

# **Request for Comment on the Independent Evaluation of the Ombudsman for Banking Services and Investments with respect to Investment-Related Complaints**

## **Introduction**

The Ombudsman for Banking Services and Investments (“OBSI”) is an independent dispute-resolution service for consumers with complaints against their banking or investment services firms that could not be resolved by the consumers and the firms on their own. OBSI is a free service, providing a valuable alternative to costly litigation. The work that OBSI conducts is confidential and non-legalistic, and it aims to find fair outcomes to disputes.

In accordance with National Instrument 31-103, *Registration Requirements, Exemptions and Ongoing Registrant Obligations*, OBSI has signed a memorandum of understanding (the “MOU”) with certain members of the Canadian Securities Administrators (the “CSA”). The MOU provides for securities regulatory oversight of OBSI to ensure it continues to meet the standards set by the CSA. It also sets out a framework for cooperation and communication through the OBSI Joint Regulators Committee (the “JRC”), which includes representatives from the CSA as well as the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association.

The MOU requires an independent evaluation of OBSI’s investment mandate at least once every five years.

## **Appointment of independent evaluator**

The Board of Directors of OBSI has appointed Professor Poonam Puri to be the independent evaluator, a decision accepted by the CSA in consultation with the JRC.

Professor Puri is one of Canada’s most respected leaders in corporate governance and corporate and securities law. She is a Professor of Law and a former Associate Dean at Osgoode Hall Law School. She is the founder of Osgoode’s Business Law LL.M. program and the co-founder of its Investor Protection Clinic, the first of its kind in Canada. She has extensive experience in the organizational design and review of public sector and private organizations.

Professor Puri will be assisted by Dina Milivojevic and Trevor Fairlie. Ms. Milivojevic is a litigator and corporate lawyer with expertise in dispute resolution and corporate governance. Ms. Milivojevic has experience conducting investigations and independent evaluations in a range of contexts. Mr. Fairlie is a corporate and securities litigator at Groia & Company. He is also a supervising lawyer at the Osgoode Investor Protection Clinic, overseeing student caseworkers on pro bono securities litigation files. Prior to starting his practice, Mr. Fairlie articulated at the Enforcement Branch of the Ontario Securities Commission and summered with the Investor Protection Clinic at Osgoode.

## **Independent evaluation timeline and process**

The evaluation is expected to conclude with a final report by late March 2022 (updated). Consultation with stakeholders is a key component of the evaluation. To facilitate consultation, the evaluators are requesting that stakeholders provide comments on a variety of issues, as outlined in greater detail below. Written responses to this Request for Comment are due by **January 31, 2022 (updated)**.

During the review period, the team will also analyze a random sample of cases (including cases where OBSI recommended compensation and cases where it did not), review internal dispute resolution and governance policies and procedures, evaluate performance against multiple metrics, and consult broadly within and outside of OBSI.

## Key matters under review

The terms of reference for the independent evaluation are included at **Appendix 1**. The independent evaluation will review the following:

- (1) Whether OBSI is fulfilling its obligations as outlined in the Memorandum of Understanding (MOU) between the Participating Canadian Securities Administrators (CSA) Members and OBSI; and
- (2) Whether any operational, budget and/or procedural changes in OBSI would be desirable in order to improve OBSI's effectiveness in fulfilling the provisions of the MOU and/or recognized best practices for financial services ombudsmen.

This consultation document is confined to OBSI's investment-related mandate (not banking). There is a concurrent review of OBSI's banking mandate, which we invite all stakeholders to comment on separately. You can access the Request for Comment for OBSI's banking mandate at:

<https://www.obsi.ca/Modules/News/en/publicconsultation>.

## Questions

The areas of inquiry outlined below are drawn directly from the requirements of the MOU, as outlined above. The matters outlined below may not be relevant to every stakeholder wishing to submit comments to the independent evaluators. Please respond to the issues of relevance to you and/or your organization.

### (1) Governance

OBSI's governance structure should provide for fair and meaningful representation on its board of directors and board committees of different stakeholders, promote accountability of the Ombudsman, and allow OBSI to manage conflicts of interest.

