

FAIR



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



OPEN LETTER

February 21, 2018

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: OBSI Independent Evaluator's Report, 2016

We are writing to you on behalf of the Canadian Foundation for the Advancement of Investor Rights (FAIR Canada), the Public Interest Advocacy Centre, CARP, and Kenmar Associates regarding the OBSI Joint Regulators Committee's ("JRC") response to the Independent Evaluation of the Canadian Ombudsman for Banking Services and Investments' (OBSI) Investment Mandate (the "Battell Report"), released on June 6, 2016.

We urge the JRC to make public its response to the recommendations and make public the specific work you are doing to further them, especially with regard to reforms that will enable OBSI to actually secure redress for investors in Canada. Additionally, we urge the JRC to indicate its expected timeline to actionize the recommendations.

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.

PIAC is a national non-profit organization and registered charity that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services.

CARP is the largest seniors' advocacy group in Canada with 300,000 members nationwide. CARP's mandate is to improve healthcare and financial security and support the human rights of Canadians as we age.

Kenmar Associates is an Ontario- based privately-funded organization focused on investment fund investor education via on-line research papers hosted at www.canadianfundwatch.com. Kenmar also publishes *the Fund OBSERVER* on a bi-weekly basis discussing investor protection issues primarily for investment fund investors. An affiliate, Kenmar Portfolio Analytics, assists, on a no-charge basis, abused investors and/or their counsel in filing investor complaints and restitution claims.

1. Factual Background

- 1.1. The Independent Reviewer's mandate was to determine whether OBSI was fulfilling its obligations outlined in the MOU between the Participating CSA Members and OBSI; and whether any operational, budget and/or procedural changes in OBSI would be desirable in order to improve OBSI's effectiveness in fulfilling the provisions of the MOU.
- 1.2. The Battell Report's "Key Findings" were that "OBSI meets the requirements of the MOU and performs well within its current mandate: its decisions are fair and consistent with those made internationally; and with its loss calculation tools, its ability to determine fair amounts of resolution is world leading."
- 1.3. However, the Battell Report also found that **"OBSI is unlike other comparable international financial sector ombudsmen in that it does not have the authority to bind firms to observe its compensation recommendations (binding authority). This drives its operating model and prevents it from fulfilling the fundamental role of an ombudsman, securing redress for all consumers who have been wronged..."**.
- 1.4. The report disclosed that "...in 2015, 18% of non-backlog complainants who OBSI considered should receive compensation, received less than OBSI recommended (on average \$41,927 less): including 3.5% who were at risk of receiving nothing." The Battell Report noted that the lack of binding decision authority led to some consumers receiving less than they should and, more importantly, that OBSI's current mandate allows this situation to occur and "tilts the playing field in favour of firms".
- 1.5. It also noted that the alternative means of prompting redress through naming and shaming has not been "universally effective" and has, in fact, been "counter-productive" as it reinforces OBSI's limitations and undermines public confidence in both the resolution system and the investment market.
- 1.6. In conjunction with the release of the Battell Report, we understand that the author, Deborah Battell, presented her report's findings and 19 recommendations separately to OBSI's Board of Directors and to the JRC. In a news release dated June 6, 2016, the JRC advised that it would be meeting with OBSI staff later that June, and with the OBSI Board in September, where it expected to learn more about OBSI's position on the Battell Report's findings and recommendations. The JRC also stated then that "[i]n the meantime, we will begin analyzing the findings and recommendations, along with other stakeholder input, in considering next steps in response to the report."

- 1.7. Six months after the release of the Battell Report, in December 2016, the OBSI Board published its "Response to the External Review Recommendations". In the JRC's Annual Report 2016, dated March 23, 2017, the JRC referred to the release of the Battell Report, listed its principal recommendations, described the response of the OBSI Board and stated that the JRC's next steps would be to continue to engage in discussions with OBSI with a view to focusing on options for strengthening OBSI's ability to secure redress for investors.
- 1.8. For almost a year the JRC has been focused on options for strengthening OBSI's ability to secure redress for investors. As the recent CSA Staff Notice 31-351, Complying With Requirements Regarding The Ombudsman For Banking Services and Investments, dated December 7, 2017 attests - a fair and effective dispute resolution process is important for investor protection in Canada and is vital to the integrity and confidence of the capital markets.

2. Our Comments

- 2.1. The Battell Report was delivered more than 18 months ago and, as noted above, while the JRC has been engaged in these issues, it has provided little public information about the details of its deliberations or work. We urge the JRC to make public its response to the recommendations of the Battell Report and the work you are doing to further them, especially with regard to changes required that will enable OBSI to actually secure redress for investors in Canada. Additionally, we urge the JRC to indicate its expected timeline to actionize the recommendations.
- 2.2. The undersigned believe that all of the recommendations contained in the Battell Report are important. In particular, we agree with the Battell Report that the lack of binding decision-making authority on the part of OBSI tilts the playing field in favour of the firm. Firms are free to offer the consumer far less than what is fair in the circumstances since they do not have to factor in the risk that the ombudsman at OBSI has the ability to decide an amount that is significantly greater (given its inability to render a binding decision).
- 2.3. We are of the view that action is long overdue to provide OBSI with power to issue binding decisions as this is critical to the integrity of the Canadian financial services market and the protection of Canadian consumers. The prospect of OBSI imposing a result would: (a) allow the consumer to have confidence that they can reject a low-ball offer and still retain the ability to achieve a fair outcome; and (b) give firms a greater incentive to make fair settlement offers instead of low-ball ones.
- 2.4. Such a reform would also further the goal to have a dispute system in Canada that complies with our international obligations to be "accessible, affordable, independent, fair, accountable, timely and efficient."
- 2.5. **We urge the JRC to act now with respect to the recommendations of the Battell Report in a manner that empowers OBSI to actually secure redress for Canadian investors. Additionally, we urge the JRC to disclose its timeline to operationalize the Report's recommendations. These actions are essential to improving retail investor protection and increasing confidence in Canadian capital markets.**

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

Sincerely,



Frank Allen
Executive Director
FAIR Canada

Wanda Morris
Vice-President, Advocacy
CARP



John Lawford
Executive Director/General Counsel
PIAC

Ken Whitehurst
Executive Director
Consumers Council of Canada

Ken Kivenko
President
Kenmar Associates

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