

FAIR

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

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Professor Poonam Poori
Ms. Dina Milivojevic
Mr. Trevor Fairlie

Sent via email to:
pp@poonampuri.ca

Re: Request for Comment on the Independent Evaluations of the Ombudsman for Banking Services and Investments (OBSI) with respect to Investment-Related Complaints and Banking-Related Complaints, and of the ADR Chambers Banking Ombuds Office (ADRBO) with respect to Banking Related Complaints

FAIR Canada is pleased to provide comments to assist with the above-referenced independent evaluations of [Ombudsman for Banking Services and Investments \(OBSI\)](#) and [ADR Chambers Banking Ombuds Office \(ADRBO\)](#).

FAIR Canada is a national, independent charitable organization dedicated to being a catalyst for the advancement of the rights of investors and financial consumers in Canada. It advances its mission through outreach and education, public policy submissions to governments and regulators, and proactive identification of emerging issues. FAIR Canada has a reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of retail investors and financial consumers.¹

Our comments include responses to the evaluation questions that are most relevant from the perspective of retail investors and banking customers, and on which we can provide meaningful feedback.

FAIR Canada's views are informed by years of advocacy for improving complaint handling, feedback from harmed investors, comparative legal research of best practices, and reviews of

¹ Visit www.faircanada.ca for more information.

international best-in-class frameworks. Since 2010, we have regularly commented on complaint handling policy proposals, and participated as stakeholders in prior independent assessments of OBSI.

Unless otherwise specified, references to OBSI in our responses below include both its banking and investment services.

Our responses also include references to ADRBO where relevant. This is, in part, to facilitate the review process and highlight points of comparison or divergence. It is also because we did not respond to the [survey monkey](#) questions prepared for the ADRBO assessment. In our view, the survey monkey approach will not yield meaningful input to support a detailed assessment of complaint handling for banks. As such, please consider any references to ADRBO below for purposes of your assessment of that organization.

General Comments

Ensuring Canada has a credible, efficient, effective, and easy-to-navigate complaint handling system is critical to promoting consumer confidence and trust in the financial sector. Complaint handling is a core component of any credible consumer protection framework. It also serves a critical role in fostering fairness in the client relationship.

Based on years of public engagement on complaint handling, FAIR Canada's view is that OBSI is an effective and efficient ombudsman with a demonstrable track record of providing high-quality services. It has continuously improved its processes and operations for the benefit of both the industry and consumers. OBSI has also addressed concerns, primarily from industry, around its governance and methodologies. Today, it meets or exceeds many best practices within its international peer group.

The two core issues that continue to hold it back as a world-class ombud service are matters that lie outside of OBSI's control.

The first issue relates to OBSI's inability to issue decisions that are binding on its members.

Despite years of talk about the merits of strengthening OBSI's mission—and strong support from multiple independent assessors, an Ontario government task force, and a Ministerial Mandate Letter issued by the Prime Minister—no binding powers have yet been introduced. It is incumbent that regulators (or governments) address this fundamental problem once and for all.

The continued lack of binding decisions undermines fairness in the complaints process, and acts as a handbrake on OBSI's efficiency and effectiveness. It also perpetuates an unfortunate and unproductive process—one in which OBSI is required to spend more time and resources to try to negotiate agreement, only to be accused by industry that OBSI is taking too long and spending too

many resources to settle cases.

The second matter relates to the framework for reporting and addressing systemic issues. In our view, this framework needs to be clarified and improved. OBSI is an important front-line service provider for consumer concerns. As such, it should play a significant strategic role in helping industry and regulators better understand consumer concerns and how they may be exposed to harm.

FAIR Canada also strongly believes there should be a single, independent ombudsman to address complaints involving banks and investment services—and this ombudsman should be OBSI. Over its 25 years, OBSI has provided an important public service and played a critical role in our consumer protection framework. And, despite constraints beyond its control, it has performed its role reliably well.

To the extent we continue, however, to have both OBSI and ADRBO deal with complaints from banking customers, both organizations should be held to the same standard and set of expectations. From a complainant's perspective, their experience in navigating the process should be the same regardless of who is handling their complaint. Similarly, from the public's perspective, both organizations should have the same level of transparency, accountability, accessibility, effectiveness, and governance.