- To what extent does OBSI's governance structure allow OBSI to provide for fair and meaningful representation on its board of directors and board committees of different stakeholders?
- To what extent does OBSI's governance structure promote accountability of the Ombudsman?
- To what extent does OBSI's governance structure allow OBSI to effectively manage conflicts of interest?
- What, if any, changes would you recommend to OBSI's governance structure and why?

### (2) Independence and Standard of Fairness

OBSI should provide impartial and objective dispute resolution services that are independent from the investment industry, and that are based on a standard that is fair to both Registered Firms and investors in the circumstances of each individual complaint. When determining what is fair, OBSI should take into account general principles of good financial services and business practice, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct.

- To what extent is OBSI's dispute resolution service impartial and objective? Are the standards used by OBSI fair to both parties?
- In determining fairness, to what extent does OBSI take into account good business practice and relevant laws, regulatory policies, guidelines, professional standards and codes of practice or conduct?
- To what extent are OBSI's decisions consistent?
- Is there anything else you would recommend to make OBSI more impartial, independent or objective?

### (3) Processes to perform functions on a timely and fair basis

OBSI should maintain its ability to perform its dispute resolution on a timely basis and deal with complaints without undue delay and should establish processes that are demonstrably fair to both parties.

This evaluation covers cases completed between November 1, 2018 and October 31, 2020. For a part of this period, OBSI was dealing with the impacts of the COVID-19 pandemic and received a higher case volume than at the height of the Global Financial Crisis. The extraordinary circumstances of the pandemic affected most international financial ombudsman schemes and will be taken into consideration when assessing performance against this term of the MOU, and OBSI's ability to provide its services in the context of rapidly rising case volumes will be evaluated.

- To what extent is OBSI able to perform its dispute resolution duties on a timely basis?
- Putting aside OBSI's decisions themselves, do you think OBSI has established processes that are demonstrably fair to both parties? Why or why not? Do both parties have an opportunity to be heard? Are there consistent and clear communications from staff?
- Is OBSI efficient as a dispute resolution service?
- Why do you think some firms refuse to compensate consumers in the amount recommended by OBSI or at all when a positive recommendation is given by OBSI?
- How effective do you consider the "naming and shaming" system to be?
- Should the \$350,000 limit on OBSI's compensation recommendations be increased?
- What powers do you think OBSI should have and, specifically, do you think OBSI should have authority to issue binding decisions? For more information, see *Capital Markets Modernization Taskforce Final Report* (January 2021), Recommendation 71, included at **Appendix 2**.
- What changes would you recommend, if any, to ensure OBSI performs its processes on a timely and fair basis?

#### (4) Fees and costs

OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership.

- To what extent does OBSI have a fair, transparent and appropriate process for setting fees and allocating costs among firms that use its service?
- To what extent does OBSI provide value for money?
- What, if anything, can OBSI do to improve the allocation of its fees and the value it provides to its participating firms?

#### (5) Resources

OBSI should have the appropriate resources to carry out its functions and to deal with each complaint thoroughly and competently.

- To what extent does OBSI have the needed resources to carry out its functions?
- To what extent are OBSI's staff qualified, experienced and capable of devoting the required time and effort to individual investigations?
- Is there anything you would recommend to improve OBSI's performance in this regard?

#### (6) Accessibility

OBSI should promote knowledge of its services, ensure that investors have convenient, well-identified means of access to its services, and provide its services at no cost to investors who have complaints.

- To what extent does OBSI promote knowledge of its services? What else could OBSI do to make consumers aware of its services?
- To what extent do participating firms adequately make consumers aware of OBSI's services? What more could be done, if anything?
- To what extent is OBSI's public guidance an effective tool for those navigating its services?
- Is OBSI doing enough to provide access for consumers? For example, are its materials and resources provided clearly and in plain language (and in multiple languages as well)? Are the complaint processes (forms, website portals, etc.) sufficiently easy to use? Is OBSI accessible for persons with mental health issues or disabilities?
- Is OBSI's social media (LinkedIn, Twitter, Facebook, etc.) effective?
- Is there anything else you would recommend to make OBSI more accessible?

#### (7) Systems and controls

OBSI should have effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes.

