendations, not binding decisions. The Proposed Regulations should provide that the decision/resolution of the ECBs should be binding on the participating members (financial firms) and the resolution should be binding on the consumer/complainant, if the complainant accepts the resolution.²¹ In the U.K., Australia and New Zealand, decisions are binding if the consumer accepts the resolution. We see no reason for a less consumer friendly system in Canada.**

Compensation Cap Should be Determined by the Legislation

- 2.31. **OBSI can make awards up to a limit of \$350,000. There is no specified compensation limit mandated in the Proposed Regulations or Proposed Guidelines. We believe that the limit should be the same regardless of which financial institution the consumer deals with and should, therefore, be mandated by the Proposed Regulations rather than determined by the ECB or by each individual bank.**
- 2.32. If the compensation cap is not set out in the legislation, firms may choose to join the ECB with the lowest cap, encouraging a race to the bottom which is not in the interest of consumers.²² In addition, Canadians should have access to the same redress mechanisms (including compensation limits) regardless of which bank they have a complaint about. Consumers are highly unlikely to switch banks to one with a higher compensation limit at the outset. It will be the banks who “compete” to get a lower compensation limit.
- 2.33. **It is our recommendation that the compensation cap should be set in the Proposed Regulations and should not be lower than \$350,000.**

Governance Requirements

- 2.34. **The Proposed Regulations do not require that approved ECBs “be operated in a manner that is consistent with the standards of good character and integrity” as suggested in the Regulatory Impact Analysis Statement²³. Instead, the Proposed Regulations only require that approved external complaints bodies “have a reputation” for such.**
- 2.35. **FAIR Canada recommends that the Proposed Regulations be amended to require that approved external complaints bodies operate in a manner that is consistent with the standards of good character and integrity.**

²¹ As in New Zealand’s scheme, see section 63(n) of the *Financial Service Providers (Registration and Dispute Resolution) Act 2008*.

²² See the 2011 Independent Review of OBSI by The Navigator Company (the “Khoury Report”) for a discussion of how this “race to the bottom” occurred in New Zealand at pages 23-24.

²³ Regulatory Impact Analysis Statement (Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations), C. Gaz. 2012.I.2081 (*Bank Act*), available online at <http://www.gazette.gc.ca/rp-pr/p1/2012/2012-07-14/html/reg2-eng.html>.

2.36. We further recommend that consideration be given to a whole host of governance issues with respect to ECBs, such as:

- requiring a majority of the ECB's board of directors to be independent from the members of the ECB,
- having an independent chair and including consumer representation on the board,
- setting out the legitimate grounds upon which the ombudsman/decision-maker of an ECB can be dismissed or removed in order to ensure independence of the ombudsman,
- outlining how the ECB will receive and consider complaints about the operation of the ECB itself, and
- describing what responsibilities and powers the ECB will have in respect of non-compliance by a member (bank) including the power to "name and shame" (ability to publicly disclose by news release non-compliance by a bank of a decision of the ECB, including the name of the bank), a power which OBSI currently has. (This power will not be necessary if decisions are binding as recommended in paragraph 2.31).

Regulatory Oversight

2.37. Regulatory oversight of the ECBs has been delegated to the FCAC. The FCAC will need sufficient financial and human resources to adequately fulfil its role, which will be passed on to taxpayers. We recommend that more details about the FCAC's increased resources should be made publicly available and that the financial institutions and ECBs be subject to a levy to recoup the additional costs that will be incurred by the FCAC in supervising the ECBs²⁴.

2.38. We also recommend that the Proposed Guidelines include a description of how the FCAC will include all stakeholders, and in particular, consumer interests, in their oversight of ECBs. It should be made clear how the FCAC will:

- deal with complaints received about the operation of an ECB;
- determine proposed changes to an ECB's terms of reference;
- take action in respect of widespread unfair practices ("systemic industry problems") referred to it by ECBs;
- ensure transparency of systemic industry problems;
- apply regulatory tools to deal with ECBs that breach requirements or processes;
- have the ability to withdraw approval for an ECB; and
- determine the process to be used in removing an ECB.

²⁴ This is provided for in recent proposed amendments to section 18(3) of the Financial Consumer Agency of Canada Act contained in Bill C-25, assented to December 15, 2010.

