

# **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 and small businesses with a complaint they haven't been able to resolve with their banking services or investment firm. As an Ombudsman scheme, it is a free alternative to the legal system charged with working confidentially and in a non-legalistic manner to find fair outcomes to disputes about banking and investment products and services.

Amendments by the Canadian Securities Administrators (CSA) to National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations (NI 31-103) took effect on May 1, 2014. The amendments require that all registered dealers and advisers outside of Québec make available OBSI as their external provider of dispute-resolution services.

Previously, participation in OBSI's dispute resolution services was only required for members of the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA) due to the rules of these self-regulatory organizations. The amendments to NI 31-103 extended the requirement to belong to OBSI to portfolio managers, exempt market dealers and scholarship plan dealers outside of Québec whose clients include individuals.

In conjunction with the amendments to NI 31-103, OBSI signed the Memorandum of Understanding concerning oversight of the Ombudsman for Banking Services and Investments' (MOU) with certain members of the CSA. The MOU provides for securities regulatory oversight of OBSI to ensure OBSI continues to meet standards set by the CSA as well as a framework for cooperation and communication via the OBSI Joint Regulators Committee (JRC) which includes representatives from the CSA, IIROC and the MFDA.

The MOU requires OBSI to submit itself to an independent evaluation of its handling of investment-related disputes commencing no later than May 1, 2016, two years after its mandate was expanded. It also requires:

- TORs and mandate for the evaluation to be established by OBSI in consultation with the CSA (see Appendix 1).
- The independent evaluation to be undertaken by an evaluator acceptable to the CSA in consultation with the JRC.
- OBSI to co-operate with the independent evaluator to facilitate the completion of the evaluator's report within a reasonable time.
- The Board of Directors of OBSI to provide the CSA Designates on the JRC with an action plan respecting the proposed implementation of any recommendations made in the independent evaluator's report.

## **Appointment of the independent evaluator**

Following an RFP process and the review of proposals for the independent evaluation, the Board of Directors of OBSI appointed Ms. Battell to be the independent evaluator, a decision accepted by the CSA in consultation with the JRC.

Ms. Battell is a former regulator (Consumer and Competition law enforcement, with the New Zealand Commerce Commission), consultant (KPMG) and Banking Ombudsman. She has conducted evaluations of more than 30 organizations in a wide range of industries, most recently New Zealand's Financial Services Federation. Ms. Battell has been a member of the Australian New Zealand Ombudsman Association and the International Financial Ombudsman network. She has also participated in international studies of Ombudsmen schemes conducted by Queen Margaret University in Edinburgh and been the subject of a similar external evaluation as an

Ombudsman. The New Zealand Banking Ombudsman Scheme resolves investment-related disputes as part of its mandate and during her six year term the scheme resolved more than 800 such disputes.

Ms. Battell will be assisted by Nikki Pender and Stephen Franks. Ms. Pender is an associate at Franks Ogilvie. She is a senior public law and litigation specialist with experience in both adjudicative and inquisitorial jurisdictions. Ms. Pender was a former Crown Counsel, served on professional disciplinary and complaints bodies and worked as a senior solicitor at the New Zealand Commerce Commission.

Mr. Franks is a prominent lawyer and expert in company and securities law and law reform. He established his own specialty law firm focusing on the intersection of government and commerce in 2009, having worked at the Parliamentary Ombudsman's office, as a partner at major law firm Chapman Tripp, and having been a Member of Parliament for two terms. Mr. Franks has acted for many advocacy groups or trade associations including the Trustees Association, New Zealand Stock Exchange, New Zealand Futures Exchange and New Zealand Bankers' Association. He was also a member of the former Securities Commission.

### **Independent evaluation timing**

The evaluation is expected to conclude with a final report by mid May 2016. Initial consultations will take place in January and February, with **written submissions due by February 19, 2016**. A draft report is expected to be complete by March 31, 2016.

During the review period, the team will also analyze a sample of cases resolved, review internal dispute resolution and governance processes, analyze key performance statistics (and, where appropriate, benchmark these against comparable international financial Ombudsman schemes) and canvass the views of OBSI's board, Consumer and Investor Advisory Council members, and staff.

### **Key issues**

The independent evaluation will consider whether OBSI is operating in accordance with its obligations under the MOU as well as whether any operational, budget or procedural changes would be desirable to improve OBSI's effectiveness.