- Does OBSI have effective and adequate internal controls to ensure the confidentiality of its investigative and dispute resolution services? Why or why not?
- Does OBSI have effective and adequate internal controls to ensure the integrity of its investigative and dispute resolution services? Why or why not?
- Does OBSI have effective and adequate internal controls to ensure the competence of its investigative and dispute resolution services? Why or why not?
- Is there anything you would recommend to improve OBSI's systems and controls?

#### (8) Core Methodologies

OBSI should have appropriate and transparent processes for developing its core methodologies for dispute resolution.

- Does OBSI meet the requirements outlined above? Why or why not?
- Does OBSI provide adequate reasons for its decisions? Why or why not?
- What changes would you recommend, if any, to ensure OBSI has appropriate and transparent processes in place?

#### (9) Information sharing

OBSI should share information and cooperate with the Participating CSA Members through the CSA Designates in order to facilitate effective oversight under this MOU.

- Does OBSI adequately share information with the participating CSA Members?
- Does OBSI adequately cooperate with participating CSA members?
- What recommendations do you have, if any, for facilitating effective communication and cooperation among OBSI and the Participating CSA Members?

#### (10) Transparency

OBSI should undertake public consultations in respect of material changes to its operations or services, including material changes to its Terms of Reference or By-Laws.

- Does OBSI engage in public consultations with respect to material changes to its operations or services?
- Is there anything else you would recommend to make OBSI more transparent or accountable?

#### (11) Comparison with other ombudsman services

One of the purposes of this evaluation is to conduct a high-level benchmarking exercise that compares OBSI to other financial services ombudsman schemes or equivalent in comparable international jurisdictions both operationally and with respect to OBSI's general organizational approaches to matters such as accessibility and transparency.

- To what extent does OBSI meet recognized best practices for financial services ombudsmen?
- How does OBSI compare to other financial services ombudsmen or equivalent organizations in other jurisdictions both operationally and with respect to organizational approaches to matters such as accessibility and transparency?
- If you have made or responded to a complaint to a financial services ombudsman other than OBSI, what differences did you notice, if any, between the way the complaint with OBSI was handled and the way the complaint with the other ombudsman was handled (e.g., accessibility, fairness, timeliness, transparency of the process, communications from OBSI staff, etc.)? Please feel free to reference financial ombudsman services outside of Canada.

#### (12) Progress

One of the purposes of this evaluation is to report on OBSI's progress since the last evaluation was conducted in 2016.

- If you have made or responded to more than one complaint through the OBSI complaint process, have you noticed any change over time in the way the complaints were handled (e.g., accessibility, fairness, timeliness, transparency of the process, communications from OBSI staff, etc.)?
- Is there anything else that you have not mentioned that you would like the independent evaluators to know?

### **Conclusion**

Thank you in advance for your submissions. Please ensure that they are submitted by January 31, 2022 (updated) at 5:00 p.m. Eastern Time to [pp@poonampuri.ca](mailto:pp@poonampuri.ca).

**Written submission will be published on the OBSI website and all or any part may be included in the final report unless submitters specifically request confidentiality.**

## Appendix 1

### Independent Evaluation Terms of Reference

#### Independent Evaluation Terms of Reference

The Evaluator will report on:

- A. Whether OBSI is fulfilling its obligations as outlined in the MOU between the Participating CSA Members and OBSI; and,
- B. Whether any operational, budget and/or procedural changes in OBSI would be desirable in order to improve OBSI's effectiveness in fulfilling the provisions of the MOU and/or recognized best practices for financial services ombudsmen.

The Evaluator will evaluate OBSI's operations and procedures applicable to the handling of investment complaints involving participating firms whose relevant regulator is a Participating CSA Member, IIROC and/or the MFDA, including the effectiveness of complaint resolution.

The Evaluator will consider and evaluate:

- investment complaint case files completed between November 1, 2018 and October 31, 2020 (the "Review Period").
- current operating policies and procedures, including any changes made between November 1, 2015 and October 31, 2020 (the "Five Year Period").
- third party evaluations, financial audits and internal self-assessments completed during the Five Year Period.

The Evaluator will ensure that the complaint files included in their review sample are selected at random and include files with the following outcomes: out of mandate following investigation, compensation recommended, no compensation recommended, settlement below recommended amount, and refusal of recommendation resulting in publication.

