

# Appendix C

## SUMMARY OF CHANGES

### Ombudsman for Banking Services and Investments Terms of Reference Renewal Project Public Consultation

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The current TORs are organized by “Sections” and the updated TORs are organized by “Parts.” The updated TORs were significantly restructured, so a blackline comparison document is not helpful in understanding the changes. Instead, below we describe the changes made by reference to the Sections of the current TORs and highlight key changes and, where relevant, set out the Part in the updated TORs to which a Section was relocated.

#### **Section 1 - Purpose**

The current Section dealing with Purpose describes the scope of the TORs rather than the purpose of OBSI. It provides a description of the TORs, a statement that the Ombudsman is the decision maker who heads OBSI and then provides some interpretive language related to the delegation of duties.

We have updated this Section to set out OBSI’s purpose as well as to provide a statement about the scope of the TORs. We used the language of OBSI’s Mission Statement as a starting point for the description of OBSI’s purpose. The description of scope in the updated TORs is similar to the purpose section of the current TORs.

We relocated the description of the Ombudsman and delegation of powers and duties to Part 2 – Definitions.

#### **Section 2 – Definitions**

We modified this Section to improve existing definitions. We also separated the standard interpretation clauses and relocated them to Part 2.2 of the updated TORs.

##### *Definitions*

A number of definitions have been amended for clarity. For example:

The definition of Representative was modified to add additional clarity to the fact that an expression of dissatisfaction with a representative’s conduct will constitute a complaint relating to the representative’s firm.

The definition of Complaint was amended to reflect the fact that OBSI may identify and investigate issues which complainants might not have raised or properly articulated. A firm always has the opportunity to respond to any issue raised through the investigation process. OBSI may extend time for a firm to

address an issue through its internal process (Part 5.4). OBSI may also provide time for firm to investigate new information raised through the reconsideration process (Part 14.6).

The definition of Customer was modified to clearly capture circumstances of complaints relating to off book transactions.

These clarifications are consistent with OBSI's longstanding interpretation and practice, developed in accordance with its duty under the current and updated TORs to perform its mandate in a manner that is fair and consistent with its Fairness Statement.

#### *Interpretive clauses*

We added a new interpretive clause in Part 2.2.1 to clarify that references to OBSI include OBSI management or staff exercising the powers and performing the duties of the Ombudsman delegated to them. This statement was previously located in the Section 1 - Purpose.

We also added a standard interpretive clause dealing with conflicts between the TORs and any statute, regulation or by-law.

#### **Section 3 – Principal powers and duties**

Section 3 lists OBSI's duties, but does not reflect the logical sequence in which the duties are executed. The duties in the updated TORs have been rearranged, and set out in Part 4, in logical sequence, namely: publicizing the availability of OBSI's services; receiving complaints; assisting with articulation of complaints (without advocating); investigation; and resolution.

We also refined the language of this part to reconcile OBSI's authority to assist complainants in articulating their complaint to a firm, with the proviso that OBSI will not act as an advocate. The new provision is in Part 4.1 (e) of the updated TORs.

Unlike the rest of Section 3, 3(h) and (i) are injunctive, prohibiting OBSI from: providing general information about firms; and providing legal, accounting and financial advice respectively. Since OBSI does provide general information about firms, primarily to redirect premature complainants who must bring complaints to firms first, we excluded the substance of clause 3(h) from the updated TORs. Section 3(i) is a limitation on, rather than one of, OBSI's powers or duties so its content was moved to Part 8 – Execution of OBSI's mandate, specifically Part 8.2. As discussed further below, Part 8 of the updated TORs sets out principles on how OBSI should execute its mandate and it draws from Sections 3(i), 17 and 25 of the current TORs.

#### **Section 4 – Delegation of duties**

In the updated TORs, this section is incorporated into Part 2.2.1, Delegation by Ombudsman.

#### **Sections 5 and 6 – Duties regarding privacy and compliance**

We consolidated these Sections into Part 4 - Ombudsman's Powers and Duties.

We also enhanced the wording to highlight the Ombudsman's responsibility to oversee staff compliance and the safeguarding of privacy. We then placed these duties immediately before Part 4.4 which authorizes the Ombudsman to delegate, signaling that delegation is subject to oversight.

## **Section 7 – Reporting threats**

We relocated this Section to Part 16.9 of the updated TORs which addresses confidentiality and disclosure.

We also clarified that it is not a confidentiality breach for OBSI or firms to report threats to law enforcement agencies or other persons as may be appropriate in the circumstances.