Based on publicly available information, OBSI tends to outperform ADRBO in all these areas.

1) Governance

In our view, OBSI has an effective governance structure. The Board appears to be functioning and performing its responsibilities and obligations well. It possesses the relevant skill sets one would expect from Board of Directors that perform with a high level of professionalism. There also appears to be good succession planning and recruitment practices that attract high calibre individuals to the Board.

Committees of the Board publish updates and information about their activities each year, including the attendance record for each Director. In keeping with best practice, the Board has a Code of Conduct that all Directors are expected to review and follow. The Code includes details about complying with OBSI's conflicts of interest rules and bylaws.

In our view, the current governance structure appears to be working well and we would not recommend tinkering with it. The structure includes having a majority of community directors (with one being reserved for a consumer interest director), a minority of industry directors, and an independent Chair of the Board.

We also note the Board is supported by the Consumer and Investor Advisory Council (CIAC), which provides an important mechanism to hear about consumer issues and challenges. CIAC also provides expert advice on important matters, including issues related to operational activities, public policy, and the financial services sector.

We note that the appointment of a Consumer Interest Director is not a substitute for, nor does it negate, CIAC's unique role within OBSI's governance structure.

ADRBO Governance

We note that in March 2021, ADRBO named its first designated Consumer Representative Director to its five-member board, which is a positive step. However, it is difficult to assess ADRBO's governance structure in any detail because of the lack of transparency and publicly available information. This includes a lack of information about board committees, board policies and board compensation.

2) Independence and Standard of Fairness

The 2016 independent evaluation found that OBSI demonstrated "considerable attention to fairness in reaching decisions about whether a complainant's case was within OBSI's mandate, whether the complainant was eligible for compensation, and the extent to which complainants themselves contributed to the losses."²

Since then, we are not aware of any changes that have weakened OBSI's processes or approach in investigating complaints. Quite the contrary, it has continued to improve them.

We believe that OBSI is independent, impartial, and it applies standards that are fair to both parties. Despite this fact, however, the process itself does not treat both parties fairly. As stated in the 2016 independent evaluation, OBSI's inability to issue binding decisions means that the process is weighted in favour of the firm or bank, which is free to ignore OBSI's recommendations. (And in the case of a bank, is free to forum shop by bringing its business to ADRBO.)

The skewed process results in consumers being pressured to accept low-ball offers (relative to what OBSI recommended), if they hope to receive any financial compensation from the firm. A process that enables this dynamic and outcome is indefensibly unfair. It also corrodes the purpose of having an ombudsman to try to level the playing field and power imbalance that exists between the consumer and the firm.

² [Independent Evaluation of the Canadian Ombudsman for Banking Services and Investments' \(OBSI\) Investment Mandate](#) (May 2016), page 36.

Addressing this fundamental question of fairness is not within OBSI's control or power. Rather, it is a question for the regulators to answer. It has been more than a decade since binding decisions was first recommended to address the asymmetrical nature of the relationship and inequity. Every day that this issue is debated is another day Canadians are exposed to harm by those willing to low-ball their clients or those refusing to play ball.

ADRBO Independence and Fairness

There are several considerations that call into question ADRBO's impartiality, independence, and objectivity.

This stems from the fact that, unlike OBSI, ADRBO is a for-profit organization, and whether it remains profitable largely depends on whether its member banks are willing to continue to use its services. This profit motive understandably raises concern about whether ADRBO treats both parties with the same objectivity or impartiality. In short, it raises a reasonable apprehension of bias against the consumer.

A further consideration is that ADRBO relies extensively on its "Initial View Letters" to close cases.³ The impartiality of this process has been called into question by the Financial Consumer Agency of Canada (FCAC). In its 2020 review of external complaint bodies (ECBs), the FCAC states that these letters are used when ADRBO believes it is "highly unlikely" that an investigation would yield a different conclusion than the bank's position.⁴ The FCAC found that in reaching this conclusion, ADRBO relies almost exclusively on the evidence and arguments in the final letter from the bank, thereby undermining the fairness of the process. In contrast, the FCAC found that OBSI was considerably more responsive and likely to open a full investigation after being contacted by a consumer.⁵

The detailed review conducted by the FCAC further highlighted that ADRBO's process was "incompatible with consumers' rights to escalate a complaint." It also found that the lack of independent research at the beginning of the review stage called into question the impartiality of ADRBO's process.