In addition to examining case files, the Evaluator will undertake interviews with key stakeholders including participating firms, complainants, consumer/investor groups, securities regulators and OBSI staff. Interviews may be conducted personally, in writing, by telephone, or by electronic means and may include the use of surveys.

The Evaluator will be given full access to information, meetings, communications, and OBSI staff for the purposes of the Evaluation. OBSI will use its best efforts to facilitate and coordinate access to former staff members and other stakeholders. Access to any materials or staff must pertain to the Review Period.

#### **A. Obligations under the MOU**

With respect to requirement (A) set out above, the Evaluator's report must include analyses and conclusions on OBSI's performance with respect to the following standards set out in Article 2 of the MOU:

- a) Governance – OBSI's governance structure should provide for fair and meaningful representation on its Board of Directors and board committees of different stakeholders, promote accountability of the Ombudsman, and allow OBSI to manage conflicts of interest.
- b) Independence and Standard of Fairness – OBSI should provide impartial and objective dispute resolution services that are independent from the investment industry, and that are based on a standard that is fair to both Registered Firms and investors in the circumstances of each individual complaint. When determining what is fair, OBSI should take into account general

principles of good financial services and business practice, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct.

- c) Processes to perform functions on a timely and fair basis – OBSI should maintain its ability to perform its dispute resolution on a timely basis and deal with complaints without undue delay and should establish processes that are demonstrably fair to both parties.
- d) Fees and costs – OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership.
- e) Resources – OBSI should have the appropriate resources to carry out its functions and to deal with each complaint thoroughly and competently.
- f) Accessibility – OBSI should promote knowledge of its services, ensure that investors have convenient, well-identified means of access to its services, and provide its services at no cost to investors who have complaints.
- g) Systems and controls – OBSI should have effective and adequate internal controls to ensure the confidentiality, integrity and competence of its investigative and dispute resolution processes.
- h) Core Methodologies – OBSI should have appropriate and transparent processes for developing its core methodologies for dispute resolution.
- i) Information sharing – OBSI should share information and cooperate with the Participating CSA Members through the CSA Designates in order to facilitate effective oversight under this MOU.
- j) Transparency – OBSI should undertake public consultations in respect of material changes to its operations or services, including material changes to its Terms of Reference or By-Laws.

## **B. Operational Effectiveness**

With respect to requirement (B) set out above, the Evaluator's report must set out analyses and conclusions including:

- a) A report on progress towards the recommendations from the previous independent reviews.
- b) A high-level evaluation of OBSI's operations with reference to its terms of reference, internal policies and procedures, fairness statement, and loss calculation methodologies. A detailed assessment of loss calculation methodologies employed by OBSI is not required.
- c) A high-level benchmarking exercise that compares OBSI to other financial services ombudsman schemes or equivalent in comparable international jurisdictions both operationally and with respect to OBSI's general organizational approaches to matters such as accessibility and transparency.
- d) An analysis of OBSI governance, including particular reference to stakeholder representation on OBSI's board of directors.
- e) An analysis of the reasons for settlements below amounts recommended by OBSI.

**[administrative details omitted]**

## Appendix 2

### Capital Markets Modernization Taskforce Final Report (January 2021) Recommendation 71 re: OBSI

#### Enhancing Investor Protection

##### **71. Provide the OSC with the authority to designate a dispute resolution services (DRS) organization that would have the power to issue binding decisions**

Currently, registered firms in Ontario are required to take reasonable steps to ensure that the Ombudsman for Banking Services and Investments (OBSI) is made available to their clients as a DRS. After OBSI has investigated a complaint from a harmed investor, it conducts necessary analysis consistent with OBSI's loss calculation methodology and, where warranted, makes a recommendation for compensation.

However, because OBSI's recommendations are not binding, registered firms that have harmed retail investors sometimes refuse to follow OBSI's recommendations or offer settlements that fall below OBSI's recommendations. Furthermore, harmed investors could be induced to accept lesser settlements because of the likelihood they may receive nothing if OBSI's recommendations are ignored. In these circumstances, the harmed investors' only alternative is to resort to the courts, which may not be possible given the legal costs involved and the time it takes to pursue a civil action.