In Part 12 – Firm’s Obligation During OBSI Investigations, we added new language, in Part 12.5, setting out a reciprocal obligation for the firms to report certain threats to OBSI which mirror OBSI’s obligation in Part 16.9. It is rare that firms receive threats that could impact OBSI but when this happens, in practice, firms already advise OBSI.

## **Section 8 – OBSI’s mandate (fairness)**

This Section’s general directive to act fairly is reflected in Part 1.1 of the updated TORs, dealing with OBSI’s purpose, which states that OBSI will work to find a fair outcome. We also retained a directive that OBSI must use a fair process that accords with its Fairness Statement in Part 4.1(a).

## **Section 9 – OBSI’s mandate (preconditions for OBSI’s involvement)**

The focus of this crucial Section of the TORs is to set out preconditions required for OBSI’s involvement in a complaint – essentially defining OBSI’s mandate. The current version of this Section, however, suffers from structural problems, described below, rendering it difficult to follow. Section 9 was thus restructured and, is located in Part 5 - Complaints to OBSI, in the updated TORs. Part 5.1 enumerates the preconditions for OBSI’s involvement.

In the current version of the TORs, the opening sentence of Section 9, which authorizes OBSI to deal with complaints about the actions or inactions of a firm’s representative is superfluous. The ability to act as an independent and impartial arbiter of disputes is already established under powers and duties in Part 4 of the updated TORs. The definition of Representative was modified, in Part 2.1 - Definitions and Interpretations, making it clearer that an expression of dissatisfaction with a representative’s conduct will constitute a complaint relating to the representative’s firm. This fact does not, therefore, need be repeated in Part 5.1.

In the current TORs, exceptions to the preconditions were immediately juxtaposed with their respective preconditions, instead of setting out each exception afterward in an orderly fashion. For clarity, these provisions have been restructured in the updated TORs so the preconditions are listed together and any exceptions or other considerations are listed subsequently.

Section 9 (e) clearly addresses how OBSI deals with complaints from people who have commenced legal proceedings regarding the same subject matter as their complaint. It is silent, however, on how OBSI should deal with a complaint from a member of a class in a class action where that person was not a named representative. Part 5.8 of the updated TORs addresses the effect of class proceedings on a complaint and was drafted on the basis of OBSI’s current interpretation and practices.

Also consolidated into Part 5 – Complaints to OBSI, are the substance of current TORs Section 11 which deals with OBSI’s 6-year time limitation period (located in Part 5.1(e) of the updated TORs); joint investigations with other ombudservices; and clarifications regarding how OBSI will deal with certain time limits, for example the factors OBSI will consider when determining whether to extend the 180-day period that a complainant has to bring their complaint to OBSI after receiving a written offer or rejection

from the firm, and clarifying that a complainant does not have to wait for the 90-day period to elapse if they received an offer to settle or rejection from a firm.

### **Section 10 – Exclusions from OBSI’s mandate**

This Section was rewritten to make it easier to navigate and understand with more specific language and additional headings and, in the updated TORs, was relocated to Part 6 – Exclusions from OBSI’s mandate. Part 6 also includes elements from other Sections including Section 17 which confirms that OBSI determines whether a complaint falls within its mandate.

If a firm has an unresolved legal action against a complainant, OBSI may investigate a complaint on issues raised in the lawsuit unless OBSI determines that the court is the more appropriate forum. Part 6(2) of the updated TORs indicates that OBSI will not, however, adjudicate matters that have already been decided by a binding proceeding, as is currently set out in Section 10(b).

### **Section 11 – Limitation Period**

The substance of this Section was moved to Part 5.1(e) and Part 5.6 of the updated TORs. Part 5.1(e) stipulates that complaints must be brought to OBSI within 6 years after the time a complainant knew or ought to have known of the issue giving rise to the complaint. Part 5.6 provides that OBSI may begin an investigation to determine whether the complaint was brought within the 6 years.

### **Section 12 – Conflicts of Interest**

This Section was revised and moved to Part 9 of the updated TORs to reflect OBSI’s conflict of interest procedures more accurately.

Part 9.2 builds on the existing process for dealing with a situation where the Ombudsman is in a conflict of interest. Under Section 12(a) of the existing TORs the Board or Board Chair assigns the investigation of a complaint to an unconflicted internal investigator. In Part 9.2 of the proposed TORs, the Board Chair, or delegate may also engage an external investigator to investigate the complaint.

