Comments to OBSI Board on Consultation on OBSI's Terms of Reference (ToR)
August 28, 2013

Introduction and Recommendation

An important role of the Consumer and Investor Advisory Council's (CIAC's) is to provide input to the Board as requested from a retail consumer perspective. We welcome the Board's invitation to comment on the proposed changes to the OBSI Terms of Reference ("ToR"). We believe that some of these changes are problematic from a consumer's point of view, and the fragmentation of the complaint handling for banking versus securities customer complaints is a regressive step.

Having reviewed the public commentary and noted its polarized nature, we also believe that the present exercise raises fundamental issues that are beyond OBSI's capacity to resolve effectively through this comment process, although they materially affect its relationship with consumers. The industry and investor comments alike highlight the institutional design flaws and ambiguities that confuse OBSI's members and disappoint complainants. As OBSI looks to take on much-needed responsibility for complaints from clients of provincially licensed Exempt Market Dealers (EMDs) and Portfolio Managers (PMs) as well as adapt to the new federal regime for handling banking complaints, **it is more important than ever that these matters be addressed on a comprehensive, multi-sector basis.**

Our overall recommendation is that only those changes to OBSI's ToR that are either purely housekeeping or are necessary to achieve FCAC approval should be made at this juncture. Others should be deferred for further discussion. OBSI should function as effectively as possible within its mandate and we would encourage OBSI to seek further clarification and consultation where its ability to do so may be at risk. In the best interests of consumers, aspects of the ToR changes that are properly within the purview of regulators and government policy makers should be dealt with as an important priority, but collectively by those responsible, not by OBSI alone.

By various public pronouncements as well as its name, consumers have been encouraged to regard OBSI as a typical Ombudservice that exists to serve the interests of individual consumers and small businesses who were unable to resolve disputes or complaints directly with a financial services provider (FSP) by providing an informed, fair and objective evaluation and recommendation for resolution. **OBSI should not, therefore, propose significant changes that erode its mandate in ways that are inconsistent with its role as an ombudsman. Nor should politicians and regulators undermine OBSI's role as an ombudsman when enacting consumer protection measures**.

There is a significant lack of guidance in the federal regulations and FCAC material as to what the phrase "systemic risk" encompasses, nor is there any clear direction as to what aspects of OBSI's mandate as an ombudservice would prompt the FCAC to reject its application for approval as an External Complaint Body (ECB) on this score. **We recommend therefore that, rather than anticipate the FCAC's response on this**

issue, that OBSI restricts its mandate only to the extent necessary to conform to a reasonable public policy interpretation of which "systemic" banking issues must be referred to the FCAC for investigation. The current proposal goes too far.

Overview

We will begin with some introductory observations to give context to our views on the individual ToR amendments.

1. OBSI History

The role, processes and reasonable consumer expectations for OBSI have all evolved haphazardly over time. To date there has been no specific focus on OBSI and its cross-sector role in an economically integrated but legally fragmented financial sector.

The federal McKay Report of 1996 made recommendations on the role and authority of an ombudservice in meeting the needs of consumers, but paid little attention to the circumstances of retail securities investors as opposed to retail banking customers. Financial services complaint handling, dispute resolution and ombudservices have not thus far been specifically addressed by or integrated into a long procession of securities regulatory reform initiatives such as the CSA's Uniform Securities Law project, the federal Wise Person's Committee "It's Time' report, the IDA's "Canada Steps Up report" or the report of the federal Expert Panel on Securities Regulation. By the same token, typical of federal financial system reform initiatives, the 1998 *Task Force on the Future of the Canadian Financial Sector* addressed the structure and role of a number financial sector ombudservices including the forerunner of OBSI in the context of the confusing proliferation of so-called financial "products", lack of transparency, readability of contracts and consumer redress, and even made reference to mutual funds and the TSX but did not acknowledge the existence of the securities regulatory regime nor its requirements and enforcement processes. While we have not attempted a full literature review here, we believe our impression that there has been inadequate specific focus on OBSI and its cross-sector role is borne out by the various federal and provincial reports and reform initiatives published over the years, including those connected with the recent *Securities Act Reference.*

We do not think it is OBSI's role or ours to try to fix or rationalize the overall regulatory system for Canada or to set cross-sector common standards for industry practices and civil recovery. Keeping in mind that uncertainty as to these matters has an effect on OBSI, in commenting on the ToR changes we have focused on OBSI's role and effectiveness as originally envisaged and as it has evolved.