3) Processes to Perform Functions on a Timely and Fair Basis

Timeliness and Efficiency: Investment Complaints – Based on OBSI's Annual Reports, the number of days to complete an investigation of investment-related complaints has continuously decreased year over year. In 2020, despite seeing an increase of 18% in the number of cases

³ In 2020, ADRBO closed close to 70% of its cases with initial view letters ([ADRBO 2020 Annual Report](#)).

⁴ [Industry Review: The Operations of External Complaints Bodies](#) (FCAC 2020), page 13.

⁵ *Ibid.*, page 13.

during 2019, OBSI required an average of 62 days to complete investment investigations. In 2019, it took on average 75 days to complete.

Similarly, 83% of cases in 2020 were closed under 90 days or less, and 93% under 120 days. Only 2% of cases in 2020 took more than 180 days to complete.

Timeliness: Banking Complaints – On the banking side in 2020, OBSI took an average of 50 days to complete investigations, down from 55 days in 2019.

The OBSI closed 67% of cases in under 60 days, and only 5% of cases took more than 90 days to close. Consistent with the requirement under the Bank Act regulations, OBSI completed all banking cases in less than 120 days.

Based on this data, OBSI seems to be performing its dispute resolutions on a timely basis and, despite a spike in more recent cases, has even been able to further improve its timelines.

The overall timelines, however, are still too long if we consider that 90 days must first elapse before a complaint can be brought to OBSI. Furthermore, OBSI calculates its timelines based on when it receives the information it needs to commence an investigation, as opposed to the date the consumer brings the complaint to OBSI. In short, consumers may be looking at timelines that exceed six months in many cases.

As such, we encourage OBSI to continue to find ways to speed up its process. Of course, having the regulators (or governments) provide it with the ability to issue binding recommendations would further help minimize unacceptable delays. We also urge regulators to reduce the complaints period that firms must respond to 56 days, rather than the current 90-day period (as is being done on the banking side).⁶

We also suggest OBSI begin calculating its timeframes from the date the complaint is made by the consumer, as opposed to the date OBSI has the information it needs to carry out an investigation. As noted in the 2016 independent assessment, beginning the clock when all the information is received is later than other ombudsman services. The earlier start date would also better align with the timelines experienced by the consumer.

Firm Refusals – As of the date of our response, 22 investment firms have refused to compensate investors for losses. In these cases, OBSI publishes its investigative reports to promote transparency about the justifications offered by these firms. The justifications range from disagreement over whether the period of limitations expired, or whether the advice was suitable. No bank has yet to refuse an OBSI recommendation.

⁶ Amendments to the Bank Act require banks to deal with customer complaints within 56 days of receipt of the complaint. The amendments received Royal Assent and will come into force on June 30, 2022.

In our view, however, the main reason some firms refuse to compensate investors is because they can. This was succinctly expressed in the 2016 independent evaluation of OBSI as follows:

...without binding authority to secure fair redress, OBSI, despite assiduously fair processes, has a model that is weighted in favour of firms who are free to ignore its recommendations and negotiate a lower award.⁷

Empowering OBSI to issue binding decisions will address the root cause of this long-standing problem.

Naming and Shaming – In our view, naming and shaming is not an effective substitute for binding authority, nor does it appear to meaningfully enhance OBSI’s effectiveness. On the contrary, as stated in the 2016 independent evaluation, publicizing firm refusals has the undesirable effect of broadcasting OBSI’s limitations and further undermining consumer confidence in the system.

Compensation Cap – The \$350,000 compensation limit has not changed since it was established 20 years ago (2002). We also note the compensation was based on the IIROC’s arbitration limit, which is now set at \$500,000.

FAIR Canada recommends consideration be given to increasing OBSI’s compensation limit to bring it closer to IIROC’s arbitration limit and the limits found in other countries. For example, the United Kingdom’s (UK) Financial Ombudsman Service (FOS) has a cap of GBP355,000 (approximately \$597,000). In Australia, for a claim relating to direct financial loss, the Australian Financial Complaints Authority’s (AFCA) monetary jurisdiction is capped at AUD\$542,500 (approximately the same in CAD\$). We also note that Ontario’s [Capital Markets Modernization Task Force](#) recommended OBSI’s cap be set at \$500,000, and adjusted thereafter over time.

