

DECEMBER 30, 2010 ISSUE

OBSI BOARD OF DIRECTORS APPROVES SELECT REVISIONS TO TERMS OF REFERENCE

The Ombudsman for Banking Services and Investments (OBSI) today announced that its Board of Directors approved certain housekeeping revisions to its Terms of Reference while deferring others.

On October 29, 2010, OBSI issued a set of proposed changes to its Terms of Reference for public comment. The proposals were intended to clarify certain aspects of OBSI's operations and mandate.

Some of the Terms of Reference revisions received broad stakeholder approval and were approved by the Board of Directors at its meeting of December 7, 2010. However, the proposals that sought to clarify OBSI's "name and shame" powers in the event a firm refuses an OBSI recommendation received mixed stakeholder feedback and were deferred.

The proposed changes which were not approved had been put forward to provide greater clarity surrounding the information which could be disclosed in the event of a refusal of an OBSI recommendation. Even without the greater clarity for stakeholders, the broad discretion of the Ombudsman to make public information concerning the complaint remains unchanged.

The following table sets out the proposed revisions to the Terms of Reference and identifies whether they were approved by the Board of Directors. A summary of the comments received is set out in Appendix 'A' further below.

Section(s)	Proposed Revision	Board Approval (Yes/No)
8bii		
8c	Add the word "calendar" before "days".	Yes
17c		
17d		
18	Add "Subject to the disclosure contemplated by Section 27," to the beginning of the first sentence.	No
26	Delete "A recommendation of the Ombudsman should seek to achieve a resolution of a Complaint that is satisfactory to the Complainant and the Participating Firm."	Yes
27	Add "the investigation and" to the first sentence such that it reads "In the case of an individual Complaint, if a Participating Firm does not accept the recommendation of the Ombudsman, the Ombudsman shall make public the name of the Participating Firm, the recommendation and the circumstances of the investigation and the case in a manner considered appropriate by the Ombudsman."	No

OBSI is the national independent dispute resolution service for consumers and small businesses with a complaint they can't resolve with their banking services or investment firm. As a free alternative to the legal system, we work informally and confidentially to find fair outcomes to disputes about banking and investment products and services.

OBSI looks into complaints about most banking and investment matters including: debit and credit cards; mortgages; stocks, mutual funds, income trusts, bonds and GICs; loans and credit; fraud; investment advice; unauthorized trading; fees and rates; transaction errors; misrepresentation; and accounts sent to collections. Where a complaint has merit, OBSI may recommend compensation up to a maximum of \$350,000.

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APPENDIX 'A': SUMMARY OF PUBLIC COMMENTS REGARDING PROPOSED CHANGES TO OBSI'S TERMS OF REFERENCE

The table below summarizes the comments received regarding the proposed changes to OBSI's Terms of Reference. All comments were received in English; OBSI will produce and publish a French translation of this summary document as soon as possible.

Section(s)	Proposed Revision	Comments Received
		Canadian Bankers Association Understand and have no difficulty with the changes.
8bii		Consumer Council of Canada Applauds the addition. This clarifies the period and speeds the process where "days" can be construed as "business days".
8c	Add the word "calendar" before "days".	
17c		
17d		FAIR Agree with the revisions.
		Kenmar Associates Agree with the revisions.
		SIPA Agree with the revisions.
18	Add "Subject to the disclosure contemplated by Section 27," to the beginning of the first sentence.	Canadian Bankers Association The expanded wording appears to broaden the scope of information that OBSI might release, with significant potential for publication of information that is proprietary to the firm and/or unrelated to the case at hand. It is not clear what information OBSI might release.
		Consumer Council of Canada The public disclosure of clients who do not comply is essential to the transparency of the process. Canadians need to be aware of those in the financial sector who are not honest players and the discretion given to the Ombudsman to make public the

circumstances of the investigation and the case is essential.

Very concerned that this addition, when combined with the addition of the word "investigation" in section 27, potentially gives the Ombudsman unlimited discretion to disclose any details about the investigation and the firm processes, should the firm not accept the Ombudsman's recommendation. This open-ended discretion is inconsistent with the provisions in section 18, which provide confidentiality assurances to participants.

IIAC

By tying confidentiality to the acceptance of the Ombudsman's recommendations, the process becomes inherently biased against the Participating Firms. The consequences of rejecting the Ombudsman's recommendations include not only the one-sided disclosure of OBSI's perspective of the facts of the case, but potentially other information about the firm that OBSI may discover in the course of an investigation. Publication of such information, particularly without the ability of the firm to respond in OBSI's press release, may not only unfairly damage the firm's reputation, but could also hinder the process and ability to resolve a complaint by making the parties less inclined to openly discuss issues, and may also invite future legal proceedings.

Kenmar Associates

Agree with the revision. Add a provision that would permit complainants to turn over OBSI Recommendations to law enforcement, without limitation or prior approval, if the complainant believes a crime or fraud has been committed.