2. Complaint Handling, Dispute Resolution and Ombudservices

OBSI was established as an Ombudservice, presided over by a designated banking and securities Ombudsman. It is an active member of various networks of Ombudsmen around the globe. **The use of the "Ombudsman" designation cannot be a mere public**

relations exercise. It connotes to consumers certain powers and responsibilities that go beyond the more limited mandate of a dispute resolution service, whether a court, regulatory tribunal or private arbitrator. The title "Ombudsman" implies there is a perceived imbalance of power and information between an individual and a public or private institution that requires special intervention. Just as we expect "financial advisers" to give consumers disinterested advice, consumers are entitled to expect that an office so titled will have the mandate and powers typical of an ombudsman.

For example, the Ontario Ombudsman, Andre Morin's, website states as follows:

> "Along with responding to more than 18,500 individual complaints a year, the office conducts systemic investigations using SORT, resulting in dramatic government reforms. The Ombudsman's recommendations to date have been overwhelmingly accepted by the government.
>
> Mr. Marin's pioneering work in conducting systemic administrative investigations has drawn the interest of the global ombudsman community. Through the "Sharpening Your Teeth" training course he developed in 2007, he has also shared his expertise in conducting systemic investigations with ombudsmen and administrative watchdogs around the world. From May 2007 to May 2009, he also served as president of the Forum of Canadian Ombudsman, representing public and private ombudsmen across the country. He also served as the North American Regional Vice-President of the International Ombudsman Institute from July 2006 to November 2012.

While we recognise that the focus and mandate of government and industry ombudsmen may differ, the expectations of consumers are unlikely to be correspondingly nuanced.

Dispute resolution providers are not necessarily ombudsmen, although an ombudsman can resolve disputes. From a process point of view there is a potentially a fundamental difference between the type of dispute that underlies a complaint, and therefore how it should be fairly handled. OBSI's mandate and the federal regulations at present treat all disputes in the same fashion.

In dealing with all unresolved consumer complaints that come in the door, OBSI as an institution wears more than one hat. These roles should not be conflated in its terms of reference or its oversight by the FCAC. For example the complaint of small depositor against a Canadian bank regarding an elderly parent's misplaced money order has a very different character from an ombudservice's perspective than, say, a dispute between a wealthy individual and a one-person Exempt Market Dealer over a long history of exempt purchases and sales, or a customer's objection to the fees charged for a bank's proprietary wrap account. Yet in public discussion all are currently treated the same, simply as unresolved complaints under OBSI's mandate.

The current comment process highlights that there are **confused expectations** for OBSI among industry, complainants, customers, government policy makers, regulators and

OBSI itself. Customer complaints in the banking and securities sectors are not homogeneous. Some complaints tend to be more suited to the traditional "ombudsman" type of process that cuts through bureaucratic red tape and brings parties to a solution, whereas some disputes are less bureaucratic, less unequal and more adversarial, involving significant financial loss, conflicts of interest, claims of fraud or negligence, disputed facts, unclear standards, offended "big producers" and complex causation. Others may involve a common firm or industry practice that affects many complainants, for example the suitability of vehicles that portray return of capital as income or return on capital.

Ideally OBSI should have processes that are tailored to all these situations.

Comments on Specific ToR Amendments

Section 1: "Ombudsman" vs. "OBSI"

We support the amendments

Section 2(a): Definition of "Participating Firm"

The OBSI proposals to sever segregated funds from its mandate and the public commentary relating to the functional equivalence of mutual funds and segregated funds point to a **need for further coordinated discussion among insurance, banking and securities regulators around complaints** and disputes related to regarding segregated funds, or to be more accurate, "individual variable insurance contracts that invest in segregated finds".