Given that most OBSI recommendations are well below these levels, the cap limit may not be an immediate priority. However, we believe the current limit should, at a minimum, be adjusted to take inflation into account.

ADRBO Compensation Cap – We note that ADRBO does not appear to have any limit on how much monetary compensation it can recommend.

Binding Decisions – FAIR Canada has long advocated that OBSI should have authority to issue binding decisions. We are far from the only ones that have called for this:

- The International Monetary Fund (IMF) stated in its 2019 Technical Note on the assessment of Canada’s securities and derivative markets that “providing binding authority for OBSI would improve investor protection” in Canada.

⁷ [Independent Evaluation of the Canadian OBSI Investment Mandate](#) (May 2016).

- The 2016 independent evaluation of OBSI stated that the problem with compensation is not that some consumers receive less than is recommended, but that OBSI's mandate allows this to happen in the first place.
- In 2017, the World Bank Group stated that consumers should have the right to use an ECB "that has powers to issue decisions on each case that are binding on the financial service provider (but not binding on the consumer)."⁸
- In January 2021, Ontario's [Capital Markets Modernization Task Force](#) recommended binding decisions as part of an efficient and cost-effective complaint-handling system.
- In December 2021, Prime Minister Trudeau issued a [Mandate Letter](#) to the Federal Minister of Finance to prioritize creating a single independent ombudsperson, with the power to impose binding arbitration, for consumer complaints involving banks.

Providing OBSI with binding decisions is also consistent with international best practice that is reflected, for example, in leading jurisdictions such as the UK and Australia, and in numerous World Bank reports.⁹

A Single Ombudsman Service – As noted above, there should be a single ombudsman service for both banking and investment services, and that single-service provider should be OBSI. Not only would this help reduce consumer confusion, but it would address a fundamental lack of fairness in the system.

As noted by the World Bank a decade ago, a structure where banks (but not consumers) can choose between competing ombudsman services presents:

Severe risks to independence and impartiality—because financial businesses may favour the ombudsman they consider likely to give businesses the best deal.

It overlooks the role of financial ombudsmen as an alternative to the courts and creates one-sided competition—because, unlike the financial businesses, the consumers are not given any choice of ombudsman.¹⁰

⁸ [Good Practices for Financial Consumer Protection](#) (World Bank, 2017).

⁹ [Resolving disputes between consumers and financial businesses: Fundamentals for a Financial Ombudsman Bank](#) (World Bank, 2012) and [Good Practices for Financial Consumer Protection](#) (World Bank, 2017).

¹⁰ [Resolving disputes between consumers and financial businesses: Fundamentals for a financial ombudsman](#) (World Bank, 2012), pages 38-39.

Adopting a single ombudsman service would also be consistent with the approach taken in many other jurisdictions, including the UK, Australia, and, most recently, South Africa.¹¹

4) Fees and Costs

OBSI has a transparent process for setting and allocating fees. The fees are allocated on a sectoral basis and based on a combination of the total number of cases opened in the previous year, the size of each member firm, and on the principle that no one sector should subsidize another.

In our view, this is a fair and sound approach. More important, this approach is designed to ensure that OBSI can operate with a high level of independence and shares several similarities with how some securities regulators set their fees. Essentially, by basing it on a blend of market participation (i.e., size) and activity fees, this approach ensures that OBSI can operate on a cost-recovery basis.

ADRBO Fees

In contrast to OBSI, ADRBO operates on a for-profit model. FAIR Canada and others have raised concerns with this model because it creates an apprehension of bias in favour of its banking members.

5) Resources

In terms of staff, OBSI appears to have well-qualified professionals with the needed skill sets to be effective in their role. The organization also provides regular training and developed a knowledge management system that encourages staff to share their learnings on each case.