We removed the Section that deals with OBSI itself being in a position of conflict of interest (as opposed to the Ombudsman or a staff member being conflicted) and the prescribed remedy, which was a referral to an outside expert. The probability of this type of conflict is extremely remote and the purported remedy raises more issues than it resolves such as: Who would qualify as an independent “expert?” By what authority would the outside expert proceed? Would the parties have to agree on the choice of the outside expert? Who would pay for the expert? Because such a conflict has never occurred, and circumstances that could lead to such a conflict are difficult to imagine, we removed the section rather than attempt to resolve the issues raised by the purported remedy.

### **Section 13 – Parallel regulatory investigations**

This Section has been revised and is integrated into Part 6 - Exclusions from OBSI’s Mandate, in the updated TORs. Part 6.2 and 6.3 state that OBSI is barred from investigating matters already decided in court proceedings, arbitrations and other binding dispute resolution forums, but not matters that have been the subject of regulatory proceedings.

### **Section 14 – Monetary limit**

The provisions in this Section are expressed as three individual provisions in Part 10 of the updated TORs, which include more clarity on how the monetary limits apply to multiple complaints and multiple

complainants. For example, we identified that the language in the last sentence of Section 14(b) in the current TORs requires clarification. It says:

The limit on the amount of OBSI's recommendation does not apply to separate Complaints made by a Complainant about unrelated subject matter.

Part 10.2 in the updated TORs provides:

The limit set out in section 10.1 does not apply to separate Complaints made by a Complainant about unrelated subject matters. In such cases, each of the separate Complaints has a monetary limit of \$350,000.

### **Section 15 – OBSI Board not to interfere with Complaint resolution**

In the updated TORs, this Section has been changed to empower the Board, and not just the Board Chair, to consider any concerns raised about OBSI's complaint-handling process or the conduct of OBSI's employees and officers. Such matters are sufficiently serious to warrant consideration by the entire Board, at least on a preliminary basis, and the updated provision reflects how such matters would presently be handled by OBSI's Board.

Section 15 (c) of the current TORs contemplates a process that OBSI does not actually have, or need, namely the involvement of the Board in the reconsideration process. Requests for reconsideration are dealt with through a specific, existing, reconsideration process. Complaints about compliance issues are reported to the Chief Compliance Officer, who is tasked with addressing and reporting these complaints to the Ombudsman and the Board as required by OBSI's policies.

These Sections are all restructured under Part 15 of the updated TORs.

### **Section 16 – Co-operation with other Ombudservices**

This Section is relocated to Part 5 - Complaints to OBSI.

### **Section 17 – Procedure**

This short Section combines 3 distinct elements, each of which are dealt with in separate Parts of the updated TORs.

The first element, which deals with procedures for filing and investigating Complaints is covered in Part 4 – Ombudsman's Powers and Duties, and in Part 8 of the updated TORs – Execution of OBSI's Mandate in the updated TORs.

The second element, OBSI not being bound by the rules of evidence, is explicitly set out in Part 8.1 (c) of the updated TORs.

The third element, OBSI's power to determine whether a Complaint falls within its mandate, is addressed in Part 6.5 of the updated TORs - OBSI to determine whether Complaints fall within mandate.

### **Sections 18 and 19 – Participating Firm's obligations**

In the updated TORs, these Sections have been reordered and relocated to reflect the sequence of actual complaints: first, the requirements for the firm's internal complaints process is dealt with in Part 11, followed by the requirement to co-operate fully with OBSI's process in Part 12.

As is described further below, Part 12 of the updated TORs brings together a description of the firm's obligations during an investigation. In the existing TORs these obligations are mixed in with other important requirements and information relating to limitation periods. Part 12 now focuses on a firm's obligations during OBSI investigations, highlighting the existing expectation that firms will fully co-operate in all aspects of an investigation including investigations dealing with departed representatives.

A firm that fully co-operates with OBSI's investigations deals with OBSI honestly, fairly, and in a manner that respects our people, the complainant, our process and mandate. Conduct that undermines the effectiveness of OBSI and impedes consumers from receiving the benefits of OBSI's services would constitute a failure to co-operate fully.

Section 18(d) of the current TORs, which deals with suspension of statutory limitation periods, was moved to Part 7 in the updated TORs, which is dedicated to the same topic, and which follows Part 6 dealing with time limitations.