The solvency of most insurers is federally supervised by the Office of the Superintendent of Financial Institutions (OSFI) while consumer and distribution issues are provincially regulated. As contracts of life insurance, IVICs are not subject to any of the extensive CSA generated custodianship, risk, distribution and conflict of interest rules that apply to mutual funds. Unlike mutual funds, IVICs are not subject to claims of creditors or probate and can offer principal guarantees. They are subject to a needs analysis by licensed life agents rather than "suitability" determinations as defined by securities legislations. Yet both investments expose the purchaser's capital to debt and equity markets.

The harmonisation efforts of securities and insurance regulators through the Joint Forum have resulted in disclosure material which, given the findings of many years of financial literacy research, can be expected to make these vehicles indistinguishable to most investors. To the average investor the mutual fund prospectus looks and reads identically to the segregated fund's contract of life insurance. Both now use an identical "Fund Facts" document at point of sale. The insurers' website disclosure around segregated funds is couched in the language of investment. In many cases the customer's human contact is a dually licensed salesperson, or an employee of a conglomerate that markets both investments.

In our view, customers who respond to these messages deserve a single provider of financial consumer ombudservices and dispute resolution. Failing that sensible structure, at least a highly co-coordinated effort between OBSI and the Ombudservice for Life and Health Insurance (OLHI). Wherever contracts of life insurance have taken on the economic nature of typical securities investment vehicles, the owners of both should be able to access a harmonised ombudservice to review and resolve complaints. From the investors' perspective the ombudservice should be portfolio based, in line with consumers' reasonable expectations, not based on subtle legal and regulatory distinctions that consumers do not appreciate. Particularly on the securities side, it is trite to note the complexity of issues that fuel disputes as compared to the general financial literacy level of retail investors. To add further complexity to disputes or complaints through arcane distinctions does not serve the interests of consumers. The OBSI ToR should not further entrench this situation if not required for FCAC approval.

The Final Report of the most recent Five Year Review of the OSC, chaired by Purdy Crawford and conducted in 2003, stated:

> For example, mutual funds and segregated funds are functionally equivalent from the viewpoint of the investor. Each is a managed pool of funds that is invested in a variety of instruments including debt instruments and equity. Mutual fund units or shares are securities and are therefore governed by securities regulation. They are subject to very detailed rules regarding: how they are structured and organized; disclosure with respect to the product, which must be pre- cleared by securities regulators and given to purchasers; conflicts of interest for portfolio managers of mutual funds; and fees which must be disclosed to purchasers. Segregated funds, on the other hand, are structured as contracts of insurance and therefore are not considered "securities" for purposes of the Act. They are instead governed by the requirements of the Insurance Act and are not subject to the same type of regulation with respect to disclosure, conflict of interest, sales practices and fees as are mutual funds. A retail investor may buy an interest in both a mutual fund and a segregated fund and, despite the similarity of the products, receive different types of protection.
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> The regulation of portfolio managers is another example. Portfolio managers buy and sell securities for their clients on a discretionary basis. Their clients are pension funds, estates, mutual funds, segregated funds and private clients. While their function is the same for all types of clients, the standards and requirements imposed on portfolio managers are significantly different, depending on where the portfolio manager works. Portfolio managers licensed by the securities commissions are subject to the highest standards of education and experience of any category of registration under securities legislation. On the other hand, trust company employees making investment decisions for estates and pension administrators investing pension funds are not subject to any proficiency requirements under federal or provincial financial institution or pension legislation. The rules designed to protect clients from conflicts of interest in the portfolio manager's investment decision-making, and those governing the conduct of the portfolio manager in the market (such as prohibitions on "front-running" client orders) differ substantially depending upon whether the portfolio manager is registered under securities legislation or is governed by trust or pension legislation.

In the intervening 10 years, little has been accomplished in financial sector regulation to respond to this, although, despite these differences, the incidence of consumer abuse or losses over time does not seem to have been materially different for mutual funds and segregated funds. However, confusion and unnecessary process or definitional complexity always has a direct negative impact on consumers. As OBSI faces adding portfolio managers and exempt market dealers regulated individually by different

securities commissions rather than by national SROs as well as equivalent activities in some but not all banks, the potential for confusion that will ultimately devolve on consumers is significant. Regulators and OBSI must act together to ensure that consumers feel the full benefits of a much-needed single complaints body for these small, non-SRO intermediaries.