SIPA

Agree with the revision. Add a provision that would permit complainants to turn over, without prior consent, OBSI communications including the Recommendations to law enforcement/police if the complainant believes a crime has been committed.

26

Delete "A recommendation of the Ombudsman should seek to achieve a resolution of a Complaint that is satisfactory to the Complainant and the Participating Firm."

Canadian Bankers Association

Understand and have no difficulty with the changes.

Consumer Council of Canada

Understand why the sentence is being deleted from Section 26. However, the principle which the deletion encompasses should not be lost. Recommend including the deleted statement as a separate section within the Terms of Reference.

The statement that OBSI should resolve complaints "satisfactory... to the Participating Firm" provides an unnecessary and investor-unfriendly counterweight to full restitution or redress to clients whose investor complaints have been vindicated. FAIR supports the removal of this language.

FAIR

However, FAIR is also concerned that OBSI's objective of fairness, as stated in section 25 of the Terms of Reference, is not specifically repeated as a directive about the determination of compensation within section 26 of the Terms of Reference. FAIR recommends adding further language to section 26, after the existing text of the section, which would read as follows: "A recommendation of the Ombudsman, including any recommendation of compensation, should fulfil the objectives of resolving the Complaint and making the Complainant whole based on what is fair to the Complainant and the Participating Firm in all the circumstances."

As OBSI wishes to clarify the primary importance of fairness in resolving Complaints, FAIR feels that this would be better if it were made explicit (especially regarding recommendations of compensation).

IIAC

Agree that that the sentence indicating that the Ombudsman should seek to achieve a resolution that is "satisfactory" to the Complainant and the Participating Firm does not reflect OBSI's mandate. However, it is appropriate to ensure that the

		<p>principles of fairness to both parties are referenced in this paragraph. Given that this principle is discussed in section 25, IIAC recommends that the first sentence in paragraph 26 reference not only section 12, but also section 25, so that it reads "Subject to sections 12 and 25, the Ombudsman shall not recommend compensation...."</p>
	<p>Kenmar Associates</p>	<p>Fully agree with the deletion. The previous language caused great concern amongst the advocacy community and led to a number of complainants avoiding OBSI as a result. The purpose of an Ombudservice is to make valid complainants whole whether or not the Participating Firm regards the recommendation as satisfactory.</p>
	<p>SIPA</p>	<p>Agree with the deletion. It has always appeared to be inconsistent with the goal of making complainants "whole".</p>
	<p>Canadian Bankers Association</p>	<p>The expanded wording appears to broaden the scope of information that OBSI might release, with significant potential for public of information that is proprietary to the firm and/or unrelated to the case at hand. It is not clear what information OBSI might release.</p>
<p>Add "the investigation and" to the first sentence such that it reads "In the case of an individual Complaint, if a Participating Firm does not accept the recommendation of the Ombudsman, the Ombudsman shall make public the name of the Participating Firm, the recommendation and the circumstances of the investigation and the case in a manner considered appropriate by the Ombudsman."</p>	<p>Consumer Council of Canada</p>	<p>The public disclosure of clients who do not comply is essential to the transparency of the process. Canadians need to be aware of those in the financial sector who are not honest players and the discretion given to the Ombudsman to make public the circumstances of the investigation and the case is essential.</p>
	<p>FAIR</p>	<p>FAIR would consider it helpful and clearer if the proposed revision were to read "and details of the investigation and" rather than "the investigation and". We consider the use of "details" to properly clarify the fact that detailed information about the investigation and the case may be made public, and not merely the existence of the investigation or the case.</p>

The addition of the word "investigation" potentially adds considerable scope to what may be disclosed by OBSI, including information that investigators may become privy to in the course of an investigation, but which may not be directly related to the case. In order to properly limit the scope of this provision, IIAC recommends that the proposed phrase "circumstances of the investigation and the case" be replaced with "facts of the case".

In addition, in order to introduce fairness and balance into the process, Participating Firms should be afforded the opportunity to present their reasons for rejecting the OBSI's recommendation in the release in which OBSI presents its perspective.

Kenmar Associates Agree with the revision.

SIPA Agree with the revision.

The proposed Terms of Reference can be viewed in their entirety at http://www.obsi.ca/images/document/1Revised_Terms_of_Reference_EN.pdf.

In addition, some public comments were received regarding sections of OBSI's Terms of Reference that were not contemplated for revision, as well as comments regarding the consultation process. Future revisions of OBSI's Terms of Reference may take into account these comments. A summary of these comments are set out in the table below.