According to the OBSI Joint Regulators Committee Annual Report for 2019, clients received approximately \$1.04 million less than what OBSI recommended in 2018 and 2019; out of 316 cases that ended with monetary compensation, there were 23 cases (approximately 7 per cent), involving 15 firms, that were settled below OBSI recommendations.

In the Canada Financial Sector Assessment Program: Technical Note — Oversight of Securities Market and Derivatives Market Intermediaries (2019), the International Monetary Fund note that providing binding authority for OBSI would improve investor protection. There are several comparable jurisdictions that already provide a framework for investor redress through a binding ombudsperson scheme, notably those in the U.K. and Australia. Other jurisdictions such as the U.S. provide arbitration as a mechanism for securing redress for investors.

The \$350,000 limit on OBSI's compensation recommendations has not been increased since its inception in 1996.

In the Taskforce's public consultations, stakeholders expressed support for effective dispute resolution mechanisms that achieve favourable, fair and cost-effective outcomes for investors. If OBSI were given the power to issue binding decisions, stakeholders expressed a need to improve accountability, develop an effective internal appeals process and enhance OBSI's ability to deal with complex capital markets matters.

#### **Recommendation:**

One of the cornerstones of healthy capital markets is democratizing access to capital, while still protecting retail investors. A binding, reputable and efficient DRS framework in Ontario would be a significant improvement to the retail investor protection framework.

##### **1. Give OSC the Power to Designate a DRS with Binding Decision Powers**

The Taskforce recommends creating a statutory authorization that allows the OSC to designate a DRS that would have the power to issue binding decisions and for the OSC to establish the framework that would govern the DRS. The resulting framework will provide redress to harmed investors, in particular retail investors who have been harmed and lost an amount too low to consider a court action, would



increase investor confidence in the capital markets by assuring that investors are compensated, when warranted, for financial losses that relate to the inappropriate trading or advising activity of a registered firm.

The framework would also require the DRS to have processes to provide procedural fairness for registered firms and investors and include a right of appeal to the OSC tribunal. To ensure the framework does not become unduly burdensome, the Taskforce recommends that an appeal of a DRS decision to be permitted only in limited circumstances such as when there is a question of law, or where the DRS failed to act in accordance with its policies and procedures, its mandate or the terms and conditions imposed as part of the oversight regime (see below). Parties to an appeal of a DRS decision would be the appellant and the DRS.

## **2. Selecting the Best DRS Approach for Ontario**

Ontario needs to have a binding, reputable and efficient framework for dispute resolution that is accessible for retail investors and accepted by registrants. This would be achieved through the OSC pursuing one of these two options pursuant to the statutory authorization given to the OSC:

- Create a new DRS that is a made-in-Ontario system that would be given the power to issue binding decisions; or
- Improve OBSI by imposing requirements to further enhance OBSI's governance structure, public transparency, and professionalism, as a condition for being given the power to issue binding decisions.

The Taskforce recommends that the OSC be mandated to present a plan to the Minister within six months of this report for achieving one of these two options, with the aim of having any required enhanced governance measures in place by January 1, 2022, and the designation of binding authority to be granted subsequently.

For either option, the OSC would work to implement a comprehensive oversight regime for the DRS. Among other components, the oversight regime would include:

- Veto power on appointments of directors and the ombudsperson; and
- Requirement to obtain approval with regards to any material amendments to the DRS's by-laws, terms of reference, fees, or policies and procedures which may have implications on procedural fairness for registered firms or investors.

It is also critical that a DRS has the appropriate expertise and credibility from all relevant stakeholders. For example, to further bolster the designated DRS's expertise and credibility on exempt market issues, the designation of the DRS would be conditional upon the DRS:

- Having a tailored loss calculation methodology to deal with exempt market cases;
- Hiring investigators with exempt market experience;
- Working with the relevant industry association(s) to develop a training program on exempt market issues for its investigators; and
- Adding exempt market representation to its Board, having regard to the overall composition and size of the Board.

## **3. Limits for DRS Compensation Decisions**

Under either option for a DRS in Ontario, the Taskforce recommends that the limit on the designated DRS's compensation decisions be \$500,000 initially with subsequent increases every two years based on a cost of living adjustment calculation.