The potential for investor confusion is highlighted in the April 2, 2013 Report prepared by the Joint Forum Product Disclosure and Regulation Committee, *Financial Product Development Standards And Practices*, which adverts to both the consumer-perceived similarity between mutual finds and segregated funds and their underlying technical differences at pp. 9,10 and 11 of the CLHIA report commissioned for the Report.

Neither the Joint Forum nor the Five Year Review Committee links its respective surveys of consumer product development and the state of state of securities regulation to dispute resolution.

In fact the trend since 2003 has been discouraging. In August 2007 the Joint Forum published "The Financial Services OmbudsNetwork – A Framework for Collaboration" http://www.jointforum.ca/en/init/fson_framework/august_10_2007_a_framework_for_collaboration-en.pdf which established a Dispute Resolution Committee of all sectors represented in the FSON would exercise principled oversight of financial sector ombudservices.

Statements made in the framework included the following, and many others with which we would concur:

> Regulators consider effective complaint resolution through independent OmbudServices such as CLHIA, GIO and OBSI, collaborating as the FSON, to be an important component of a well functioning consumer protection policy framework. As impartial services, they offer an alternative to the legal system in a confidential informal setting that is free to the consumer.
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> In carrying out their overall mandate of consumer protection it is the goal of regulators to articulate the public interest objectives of complaint resolution, to define the criteria for their achievement, and to assess from time to time whether the public interest is being achieved by third party resolution systems.
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> It is important to ensure that the FSON dispute resolution systems are both (a) comprehensive (i.e., all consumers from firms in a sector should have access to the system), and (b) consistent (i.e., consumers of similar financial products should receive like treatment and the services of dispute resolution systems should be equivalent in quality and meet minimum standards).

Other than serving as guidance for OBSI in developing the 2010 amendments to its Terms of Reference, the Framework and its principles appear to be defunct. The Dispute Resolution Committee of the Joint Forum which was intended to oversee adherence of all the ombudservices to the Framework principles no longer exists. The FSON has ceased to exist except as a portal streaming visitors to the three sector specific ombudservices.

The process for segregated fund complaints is not an issue that can or should be resolved as part of OBSI's overhaul of its Terms of Reference to conform to FCAC approval criteria. It is not a housekeeping change. While this clarification may be required in respect of banking complaints, it is not otherwise required to satisfy FCAC. The *status quo*, being more progressive and responsive to a consumer's sense of economic realities than what is proposed, should be maintained. That said, the larger issues such as this should not be neglected, but should be the subject to a comprehensive multi-sector, multi-stakeholder expert review and not left subject to the vagaries of a brief, limited public comment process.

It is worth noting that Australia has consolidated a number of sector-specific financial services ombudsmen into two bodies –the Financial Ombudsman Service which handles insurance, banking and securities complaints and the Credit Ombudsman Service that deals exclusively with mortgage and other non-bank lenders. Both are required to identify and rectify systemic issues, and have fairness in their mandate. Their decisions are binding on the firm.

Section 6: Code of Conduct and privacy policies

We support the amendments.

Section 2(a) and former Section 11: Systemic issues

The impetus for the present ToR consultation is the need to adapt OBSI's Terms of Reference to qualify as an approved External Complaints Body (ECB) under the new federal *Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations* ("regulations) by a September 2, 2013 deadline. OBSI has no choice but to seek this approval if it is to continue to handle bank customer complaints.

The ToR amendments respond to s. 7 and the FCAC guidance by deleting s. 11 and the definition of "systemic issue" in order to meet FCAC approval criteria. Apparently with the informal encouragement of securities regulators the amendments attempt to harmonise banking and securities complaint processes in this regard, in effect applying the federal standards to all complaints.

The Backgrounder to the regulations states that in the interests of effectiveness:

- .External complaints bodies would concentrate on their role in resolving individual complaints.
- External complaints bodies would notify the FCAC of systemic issues leaving the role of investigation to the FCAC.
- The FCAC would supervise the compliance of external complaints bodies with the proposed regulations.