While we generally believe OBSI has the needed resources to carry out its functions, we wish to emphasize two issues:

First, OBSI's 2020 Annual Report states that it experienced a significant increase in case volumes and, as a result, would draw additional funds needed for its operations in 2021 from its reserve fund. OBSI has since indicated that its 2022 budget reflects a fee increase of about 21% for participating firms. This increase is to provide for additional staff to deal with higher case volumes.¹²

We support this anticipated fee increase to ensure OBSI is not only able to keep up with increasing case volumes, but it can also continue to improve its ability to deliver services in a

¹¹ [South Africa Financial Ombud System Diagnostic](#), (World Bank, 2021), and [Review of the financial system external dispute resolution and complaints framework](#) (Commonwealth of Australia, 2017).

¹² <https://www.obsi.ca/en/news/firm-bulletin-2022-fees-for-participating-firms.aspx>.

timely and efficient manner.

Second, the lack of binding decisions means that OBSI staff spend more of their time trying to resolve complaints by negotiated settlements. This, not surprisingly, leads to longer resolution times and creates the risk of future backlogs.

The solution to the second problem lies outside of OBSI's control and can only be addressed by regulators giving OBSI binding decisions.

ADRBO Resources

The FCAC found that ADRBO's organizational structure presents obstacles to training and supervising investigators. It also concluded that ADRBO's use of independent contractors to help meet resourcing needs "makes it difficult to provide new hires with opportunities to job shadow or be mentored by experienced investigators."¹³

6) Accessibility

Raising Awareness of OBSI's Services – Based on OBSI's 2020 Consumer Survey, less than a quarter of complainants did not respond favourably when asked how easy it was to find out about OBSI's services. And less than 20% of complainants said they had some difficulty in finding out about OBSI.

In terms of awareness, 52% were made aware of OBSI through their bank, firm, or advisor (who are legally required to inform their clients about OBSI when a complaint is made). Another 25% found OBSI based on their own research. Only 2% found out about OBSI on social media.¹⁴

Given existing legal requirements for industry to disclose information about OBSI, we would have expected the 52% figure to be considerably higher. It suggests that the communications used by participating members are not effective in conveying information about OBSI. We believe regulators should review this matter and assess ways firms can better promote and raise awareness of OBSI's services with their clients.

In this regard, we note that complaint handling brochures developed by industry tend to include contact information for multiple different types of ECBs, making it difficult to identify which ECB a consumer should contact about investment or banking products.

Another strategy that might help improve awareness is the approach under the UK's [Consumer Awareness Rules](#), which allow firms to use the UK FOS's logo in branches and marketing literature.

¹³ [Industry Review: The Operations of External Complaints Bodies](#) (FCAC 2020), page 13.

¹⁴ [2020 OBSI Consumer Survey Results](#).

We would encourage OBSI to consider adopting a similar practice and explore other ways in which technology might allow for novel means to improve awareness.

Finally, we are aware that OBSI has been focusing on expanding its reach on social media, including making use of Google ads to attract more visitors to its website. We would recommend that it continue to make investments in this area and make further inroads where possible. Regulators and industry could also supplement OBSI's efforts through their own channels and social media platforms.

Accessibility of Consumer Information – OBSI's website provides useful and clear information about how to navigate its services. It also has the flexibility to be translated into more than 100 different languages spoken by Canadians. Moreover, it is accessible to individuals with vision and hearing-related disabilities by permitting users to zoom in up to 300% without the text spilling off the screen, or to navigate the website using a keyboard and speech recognition software.

Since the last independent assessment, OBSI has also increased its transparency and public accessibility through its plain language initiative, by circulating quarterly newsletters, posting regular case studies, and publishing helpful FAQs.

The new consumer portal introduced in late 2020 has likely made it easier for consumers to access the complaints process, while obtaining more information on how OBSI's investigation into their complaint is progressing.

OBSI's website also provides easy-to-read information and explains the complaints process in 10 simple steps, including what consumers can expect from OBSI and what OBSI will expect of them. It also includes a user-friendly form that can be completed online to begin the complaint process.

Lastly, we note that the 2020 Consumer Survey also shows a high level of consumer satisfaction in terms of the communications between OBSI staff and the consumer.

In terms of enhancing accessibility, OBSI may consider employing chat bots, where appropriate, to provide another way consumers can get quick responses to common questions.