### **Section 20 – Confidentiality and disclosure**

This Section of the current TORs is structured as a statement of general principles (confidentiality, non-disclosure, obligation to publicize a refusal or failure to cooperate) followed by a series of processes and exemptions.

All parties' duties of confidentiality regarding disclosed information and the investigation is located in Part 16 of the updated TORs – Confidentiality and Disclosure in the updated TORs.

We also added language to Part 16 clarifying that:

- the initial consent letter is not subject to confidentiality and it may be disclosed to enforce its terms;
- OBSI, complainant and firms may comply with a written request from a regulator for any information or materials in OBSI's files;
- nothing in the TORs prevents a complainant from sharing information with a regulator for regulatory purposes; and
- OBSI can and will disclose information in the event of a threat against a person or property related to a complaint.

Section 20(b) combines two important but distinct obligations: to cooperate during investigations and to comply with recommendations. The obligation to cooperate is also dealt with in Section 18(a) as set out above. The structure was improved upon in the updated TORs by separating the firms' obligations regarding cooperation, and compliance with recommendations, as follows:

- Cooperation and documentary disclosure requirements are located in Part 12.1 and 12.2 of the updated TORs – Firm's Obligations During OBSI Investigation;
- Consequences for firms that don't cooperate are located Part 12.4 of the updated TORs – Consequences of Failure to Co-operate; and

- Consequences for refusal or failure to comply with a recommendation are located in Part 13.8 of the updated TORs - –consequences of refusal for failure to comply with a recommendation.

### **Sections 21 to 27 – Recommendations and rejections of complaints**

Sections 21 to 27 currently appear in the TORs after the provisions on confidentiality and disclosure. In the updated TORs, we've moved the majority of these Sections to Part 13 – Recommendations and rejections of complaints, which is situated directly after the provisions setting out the obligations of Participating Firms. These provisions are followed by the Part dealing with reconsiderations, so the sequence in the updated TORs is better aligned with the sequence of OBSI's dispute resolution process.

In Part 13.4, we also clarify that OBSI can recommend compensation for non-monetary losses.

In the current TORs, Section 25 speaks to how OBSI will determine what is fair, and identifies the need to follow principles of good financial services and business practice. In the updated TORs, these principles were relocated to Part 8, a new provision consolidating the principles relating to how OBSI will execute its mandate.

Also included in Part 8 of the updated TORs are provisions from earlier Sections in the current TORs, including Section 3(i) which stipulates that OBSI will not provide legal, accounting or other professional advice, and Section 17 which states OBSI will not be bound by the rules of evidence. In the updated TORs, the principles in Part 8 logically follow Parts 5, 6 and 7, which determine what falls within and outside of OBSI's mandate and the suspension of the limitation period, and prior to Parts 9, and 10 which deal with the more mechanical aspects of carrying out the mandate, such as managing conflicts of interest and monetary limits.

### **Sections 28 and 29 – Cooperation**

As described above, the substance of these Sections is set out in a bit more detail in Parts 12.4 and 13.8 of the updated TORs.

### **New – Part 14 – Reconsideration reviews**

The current TORs refer to reconsideration reviews in Section 9 (d), but only in the context of relevant new information being made available.

Part 14 in the updated TORs defines the four bases upon which OBSI will reconsider complaints, which is reflective of OBSI's current process as set out in OBSI's Reconsideration Guidance Note and various public documents. Part 14 also clarifies other aspects of the reconsideration process including the impact of a reconsideration on statutory limitation periods.

### **Section 30 – Reporting**

This obligation is set out in Part 17 of the updated TORs.

### **Sections 31 to 36 – Incorporation, governance, membership, senior management, oversight of investigators, and fees**

The substance of these Sections has been relocated closer to the beginning of the updated TORs in Part 3 – OBSI Organization and Governance.

Section 34 of the current TORs, titled “Selection and Oversight of Investigators” strays beyond this subject and deals with the escalation of matters where a firm refuses to comply with a recommendation. In the updated TORs, we relocated these provisions to Part 13.9 – Escalations before OBSI Publicizes a Refusal, which is a subsection of Part 13 - Recommendations and Rejections of Complaints. In 13.9 we make clear that the complaint, and the firm’s reasons for refusal or failure to comply will be escalated to the Ombudsman or his or her delegate for review before OBSI publicizes the refusal or failure to comply.

**Section 37 – Third party evaluation**

This obligation is set out in Part 18 of the updated TORs.

**Section 38 – Code of Practice**

This section is a statement of fact rather than a guiding provision appropriate for the TORs, so it was removed.