The FCAC *Application Guide for External Complaint Bodi*es directs compliance with s. 7 of the regulations sates that (emphasis added):

The ECB must also do the following in relation to its engagement with FCAC as required by the regulations:

- report regularly to FCAC
- report any systemic issues to the Commissioner without delay
- undertake an evaluation by a third party of the discharge of its functions and performance , in accordance with terms of reference established in consultation with the Commissioner every five years, and make the findings available to the public
- monitor and assess the board of directors' and/or senior management's commitment to and delivery of regulatory requirements, including the complaints process.

There is no other explanation of "systemic issues" even though it is a key jurisdictional constraint. A reasonable interpretation of "systemic issue" in the context of an ombudservice would be an issue that does not directly affect any individual complainant in the resolution of their complaint**. It is not clear therefore that the FCAC would be entitled to refuse approval of OBSI as an ECB so long as OBSI's terms of reference comply with s. 7 of the regulations, i.e. include a provision for referring some "systemic issues" to the FCAC and undertake to deal with banking complaints in manner that only affects the parties. This would not seem to preclude OBSI dealing with an issue that affected multiple parties on a collective basis.**

When the possible implications of this compliance are assessed against the distinct roles of a financial sector ombudsman and a dispute resolution service, it appears there may be conflicts or at least ambiguities in OBSI's responsibilities to consumers as an ombudsman for banking and securities complaints and the role of an ECB as contemplated by the federal regulations. We recommend that more attention be paid to understanding the roles OBSI will play for banking and securities complaints, especially given its proposed new responsibilities for Exempt Market Dealer and Portfolio Managers under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations.*

This raises three issues which require a wider discussion:

1. If not necessary to comply with the regulations to obtain FCAC approval, is it in the interests of consumers for OBSI to make the conforming changes on its own initiative for securities complaints?
2. Is wholesale deletion of the current provision regarding systemic issues clearly required by the federal regulations?
3. If so, can we continue to say there is an Ombudservice in the banking sector?

Restricting mandate for securities complaints where not required for FCAC approval

Most ombudsmen, financial or otherwise, are given responsibility to provide redress for systemic issues. The federal regulations themselves and the FCAC guidance are not helpful on this key issue. The regulations refer to "approved external complaints bodies"

only. Neither the regulations nor the FCAC approval criteria make reference to the role of a financial sector ombudservice, or address the fact that an ECB may also be ombudservice.

OBSI's current mandate regarding systemic issues, which it proposes to delete, is expressed as follows:

> "Systemic Issue" means a matter such as undisclosed fees or charges, misleading communications, administrative errors or product flaws discovered in the course of considering a Complaint against a Participating Firm which may have caused loss, damage or harm to one or more other Customers of the Participating Firm in a similar fashion to that experienced by the original Complainant;
>
> 11. The Ombudsman may identify potential Systemic Issues in the course of dealing with individual complaints, and shall investigate them in the following manner:
> (a) if a potential Systemic Issue is identified, OBSI will request the Participating Firm to investigate and report on its investigation to the Ombudsman;
> (b) if a Systemic Issue is confirmed by the Participating Firm, the Ombudsman will:
> (i) offer to work with the Participating Firm to find a fair resolution; and
> (ii) recommend in appropriate circumstances the Participating Firm compensate all affected individuals or small businesses and take steps to prevent a future occurrence of the issue;
> (c) if a Systemic Issue is not found by the Participating Firm and that finding is disputed by the Ombudsman, or a recommendation under section 11 (b)(ii) is rejected:
> (i) the Ombudsman will refer the matter to the Participating Firm's regulator; and
> (ii) OBSI shall report on a "no-names" basis on the matter in its Annual Review;
> (d) a failure by the Participating Firm to co-operate in the investigation of a potential Systemic Issue shall be reported to the Participating Firm's regulator; and
> (e) matters which in the judgement of the Ombudsman involve potential regulatory or criminal breaches will, in appropriate circumstances, be referred to the appropriate regulatory or law enforcement agency.