Aiding Complainants – Complainants are often at a disadvantage when trying to resolve complaints against firms. For most, it is their first time navigating a complex, multi-tiered complaint system. Many may not even be aware that they can file a complaint against a firm or, if so, how to describe the nature of their complaint. In contrast, firms have a wealth of resources and institutional expertise at their disposal.

In our view, it is critical that the ombudsman be able to aid complainants to bridge this gap. Providing assistance to the consumer not only helps level the playing field, but it also makes the process more efficient. It is also recognized by the FCAC as a best practice.

In describing the importance of ECBs taking an “active” approach to investigating complaints, the FCAC states:

An active investigation involves asking the consumer questions during the intake process, **helping them articulate their complaint, and helping them understand their rights and responsibilities.** During active investigations, ECBs use their expertise in financial services to identify relevant documentation and request evidence from consumers and banks; they do not limit the investigation to what consumers and banks choose to submit. The practice of conducting active investigations is central to the purpose of ECBs, which is to promote confidence and trust in the financial system by providing consumers with access to a fair hearing.¹⁵ (Emphasis added.)

The FCAC’s review found that OBSI's practices, unlike those of ADRBO, meet the standard for active investigations and assisting complainants.

ADRBO Accessibility

In contrast to OBSI, ADRBO is not easily accessible. Its website does not use plain language, nor does it provide much in the way of consumer resources.

Even more worrisome is that some of the information on ADRBO’s website is potentially misleading. Specifically, the section “Make a Complaint” states, in bold:

ADRBO cannot entertain complaints until the internal bank complaint process has been exhausted. If you have yet to do so, please follow the process listed below:

This statement is inconsistent with the consumer’s rights. A consumer currently has the right to bring any complaint to ADRBO (or OBSI) after 90 calendar days have passed since bringing the complaint to the bank. This includes situations where the bank either fails to provide a final response or, if one is provided within 90 calendar days, the consumer remains unsatisfied.

ADRBO’s misleading statement is further exacerbated by suggesting the complainant must follow a series of steps before the complaint can be escalated to ADRBO or OBSI. For example, the information provided in respect of two banks, ADRBO states the consumer must complete three steps. These include contacting the branch, the office of the president (or the client response group), and ultimately the bank’s ombudsman.

Again, suggesting the consumer must take all three steps before the complaint can be taken to ADRBO or OBSI, or that the consumer must deal with the bank’s Ombudsman is incorrect.

¹⁵ [Industry Review: The Operations of External Complaints Bodies](#) (FCAC 2020), pages 14-15.

Finally, ADRBO's 2020 consumer feedback survey found that only 42% of respondents felt the information and assistance provided by ADRBO helped them understand the complaint process and was easy to follow.¹⁶

7) Systems and controls

The 2016 independent evaluation of OBSI found that it had “effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes.”¹⁷ Since then, it has disclosed that it made further improvements to its systems, including introducing a formal enterprise risk-management framework, launching a knowledge-management system, and improving its IT security and data governance capabilities.

ADRBO Systems and Controls

Unlike OBSI, there is a lack of public information available about ADRBO's systems and controls.

8) Core Methodologies

We are unable to comment on the adequacy of case decisions for OBSI and ADRBO because their decisions are not published.

This practice stands in contrast to the approach in other jurisdictions, such as the UK, where the FOS publishes its final decisions, and Australia's AFCA, which publishes about 4,900 case decisions per year.

We recommend that OBSI adopt a similar approach and look for ways to address any privacy issues (for example, by making decisions anonymous prior to publication). This would improve transparency, accountability, and promote consistency in decision-making.

9) Information Sharing

FAIR Canada's concerns about information sharing relate mainly to how systemic issues are reported, addressed, and publicly disclosed.

We believe that OBSI and ADRBO should be encouraged to identify and report on issues that may have wider implications or affect more consumers than just the complainant. They should also be

¹⁶ [ADRBO Annual Report 2020](#), page 6.

¹⁷ [Independent Evaluation of the Canadian OBSI Investment Mandate](#) (May 2016), page 8.

encouraged to refer systemic issues to their members to resolve when the issue falls short of concerns better addressed by regulators.