Tolling of Limitation Period Required

- 2.39. **OBSI's Terms of Reference require all participating firms to enter into a tolling agreement – an agreement that stops the clock on the limitation period for bringing an action in court. However, the Proposed Regulations and Proposed Guidelines do not provide the same protection to consumers.** Therefore, under the Proposed Regulations, while a complaint is being considered by an ECB, the limitation period for a civil action could run out and leave the consumer without the option to bring an action in court. **We believe that this is highly prejudicial to consumers and needs to be rectified. FAIR Canada strongly recommends that all ECB members be covered by a blanket tolling agreement which suspends the limitations period while a complaint is under consideration by the ECB. We recommend that this be stipulated in the Proposed Regulation.**

Ability of Banks to Switch ECBs should Not Prejudice Consumers

- 2.40. The Proposed Regulations contemplate the ability of a bank to leave one ECB and join another and stipulates that the complaint and all related information will be transferred to the new ECB.²⁵
- 2.41. The result of transferring the complaint to a new ECB will likely involve considerable delay and inconvenience to the parties, and would be inefficient, which is not in the interests of consumers. A far better approach would be to require the bank to give the ECB notice that it is going to switch to another ECB and that all existing complaints continue to be resolved by that ECB and not be transferred. **A minimum notice period of 6 months should be mandated for a bank wishing to withdraw from an ECB.**

Short Time Period for Resolution of Complaint May Lead to Harm

- 2.42. The Proposed Regulations provide that complaints are to be resolved within 120 days. While this appears to be pro-consumer, in fact, if complaints are complex or if there is delay and non-cooperation by the bank or if a consumer has difficulty articulating a complaint in the manner required for a fair hearing, a consumer could be prejudiced by a rigid deadline. This may result in “quick” resolutions but not necessarily resolutions which are fair to the parties, including the consumer.
- 2.43. **FAIR Canada recommends that the government set guidelines which must be met by ECBs to resolve the majority of their complaints within a certain time-frame, such as 180 days.**

²⁵ See Section 4(g) and (h) of the Proposed Regulations.

3. FAIR Canada's Concerns with the Direction Taken in the Proposed Regulations

Do Not Meet International Standards, Lack of Independence and One-sided Competition

- 3.1. **FAIR Canada is of the view that allowing dispute resolution of consumer banking complaints to be undertaken by multiple for-profit ECBs will create a worse system than we have at present and will be much less optimal than mandating an independent statutory bank ombudsman. The direction being taken is a major step backward for consumer protection in Canada, falls below international standards and ignores the tough lessons learned in other major jurisdictions.**
- 3.2. **The new framework will not meet international standards set by the G20.**²⁶ The World Bank warns that allowing financial firms to choose between two or more competing ombudsmen “....presents severe risks to independence and impartiality – because financial businesses may favour the ombudsman they consider likely to give businesses the best deal” and such ‘competition’ is one-sided because consumers are not given any choice of ombudsman.²⁷
- 3.3. The Australian and New Zealand Ombudsman Association policy statement on competition among ombudsman offices, included as Annex H to the World Bank Report²⁸, states that ‘competition’ among Ombudsman offices runs counter to the key principles of independence, accessibility, fairness, efficiency, effectiveness and accountability. The policy statement takes the position that there should be only one external dispute resolution ombudsman for any industry or service area and competition is inefficient and undesirable on a range of policy issues.
- 3.4. Similarly, the British and Irish Ombudsman Association is opposed to the fragmentation of redress schemes within a single industry and prefers a single ombudsman.²⁹

Offer choice for banks but no choice for consumers

- 3.5. Under the Proposed Regulations, consumers have no choice of dispute resolution service provider – they must use the service chosen by the bank. **Banks will entertain bids from approved service providers and choose the one that best serves their interests.**
- 3.6. **Banks will be able to shop around and choose the commercial service that gives them the best deal and serves their interests whereas consumers will have no choice of ECB but can only choose between using the ECB selected by the bank and the**

²⁶ It will not meet Principle 9 because the ECBs will not be truly independent and accessibility, fairness and accountability will also be weakened or threatened.

²⁷ The World Bank Report which is critical of the idea of “competitive’ ombudsman based on the experience of some countries, at page 38-39 and at page 75. Available online at http://www.networkfso.org/Resolving-disputes-between-consumers-and-financial-businesses_Fundamentals-for-a-financial-ombudsman_The-World-Bank_January2012.pdf.

²⁸ Supra, note 5 at page 75.

²⁹ See the British and Irish Ombudsman Association Schedule 1 to the Rules: Criteria for Recognition of Ombudsman Offices, at page 1, available online at <http://www.ombudsmanassociation.org/docs/BIOA-Rules-New-May2011-Schedule-1.pdf>.

existing legal system (the latter is not a viable option for the majority of retail bank customer complaints).

Less Consistency in Decision-Making and Oversight More Difficult

- 3.7. Allowing multiple ECBs will reduce consistency in decision-making and makes oversight by the FCAC more costly, complicated and likely less effective than if there were one ombudsman.