There was considerable public commentary on the subject, but there does not appear to be a common understanding of what the phrase "systemic issues" used in the federal regulations encompasses. There is little federal analysis of the effect and extent of the carve-out on OBSI in particular or on ECBs in general. We have yet to see a clear rationale for removing it for banking complaints while purporting to maintain an ombudservice for financial consumers**. From a consumer perspective, this is a fundamental flaw in the federal regime and in OBSI's response in the ToR to the FCAC approval criteria.** If a conforming change is made to the OBSI ToR for complaints against securities firms, there is no concomitant regime for responding to OBSI referrals. It is another matter that calls for discussion beyond the limits of OBSI and the FCAC ECB approval process.

That said, we recognise that federal banking supervisors and economic policy makers could find the term "systemic issue" ambiguous and potentially over-inclusive,

encompassing financial system issues that are only peripherally related to a customer complaint**. We do not dispute that issues OBSI identifies which are "systemic" in the sense they are properly the concern of financial sector regulators or government officials should be referred outside of OBSI**. It does not follow that as an ombudsman OBSI should necessarily concern itself with issues outside a specific complaint that do not originate from a federally regulated bank. The federal rules regarding dispute resolution aim to provide for this. At present securities regulators have not attached conditions in designating OBSI as solely responsible for securities complaints.

In our view, OBSI's terms of reference can be adjusted to meet the FCAC requirements by replacing the term "systemic issues" with "collective issues" for all complaints, referring specifically to s. 7 and making any conforming drafting changes. We suggest that Canadian consumers would not be disadvantaged if the phrase were replaced by "broad-based", 'collective" or "common" issues or a similar term that implies there are multiple complaining consumers similarly affected by a common unfair practice.

What do the federal regulations actually require for FCAC approval of an ECB?

It remains an open question if under this rubric such broad-based consumer specific matters could still be dealt with by OBSI on the banking side as well rather than as a referral to the FCAC. **At present there is no formal national means to deal with systemic issues raised by securities complaints, so it is premature to make conforming changes that would erode OBSI's role as an ombudsman.**

We question whether the phrase "systemic issues" under the federal regime must or should be interpreted to prohibit OBSI from dealing with issues that are common to a number of complainants on a collective basis even as an approved ECB. **It is not in the interests of consumers that s. 7 of the regulations be interpreted to require that a group of individuals' complaints' must be transferred from OBSI to the FCAC, given the Commissioner cannot provide equivalent redress to consumers. The FCAC has no powers to make decisions or order restitution to the affected consumers.**

The relevant portions of s. 7 of the *Approved External Complaints Bodies (Banks and Authorized Foreign Banks) Regulations* read:

> 7. Every body corporate that is approved by the Minister as an external complaints body must, as conditions of maintaining that approval,
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> ….
>
> (i) advise the Commissioner in writing and without delay if it determines that a complaint raises a systemic issue;
>
> …
>
> (k) deal with complaints in a manner that affects only the parties to them;

Under the federal rules, "complaint" is defined tautologically as a complaint by a bank customer. They key concept of what is meant by "systemic issues" raised by a

"complaint" is not defined in the regulations, nor explained in backgrounders or the FCAC approval guidance

The Regulatory Impact Analysis Statement published in connection with the regulations makes no reference to OBSI's role as an Ombudservice, or to the need for an ombudservice in the banking sector. Typical statements are:

> An external complaints body provides a service involving an impartial review of a customer's complaint, and it is not a regulator, nor an advocate. For customers, an effective and efficient external complaints body can provide a timelier and no-cost alternative to the court system. However, customers and banks continue to have the right to bring their dispute to the courts
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> There had been one external complaints body for the banking sector for many years. With the advent of a second external complaints body for the banking sector, stakeholders were concerned that, in a multiple-provider market, there is a need for criteria to be met by all external complaints bodies for the banking sector.
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> …The purpose of external complaints bodies is to deal with complaints made by customers of banks. The amendments also provided authority to set out, in regulations, clear criteria to govern the approval of an external complaints body.

However, it is not clear that the regulations prohibit consideration of all matters that would be considered "systemic" under OBSI's current ToR.

Do the federal regulations permit an ECB to be an ombudservice?

OBSI's interpretation of the FCAC approval criteria as calling for the wholesale elimination of so-called "systemic issues" from OBSI's mandate for both securities and banking complaints, the lack of any specific reference to an ombudservice under the federal ECB regime and the omission of a duty of fairness from the federal list of approved ECB features raises a real question of whether these changes could erode OBSI's mandate to such an extent that there will cease to be any true Ombudservice for consumers in the banking sector. The mere possibility that the effect of the federal complaint regime is to deny consumers the benefit of an Ombudsman for bank disputes, should be enough to preclude any equivalent changes to its mandate in other sectors without further discussion.