Currently, OBSI's [MOU](#) with the CSA includes provisions dealing with cooperation and information sharing, including a specific reference that OBSI is to inform the CSA of issues "that appear likely to have significant regulatory implications, including issues that appear to affect multiple clients of one or more firms." This MOU is supplemented by a formal [Protocol for Handling Systemic Issues](#), which reinforces information sharing about issues that have significant regulatory implications, or raise concerns about the registrant's fitness for registration.

Despite these mechanisms, the annual reports published by the CSA's Joint Regulators Committee (JRC) indicate that OBSI reported only four systemic issues since 2015. On the banking side, OBSI and ADRBO only report a total of "roughly one a year" to the FCAC.¹⁸

This stands in sharp contrast to financial services ombudsman in other jurisdictions. For example, the 2020-21 Annual Review of AFCA states:

This year, AFCA assessed 1,086 possible systemic issues and possible serious contraventions of the law, conducted 147 detailed investigations into possible systemic issues and 36 possible serious contraventions of the law.

These systemic issues and serious contravention work have also led to a range of enforcement actions taken by regulators and provided more than \$31 million in financial remediation to consumers and small businesses. Around 357,959 customers have been affected by these systemic issues.¹⁹

AFCA referred the 147 potential systemic issues to financial firms for response and action, and based on the responses received from these firms, it reported 55 "definite" systemic issues to regulators.²⁰

Intuitively, we would expect OBSI to report more issues under the Protocol or MOU. Our view is reinforced by the FCAC's findings that both OBSI and ADRBO were falling short of the FCAC's expectations for reporting systemic issues.²¹

We acknowledge that OBSI has been providing training and guidance to its staff on how to identify emerging issues. It also established an internal tracking and reporting system in respect of systemic issues. These are welcome developments and may, over time, lead to more identification and reporting of systemic issues.

¹⁸ [Industry Review: The Operations of External Complaints Bodies](#), page 27.

¹⁹ <https://www.afca.org.au/about-afca/annual-review/2020-21/systemic-issues>.

²⁰ AFCA's 2020-2021 Annual Review, available at <https://www.afca.org.au/about-afca/annual-review/2020-21/systemic-issues>, page 72.

²¹ [Industry Review: The Operations of External Complaints Bodies](#), page 27.

Part of the problem, however, may stem from how “systemic issue” is defined. In this respect, we prefer how the term is defined by the FCAC.²² Essentially, it includes issues with the potential to negatively affect a number of consumers beyond just the complainant. This approach is more open-ended and promotes sharing of potentially more information, which could then be assessed to evaluate whether the information points to a “definite” systemic issue or problem that ought to be resolved.

The CSA’s definition of systemic issues, as defined in the [Protocol for Handling Systemic Issues](#), is restricted to issues that “appear likely to have significant regulatory implications or to raise concerns about the registrant’s fitness for registration.” In our view, this definition may be too constraining.

We also note the protocol does not permit OBSI to report potentially systemic issues if the information is based only on one complaint. We believe the definition of “systemic issue” should be broadened to include issues raised by a single complainant. As stated in the 2016 independent assessment, it is not “unusual for systemic issues to be identified by one particularly knowledgeable and conscientious person.”²³

The protocol, or OBSI’s terms of reference, should also be revised to clarify OBSI’s role in dealing with “less significant” systemic issues. For example, we note that ADRBO’s terms of reference make it clear that ADRBO can raise systemic issues, or a pattern of complaints, with its member banks so that they can be addressed and resolved.²⁴ To our knowledge, unless a systemic issue rises to the level of seriousness contemplated by the CSA Protocol, there is no guidance about what OBSI could or should do.

Given the importance of addressing systemic issues to protect consumers, we strongly recommend that these processes be reviewed and assessed in detail. This would include ensuring that OBSI’s MOU and protocol are working as intended.

FAIR Canada also strongly recommends the CSA provide public information on the scope of any identified systemic issue, how many investors were likely affected, and what steps, if any, were taken in response. The added transparency would reassure the public that the information sharing between OBSI and the CSA is meaningful and working to protect consumers from potential harm.

²² Section 7 of the [Mandatory Reporting Guide for External Complaints Bodies](#) defines a systemic issue as a compliance issue that may:

- impact multiple consumers, or
- have market-wide implications

Generally, these issues are not isolated in nature and often stem from more widespread procedural or documentation issues.