The issues set out below cover both these matters as well as the extent to which OBSI meets international benchmarks for industry-based dispute resolution (based on the British and Irish Ombudsman Association criteria and the Benchmarks and Key Practices for Industry-based Customer Dispute Resolution developed by the Australian Government).

The issues outlined below may not be relevant for all stakeholders. Please respond to the issues of relevance to you. Please remember that this review is confined to OBSI's mandate with respect to investment complaints (not banking).

### **Clarity of purpose**

Ombudsman schemes should ensure stakeholders know why the scheme exists, what it does and what to expect from it.

In your view:

- how clear is the purpose of the scheme and who it serves?
- how clear is its mandate and the limits to this?

We would also be interested in any views on the appropriateness and scope of OBSI's mandate with respect to investment complaints.

## **Governance**

OBSI's governance structure is expected to:

- ensure that the Ombudsman and the scheme are independent from those whom the Ombudsman investigates (participating firms) and that it safeguards that independence
- ensure that the Ombudsman alone (or his or her delegate) has the power both to decide whether a complaint is within mandate and to then determine/resolve that complaint
- provide for fair and meaningful representation of different stakeholders on its Board of Directors and board committees
- ensure those involved in scheme governance conduct themselves in the best interest of the scheme
- promote accountability of the Ombudsman
- enable the board to effectively manage conflicts of interest.

In your view, to what extent does OBSI's board achieve these governance standards? What changes, if any, should be made to OBSI's governance structure and processes?

## **Independence and standard of fairness**

Ombudsmen schemes should be impartial, proceed fairly and act in accordance with the principles of natural justice as well as with general principles of good financial services and business practice, and any relevant laws, regulatory policies, guidance, professional standards and codes of practice or conduct. They should also notify complainants as to the reasons why a complaint is considered outside mandate if they decide not to accept the complaint for investigation. Similarly, they should notify all parties concerned of their decisions and the reasons for them.

- To what extent do you consider OBSI provides impartial and objective dispute resolution services that are independent from the investment industry and participating firms?
- In your experience, are OBSI's decisions based on a standard that is fair to both participating firms and investors in the circumstances of each individual complaint?
- When determining what is fair, to what extent do you consider OBSI's decisions are consistent?

## **Processes to perform functions on a timely and fair basis**

This evaluation covers cases completed after January 1, 2014. For a part of this period, OBSI was dealing with a backlog due to the unusually high volume of complaints received during the Global Financial Crisis (GFC), and was unable to resolve some complaints received prior to November 2013 in its usual timeframes. As of May 1, 2015, OBSI has resolved all backlog cases and resolution times for cases commenced after November 2013 have reduced. The extraordinary consequences of the GFC affected most international financial ombudsman schemes and will be taken into consideration when assessing performance against this term of the MOU.

- Bearing in mind the GFC context, to what extent do you consider OBSI **now** maintains its ability to perform its dispute resolution on a timely basis and deal with complaints without undue delay?
- Do you consider OBSI's processes (rather than its decisions) are demonstrably fair to both complainants and registered investment firm participants in the scheme? Do you consider both parties have sufficient opportunity to be heard and respond to each others' submissions? Do OBSI staff keep in good contact with complainants and participating firms during an investigation/resolution process? Do they keep commitments made?

- What could OBSI do to improve the timeliness and fairness of its processes?

OBSI is unable to require participating firms to pay the compensation it recommends in its decisions on cases. Instead, for cases where a reasonable settlement cannot be reached, its final recourse is to “name and shame” the firm involved - that is, it can publicize the fact that a participating firm has not complied with a recommendation for compensation.

- What, in your view, are the key reasons for firms refusing to compensate, or to pay at OBSI’s recommended amount?
- How effective do you consider naming and shaming to be?
- What powers do you consider OBSI should, ideally, have?

### **Fees and costs**

OBSI’s service is free of charge to complainants. Under the MOU, OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership.

- To what extent do you consider OBSI meets its obligations under the MOU with respect to setting fees and allocating costs?
- To what extent do you consider OBSI provides fair value for money?

### **Resources**

Ombudsmen schemes must be adequately staffed and funded so that complaints can be investigated and resolved effectively and in a timely manner.

- In your view, to what extent does OBSI have the appropriate resources to carry out its functions and to deal with each complaint thoroughly and competently?