If it is the intention of regulators that OBSI cease to be an ombudservice in the generally recognized sense of the word as a condition of approval to deal with consumer complaints, then its title becomes misleading to consumers and should be changed.

Section 4: Delegation of powers and duties

We support the amendment

Section 6: Code of Conduct and privacy policies

We support the amendment

Section 7: Threats to participating firm staff or property

We support the amendment

Section 8: Fairness

Neither the regulations nor the FCAC approval criteria include "fairness" as a criterion for resolving disputes. Yet fairness is the essence of OBSI's role and of Ombudsmen generally.

The regulations state their purpose as:

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

We support OBSI's fairness mandate being articulated in the ToR. More consideration should be given to the significance of OBSI's overriding mandate as an Ombudservice to apply fairness in resolving disputes and complaints, as well as process followed on a file, in particular since "fairness" is not listed as one of the published ECB decision-making criteria that meet with FCAC approval

Section 9: Firm responsibility for actions of their representatives

This should not be treated as a question of employer or principal vicarious liability in the legal sense. The Ombudsman is not a court. Where fairness suggests that a firm should compensate a customer for losses caused by an employee, whether in the customer's account or off-book (for example an adviser recommending a high risk loan to a friend's failing business which entails redemption of mutual funds in a firm account) it should be within the scope of the authority of an Ombudsman to recommend it.

The Consultation Paper refers to the practice of firms extracting OBSI-recommended compensation from the responsible employee. This is not conducive to a speedy resolution of the complaint and thus not in the interests of consumers. The responsible representative has a significant incentive to dismiss the complaint and obstruct the investigation process. While it is a firm's right to discipline its employee, this should not take a form that disadvantages the complainants. We are also concerned that this might be viewed as a "systemic issue" as it goes beyond the individual case to industry wide practices of recouping any compensation paid to investors from the responsible employee and declining firm responsibility for all customers' off-book trades. If an individual case raises an issue that might be described as "systemic", would OBSI refuse to make a finding or would a firm refuse to comply on the basis that it is now outside of OBSI's mandate? No guidance is provided by the FCAC, nor would any exist on the securities side if the deletion were made across the board. This relates to our comment above

regarding the need for a clearly articulated uniform concept of the "systemic issues" that OBSI will not pursue.

Section 9(c): 180-day guideline for escalating complaints

We support the amendment.

Section 9(e) and 10(b): Other proceedings related to the subject of a complaint

We support the amendment. We note that the ability of tolling agreements to stop limitation clocks running is not free from doubt. The minimal filing of a Notice of Action in Ontario, or other provincial equivalent, solely to preserve a limitation period should continue to be permitted.

Section 11: Self-imposed limitation period

OBSI should retain the current 6 year limitation period which runs from the time a consumer knew or ought to have known that there was a problem. Until relatively recently the limitation period for civil claims in most provinces was 6 years from the discovery of the harm. **The complexity and opacity of claims regarding long-term investment accounts such as RRSPs and investments funded by debt means that a 2 year limitation period that runs from discovery can be highly unfavourable to consumers. With fairness rather than an adjudication mandate, the question of timeliness in bringing a complaint forward should be a matter of fairness between the parties rather than a strict deadline.**

Section 12: OBSI/Ombudsman has a material interest in a complaint

We support the amendment

Section 14(a): Compensation limit

This is more of an issue for securities complaints that may relate to significant losses. It is the Council's view that OBSI should not undertake a review of the maximum amount of compensation OBSI can recommend. It is hard to see why compensation caps are warranted at all if both parties are in agreement that they want their dispute to be settled by a third party on fairness principles. However, the higher the sum that is the subject matter of the complaint, the higher the stakes and the likelihood the parties will want a rigorous adjudication based on legal/regulatory principles and a strict case precedent type procedure they can accept as justifying an unfavourable or disappointing result for them.