Section(s) Comments Received

3g	Kenmar Associates	Great that it is part of the ToR but has no effect if not widely communicated to complainants. OBSI should undertake to promote this assistance service.
3i	Kenmar Associates	Add a sentence that OBSI will provide guidance as to where information about limitation periods can be found, or better yet, post limitation periods by province with a disclaimer.
11	Kenmar Associates	Include requirement that OBSI publicly disclose the nature of the systemic issue, the firm(s) name(s), and OBSI's recommendations regarding the issue, including compensation.
11bii	SIPA	Add the words "and timely" such that it reads "offer to work with the Participating Firm to find a fair and timely resolution; and"
11bii	Kenmar Associates	Add the words "and timely" such that it reads "offer to work with the Participating Firm to find a fair and timely resolution; and". Long cycle times are not a good statistic for an Ombuds service or for complainants.
11d	SIPA	Include a requirement that there be public disclosure via a news release and web posting in addition to reporting to regulators.

12	SIPA	Include formal annual Board review of the \$350,000 compensation limit to ensure it is fair and reasonable.
	Kenmar Associates	The \$350,000 compensation cap should be reviewed at least annually.
15	RBC DS	This statement means that OBSI has no accountability when applying its methodology to resolve disputes or assess damages. The OBSI currently applies a standard, demonstrably flawed, methodology to all complaints. This has led to the OBSI neglecting to account for the unique circumstances of each case to arrive at fair conclusions.
28	SIPA	Amend to require increased reporting disclosure.
UnspecifiedFAIR		<p>OBSI should consider revisions to its Terms of Reference or to its practices in resolving complaints that would publicly disclose the methodology it uses in calculating redress or compensation amounts where such determinations are needed. FAIR understands that the methodology is understood by the industry. However, investors and complainants are usually not familiar with the methodology, and are often unaware of the potential compensation they may be entitled to. This situation of asymmetric information is unfair to complainants.</p> <p>OBSI should resist, and continue to resist, attempts by the banking and especially the investment industries to narrow its mandate or reduce its usability from a retail investor perspective. The comments IIROC received in response to its Notice 09-0359 <i>Review of IIROC Arbitration Program</i> were instructive in this regard. Responses were received from the Investment Industry Association of Canada and at least one of its members, seeking to have OBSI's maximum award reduced from \$350,000 to \$100,000. Another member of IIAC identified "problems" with OBSI's procedures in resolving complaints and establishing compensation. FAIR considers the alternative dispute resolution offered by OBSI to be a cornerstone of the investor protection system. Reducing the alternatives open to investors for resolving disputes is not adhering to the principles of an open and responsible market, nor is it likely to reduce the expense and efficiency of dispute resolution.</p> <p>Consider a revision to its Terms of Reference specifying certain goals and objectives for OBSI's Board of Directors, including an objective to fulfil specific mandates in the composition of the Board itself.</p> <p>The presence of Industry-appointed directors on the Board is not sufficiently counterweighed by the presence of directors who represent the interests of ordinary investors. As such, FAIR would encourage OBSI to consider appointing directors who represent the perspective of retail investors, particularly since retail investors represent the largest body of actual and potential complainants to OBSI.</p> <p>Agree with Kenmar submission regarding suitability guidelines. FAIR encourages OBSI to consider publishing a clear set of guidelines (ideally to be incorporated via reference in the Terms of Reference) that would clarify OBSI's interpretation of the "suitability" requirement within the context of its dispute resolution process.</p> <p>It is more incumbent than ever upon OBSI to provide increased guidance to investors about the meaning of "suitability" as it relates to the OBSI dispute</p>

resolution process. This guidance would essentially be a distillation of the principles and practical analysis that OBSI has applied in its hundreds of successful facilitated settlements. It would be of most use to investors, but such guidance would also be useful as a check and balance to OBSI's member firms, allowing them to properly assess their own internal suitability requirements and rules.

Kenmar Associates Supportive of OBSI working closely with stakeholders and publishing meaningful harmonized Suitability Guidelines (for investments) that will make it clearer for advisers, investors and regulators to understand the rules and help prevent many disputes/ complaints.

RBC DS continues to have significant concerns about the overall lack of accountability and transparency with respect to OBSI's public consultation and approval process for revising the ToR.

Process RBC DS -Many of the recent amendments to the ToR expanded the scope of OBSI's powers beyond that of a dispute resolution service, allowing OBSI to effectively adopt quasi SRO functions while it is not subject to the high standards of due process that are required of a statutory body. As expressed in a number of industry submissions to OBSI over the past years, this has created a significant dissatisfaction among the Participating Firms. The request for comments published on October 29, 2010 presents an example where substantive changes in OBSI's process were introduced as changes of a housekeeping nature and as such, would not be subject to due process that accompanies material changes to the ToR.

RBC DS strongly supports investors' access to dispute resolution services that are fair, transparent and efficient; however, RBC DS does not believe that OBSI provides a dispute resolution service with these merits.

Comments not directly related to OBSI's Terms of Reference have not been included in this summary but have been taken under advisement by management.