²³ [Independent Evaluation of the Canadian OBSI Investment Mandate](#) (May 2016), page 21.

²⁴ AFCA is similarly able to refer possible systemic issues to its member firm.

ADRBO Information Sharing

Under its terms of reference, ADRBO must alert the FCAC if it determines a complaint raises a systemic issue. A systemic issue is broadly defined by the FCAC to include any issue that impacts multiple consumers or has market-wide implications. ADRBO is also required to raise systemic issues with a member bank so that the member can try to address and resolve the issue. ADRBO should also report to the FCAC on these issues.

10) Transparency and Accountability

OBSI consults publicly with respect to material changes to its operations and services. Apart from the consultation on this independent assessment of OBSI, the last significant consultation occurred in 2018, in connection with amendments to its terms of reference.

Since 2016, OBSI also conducts annual surveys of consumer and participating firm to help it continuously improve its services and be responsive to its stakeholders. The results of these surveys are published on OBSI's website and are easily accessible to the public.

Efforts to engage in public consultations is supplemented by the CIAC, which was created to advise OBSI's Board on issues and challenges faced by consumers. We are supportive of the CIAC's role; it provides an important internal resource for OBSI to better understand the consumer's perspective and the challenges they face when navigating the complaints process.

OBSI makes information available to the public about its constitution, governance, and the identity of its members; the terms of reference that govern its functions and activities; all sources of funding, including the fees charged to each of its members for its services and the method of calculating those fees; and the results of the most recent evaluation. All this information is easy to find on its website.

Regarding OBSI's annual reports, they are easy to understand with information that effectively conveys case statistics, as well as consumer and firm feedback. The reports also do a good job of outlining OBSI's strategic plans and the status of related initiatives. As noted above, these reports and other OBSI reporting would benefit from additional detail concerning systemic issues.

ADRBO Transparency

In the case of ADRBO, far less governance and accountability-related information is available on its website compared to OBSI. The information that is available is not always easy to find.

11) Comparison With Other Ombudsman Services

As noted previously, we believe that OBSI compares well with other international financial services ombudsmen. However, there are a few practices from other jurisdictions OBSI may wish to consider adopting.

One practice is to publish its decisions. This is the practice in the UK and Australia, which helps promote transparency and foster public confidence. Should OBSI adopt this practice, it would need to do so in a way that addresses any privacy concerns.

Another recommendation would be to develop rules that require the parties to provide documents to OBSI within required timelines. For example, in Australia, [AFCA's Complaint Resolution Scheme Rules](#) state:

If a party to a complaint without reasonable excuse fails to provide information, or to take any other step required by AFCA, within the AFCA specified timeframe, AFCA may take whatever steps it considers reasonable in the circumstances:

a) If the information requested by AFCA is of material importance, AFCA will proceed with the resolution of the complaint on the basis that an adverse inference will generally be drawn from that party's failure to comply with AFCA's requirement, unless special circumstances apply.

b) If the complainant fails to comply with an AFCA requirement, AFCA may refuse to continue considering the complaint.²⁵

We think such a rule could help reduce undue delays. Given the existing long timeframes to resolve complaints, adopting similar rules in Canada may speed up the process for starting investigations.

13) Progress

We wish to reiterate that, in our view, the single biggest impediment to OBSI's mission is that it lacks the ability to make binding recommendations. We are aware the members of the CSA are working on a proposal to make OBSI's recommendations in investment-related complaints binding. We encourage them to move forward as quickly as possible with a concrete proposal in 2022.

We strongly recommend that OBSI and ADRBO recommendations related to banking complaints will also be made binding. This issue was identified as a fundamental problem more than 10 years

²⁵ AFCA rules are available at <https://www.afca.org.au/about-afca/rules-and-guidelines/rules>.

ago, and action is needed now to maintain public confidence and trust in the complaint-handling system.

Conclusion

We thank you for the opportunity to provide our comments regarding your assessment of OBSI and ADRBO. We would be pleased to discuss our submissions with you if you have questions or require further explanation of our views on these matters. Please feel free to contact me at jp.bureaud@faircanada.ca.

Sincerely,



Jean-Paul Bureaud,
President, CEO and Executive Director