Thus the question of compensation limits is intertwined with process by which OBSI determines complaints that involve significant disputes of fact or principle. Court proceedings are always available to an aggrieved investor and may be preferable to achieve finality where sums lost are substantial and evidentiary issues of fact, credibility, and causation are serious dispute. The "name and shame" experience shows that a fairness based process leading to a decision in legalistic terms (as the published decisions were) may invite

allegations of advocacy and bias, undermining the credibility of the assessment process. OBSI must not only be fair but must be seen to be fair by all parties. Again it does not assist consumers for OBSI to be chronically vulnerable to fundamental criticisms.

It should be noted that, among other concerned jurists, the Chief Justice of the Supreme Court of Canada has observed that the high cost of civil litigation has restricted access to justice for middle class individuals. The very elements of the litigation process that ensures neutrality, fairness, finality and enforcement can also be lengthy, complex and expensive, especially for an individual who has sustained losses confronting a deep pocket financial firm. The plaintiff always has the burden of moving the matter forward with motions, discovery and so on. The plaintiff will bear the other side's legal costs and their own with no recovery if they lose. Litigation counsel are expensive and do not typically act on contingency as with personal injury cases. Even a fairly straightforward civil claim against a broker can run up counsel and expert fees of $40,000 fairly quickly, sums which must be paid by a client who may have lost most of their savings. For claims that could realistically settle at under $300,000, litigation is not feasible. Investors need to be able to rely on OBSI as an alternative. In fact it is not clear that any limits should be prescribed for losses sustained by an individual.

Section 18(c): Tolling agreement

We support amendment subject to our concern that such tolling agreement may not be enforceable in the face of provincial limitations statutes.

Section 19: SRO complaint-handling rules

We support this amendment.

Section 19(d): Substantive written responses

We support this amendment

Section 20(c): Escalation process

The subject matter of OBSI complaints does not necessarily lend itself to a name and shame remedy. The basic facts under review in many banking matters involving a few large players are readily understandable by most readers. The public would be able to attribute fault if OBSI recommendations for systemic reform or individual redress are rejected. Contrast this with an OBSI review allocating responsibility for losses in a leveraged portfolio over a particular period on the basis of KYC documentation, risk measures, regulatory requirements, industry norms and larger economic events. Publication of a refusal to pay with the response of both sides may be not be comprehensible enough to the average consumer to confer shame. The remedy becomes ineffective for compensating the individual consumer.

The real question here is whether there should be binding decisions. The name and shame remedy is evidently ineffective in many cases, so OBSI and regulators mandating use of

OBSI's services should consider a more effective approach for consumers' complaints. Once it is used broadly and the named entities have an opportunity to respond in the press, there is no more shame. **Name and shame can be effective where the potential damage to reputation exceeds the dollar amount of the compensation proposed, which would generally be the case for large banks and dealers but not so much for smaller dealers, Exempt Market Dealers and Portfolio Managers that will soon be members of OBSI. However, short of a more effective mediation process, there seems to be no alternative to name and shame until OBSI decisions are binding.** At a minimum, where facts underlying an OBSI compensation recommendation suggest a securities firm has failed to comply with currently prescribed duties to clients, the prospect of referral of the matter the responsible regulator for investigation might also act as an incentive to compensate.

Regulators should consider making OBSI decisions binding, although this would require major reconsideration of OBSI's role. We can only propose a few ideas here. It would be necessary to build in some element of procedural fairness in addition to the present discretionary fairness in order to promote greater support and acceptance of a binding result. For some complaints, a non-binding process might be adequate. Parties could choose, or be streamed into, a binding "arbitration" versus "non-binding mediation" route depending on the nature of the dispute or complaint. OBSI would classify files coming in as customer complaints versus potentially justiciable disputes with serious financial losses and/or entrenched positions as to facts, causation, and fault. Fairness or perceived fairness can be strained in such cases since the investigator is also the adjudicator. These cases could follow a more structured process where the information and interpretation gathered by staff are presented to an independent decision- maker simultaneously by both sides. The results would be binding.

Section 20(d): Disclosure to third parties

We support this amendment

Sections 31-37

We suggest that the CIAC be specifically identified as an element of OBSI governance, establishing it as permanent body.