Ability to Address Widespread Unfair Practices (also known as “systemic issues”) Removed

- 3.8. Under the Proposed Regulations, systemic issues are removed from the ECBs’ mandates and it will be more difficult to identify and act on unfair or inappropriate bank practices in a timely manner given that there will not be one entity that will gather information on complaints. The early detection of a widespread issue will be much more difficult, if not impossible, to determine.
- 3.9. **Under the Proposed Regulations, consumers who are harmed by poor bank practices may never know and never be compensated for such harmful practices.** This is not in the interest of consumers. By “systemic issues”, we are referring to widespread practices in the banking industry that can harm consumers (including those consumers who may not yet be aware of the harm).
- 3.10. One example is bank charges in connection with mortgage prepayment, where there is often a lack of clear disclosure in mortgage documentation, particularly about the calculation of the interest rate differential. Consumers have been overcharged in many cases. The new complaints bodies will not have a mandate to address inappropriate practices affecting many consumers and may only refer these to the FCAC. **Under the Proposed Regulations, FCAC is not mandated to investigate and require the relevant bank to correct the practice and compensate consumers who have been overcharged or suffered other financial loss.**
- 3.11. OBSI will be forced to change its terms of reference to remove the systemic issues mandate. **The result will likely be less oversight of bank consumer business practices and bank customers not being compensated despite having been overcharged.** OBSI’s current terms of reference make it clear that OBSI is to identify potential systemic issues and request the bank to investigate and report to OBSI as to whether the systemic issue exists, and then work with the bank to arrive at a fair resolution including recommending, in appropriate circumstances, that affected individuals be compensated. If the existence of a systemic issue is disputed, the matter is simply reported to the relevant organization (e.g. FCAC) which has a responsibility to consider the matter and determine whether bank or regulatory action is required to address the matter.
- 3.12. **FAIR Canada believes that a regime which allows for widespread bank practices that harm consumers to be addressed at an early stage is preferable and in the interest of consumers and banks.** Such an approach can lead to fewer complaints, earlier

detection of problems and their resolution, the development of better banking practices and thereby increase consumer confidence in the financial market place (thereby resulting in the achievement of the purposes of an effective consumer dispute resolution regime).

- 3.13. The Proposed Regulations make it more difficult to detect and address widespread issues. As a result, it will be more difficult to detect and address truly systemic risks in the system, which may affect the financial markets and the economy as a whole.
- 3.14. **FAIR Canada recommends that the FCAC be mandated to investigate systemic issues and require the relevant bank to correct the practice and compensate consumers who have been overcharged or suffered other financial loss.**

Types of Awards Narrowed

- 3.15. The Proposed Regulations require that ECBs “...deal with and resolve complaints in a manner that affects only the parties to them”. This prevents an order which would provide that action be taken that would affect other consumers and/or potential complainants. This is unduly restrictive and not in the interest of consumers. Remedial action that will affect more than the parties will be unduly circumscribed.

Federal Expert Report Pointed Out Existing Weaknesses in Complaint Handling and Consumer Redress

- 3.16. As noted in the January 2009 **Report of the Expert Panel on Securities Regulation** regarding the inadequacy of complaint handling and redress mechanisms in Canada:

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.³⁰

- 3.17. FAIR Canada submits that permitting multiple approved ECBs will worsen the problem of poor complaint handling and redress mechanisms rather than improve it.

National Securities Regulator

- 3.18. **If the Federal Government weakens consumer protection for consumers of banks, this will undermine public confidence that a national securities regulator would lead to improved consumer protection in investments and thereby undermine public support for a national regulator.**
- 3.19. **The Proposed Regulations also run contrary to the more pro-consumer stance of provincial securities regulators, who are supporting mandatory participation in OBSI and have not allowed investment firms to leave OBSI and choose a for-profit ECB.**

³⁰ Expert Panel on Securities Regulation, “Final Report and Recommendations” (January 2009) at page 34.

Conclusion

- 3.20. **Canadian consumers would be better served if the Minister of Finance brought Canadian banking regulations up to current international standards for consumer redress, by implementing one, independent, national external consumer dispute resolution service for banks being either OBSI or a statutory banking ombudsman. In the absence of this we recommend that major changes be made to the Proposed Regulations to address the major deficiencies highlighted in this letter.**

Public Consultation

- 3.21. **We also respectfully submit that a 30 day comment period, issued in the summer, for the Proposed Regulations is far too short, and should be extended to coincide with the consultation being undertaken by the FCAC regarding the Proposed Guidelines, which deal with the same subject matter, the deadline for which is September 10, 2012.**
- 3.22. **We also respectfully submit that all comment letters received should be posted in the public domain in the interests of transparency.**

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. 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