### **Accessibility**

Ombudsmen should promote knowledge of their services, ensure that investors have convenient, well-identified means of access to services, and provide services at no cost to investors who have complaints. These services should also be straightforward for complainants to understand and use.

In your opinion:

- How effective is OBSI at promoting its services?
- What else could it do to ensure investors are aware of its service?
- To what extent do participating firms adequately promote OBSI? What more could these stakeholders do to ensure their customers know about OBSI when access to OBSI may help resolve a complaint?
- Is OBSI doing enough to enable investors to access them? For example, is it easy to use; is it making its resources and service available in a range of different languages, a range of different channels (phone, electronic etc.) and in a way that enables 24 hour access (e.g. on-line complaint forms)? Does it cater adequately for people, including those with disabilities, mental health issues?
- What else could OBSI be doing to improve access?

## **Systems and controls**

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

Based on your experience, to what extent do OBSI's systems and controls ensure:

- confidentiality is maintained;
- its investigative and dispute resolution process has integrity;
- its investigators have the necessary competence and industry knowledge to undertake their work;
- its decisions are robust and clear; and
- its decisions are consistent with its published approaches?

## **Core methodologies**

Under the MOU, OBSI should have appropriate and transparent processes for developing its core methodologies for dispute resolution. During the evaluation period, OBSI has consulted on its loss calculation methodology and changes to its Terms of Reference.

- In your view, have OBSI's processes for developing or changing core methodologies been transparent and appropriate?
- Have they allowed sufficient opportunity to provide external input? Did OBSI publish its response to the consultation and explain its decisions?
- Have the changes achieved what they intended?

## **Information sharing**

Under the MOU, OBSI should share information and cooperate with the CSA through the CSA designates on the JRC in order to facilitate effective oversight under the MOU.

- How effective is this information-sharing? Does it enable effective oversight?
- What further information sharing would facilitate more effective oversight?

## **Transparency and accountability**

As an Ombudsman scheme, OBSI is expected to publicly account for its operations. This enables public confidence in the scheme and its decision-making and management processes. In addition, Ombudsman schemes should have processes for dealing with complaints about their own service.

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

OBSI publishes Annual Reports, including financial statements, and case studies on its website, engages in public consultation with respect to changes to its Terms of Reference and core methodologies, and submits itself to independent review/evaluation (independent review reports are also published on the website).

- To what extent do you consider OBSI provides adequate accountability to participating firms and the public?

- What further information could OBSI provide to assure stakeholders as to its effectiveness and efficiency?
- To what extent do you consider OBSI's process for dealing with complaints about its own service are transparent and effective?

### **Conclusion**

Finally, you are welcome to make any other comments with respect to whether OBSI is fulfilling its obligations as outlined in the MOU between the CSA and OBSI; or 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.

Thank you in advance for your submissions. Please ensure they are submitted by **February 19, 2016, 5:00 pm** Eastern Time to **dbattell@gmail.com**.

**Written submissions 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**

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.

The Evaluator will evaluate 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 evaluate investment complaint case files completed since January 1, 2014 (the "Review Period"). During the Review Period, OBSI's investigation files were pursued in two categories: cases that had been backlogged since prior to November 1, 2013 ("Backlog Cases"), and current cases received after November 1, 2013 ("Current Cases"). The Evaluator will consider cases completed during the Review Period including Backlog Cases, but will focus principally on Current Cases completed during the period. The Evaluator will ensure that the files included in their review sample include files with the following characteristics: out of mandate following investigation, no compensation recommended, low settlement 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, regulators and OBSI staff. Interviews may be conducted personally, in writing or by telephone and may include the use of surveys.

The Evaluator will be given reasonable 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. 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 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 benchmarking exercise that compares OBSI to other financial Ombudsman schemes or equivalent in comparable international jurisdictions.
- c) 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.
- 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.

## **Deliverable(s)**

The Evaluator will present a final report to OBSI and make separate presentations to OBSI Senior Management, OBSI’s Board of Directors, and a joint meeting of the OBSI Board of Directors and the JRC.

## **Timeline**

The Evaluator will regularly update OBSI on its progress and immediately disclose any material issues that could hinder its ability to carry out an effective independent evaluation. A full project timeline will be presented by the Evaluator to OBSI for consideration and approval.

The final presentation to the OBSI Board of Directors and JRC will take place at their May 2016 meeting. Work on the review could begin in late 2015 or early 2016.