OBSI OMBUDSMAN FOR BANKING SERVICES AND INVESTMENTS
OSBI OMBUDSMAN DES SERVICES BANCAIRES ET D'INVESTISSEMENT

Executive Summary

In response to a recommendation made in OBSI's most recent independent external review, on September 24, 2024, OBSI launched a public consultation on our approach to loss calculations involving illiquid exempt market securities, describing the development of our approach, feedback we had received on our approach, and relevant considerations for an appropriate loss calculation methodology. We posed two questions for stakeholder feedback, seeking comment on whether our approach was fair and reasonable, whether there were any alternative approaches we should consider, and how our methodology might be improved.

The consultation period closed on November 21, 2024. OBSI received 13 submissions from key stakeholder groups, including consumers, investor protection advocates, participating firms and industry associations, reflecting a range of perspectives on our approach. This document summarizes the comments received during the consultation period, our responses and our resulting commitments.

Overview of comments received

Stakeholders provided a range of comments, from broadly supportive to broadly critical. Many commenters provided suggestions for potential improvement or refinement of our current methodology, though no commenters suggested a substantially different approach to the fundamental challenge of calculating financial loss when an ending value for a security cannot be determined.

Most consumers and investor protection advocates and some industry participants expressed support for our current approach. Key themes raised by consumer advocates and associations were:

- Many expressed the view that the approach was fair and reasonable
- Many highlighted the alignment of OBSI's methodology with international best practices
- Some consumers suggested that there may be circumstances where a partial valuation is possible, particularly where recovery appears likely
- Some consumers and investor protection advocates stressed the importance of accurate suitability determinations and flexibility in exceptional circumstances
- A number of consumers and advocates expressed the view that exempt market dealers should improve their compliance processes and suitability determinations to reduce unsuitable sales
- Some consumer commenters also recommended that OBSI should publish redacted actual complaint cases to allow stakeholders to better assess the implementation of its loss calculation methodology
- An investor protection advocate encouraged OBSI to continue engaging with industry stakeholders to address any concerns and prevent misinformation about the methodology

In general, industry associations and participating firms who responded to the request for comment were more critical of the approach, with many suggesting potential refinements or exceptions. Key themes raised by industry participants and associations were:

- Many cited operational costs and undue burden on dealers associated with OBSI recommendations
- While none proposed a fundamentally different approach, most suggested changes to the current approach or suggested situations where exceptions should be made and additional considerations that should be taken into account
- Most emphasized the importance of careful attention to valuation and some suggested techniques to determine the value of illiquid securities, such as by engaging professional valuators or working with issuers to determine value
- Some firms suggested that there may be circumstances where a partial valuation is possible, particularly where recovery appears likely
- Some comments focused on the importance of considering investor responsibility in suitability cases and ensuring no unjust enrichment for complainants
- Some firms also emphasized the importance of flexibility in exceptional situations and the consideration of residual value
- Some industry commenters made suggestions about appropriate high-risk indices for comparative loss calculations
- Some commenters called for greater transparency and accountability in OBSI's processes, including publishing clear guidelines and methodologies
- One commenter suggested that OBSI impose a limitation period for suitability cases
- One industry association expressed concern about impartiality and recommended the adoption of valuation methodologies from National Instrument 31-103
- One industry association applauded OBSI's continued work to examine the fairness of its dispute resolution processes and encouraged ongoing evaluation as new products and services come to the market

OBSI commitments in response to comments received

We would like to thank all participants for their comments, which we have considered carefully. In response to the suggestions received, OBSI will be taking a number of steps to improve our methodology, as well as our transparency and communications relating to our loss calculations. In response to the comments received, OBSI has committed to:

- Reviewing and updating all of our public information and disclosures relating to our loss calculation methodology, including our approach in cases involving exempt market products and firms with limited strategies and offerings
- Publishing a document comprehensively describing our approach to benchmark selection and comparative investments to help stakeholders better understand the benchmarks we use in our loss calculations
- Publishing an updated technical loss calculation methodology approach document to provide more complex and detailed information for stakeholders
- Publishing a series of technical case studies to supplement the simplified case studies currently available
- Continuously adjusting our methodologies to reflect emerging investment products and services

We note that we will also be undertaking our next independent external review in 2026, which will include consideration of our loss calculation methodologies and the overall fairness of our approaches.

OBSI appreciates the feedback received during this consultation and remains committed to transparency, accountability, and continuous improvement in our methodologies. We look forward to implementing these commitments and continuing to work with stakeholders to ensure fair outcomes for all firms and consumers.

List of commenters

OBSI received 13 submissions – five from consumers, two from investor protection advocacy groups, two from participating firms, and four from industry associations.

Consumers

1. Stan Gourley
2. Harvey Naglie
3. Rick Price
4. Arthur Ross
5. Peter Whitehouse

Investor protection advocates

1. FAIR Canada
2. The Canadian Advocacy Council of CFA Societies Canada

Participating firms

1. M3 Securities
2. Portfolio Strategies Corporation

Industry associations

1. Federation of Independent Dealer (FID)
2. Investment Industry Association of Canada (IIAC)
3. Private Capital Markets Association of Canada (PCMA)
4. Portfolio Management Association of Canada (PMAC)

Summary of public comments and OBSI responses

Question 1

For loss calculations involving unsuitable illiquid exempt market securities for which no ending value can be determined, is OBSI's approach of assigning a value of zero and requiring the investor to return the unsuitable illiquid exempt market securities to the firm fair and reasonable? If no, are there any alternative approaches that we should consider?

Most consumers and investor protection advocacy groups and one industry association expressed support for OBSI's approach with some offering additional suggestions. Most industry associations and one participating firm were critical of OBSI's approach, expressing the view that OBSI's approach is operationally costly and creates an undue burden on dealers, and some suggested modifications as described below.

Some commenters also made suggestions for changes to OBSI's policies and procedures that are beyond the scope of this consultation or for regulatory changes that are not within OBSI's jurisdiction. We have read and considered these comments but have not included them in this response document.

Theme	Summarized comments	OBSI responses
General support for OBSI's approach	Two investor protection advocacy groups and one industry association expressed support for OBSI's approach as fair and reasonable and did not suggest any alternative approaches. One consumer expressed support for OBSI's approach on the grounds that it treats the transaction as a refund for the sale of a defective product and aligns with international best practices. One industry association expressed support for OBSI's general approach to using Market-Adjusted Damages, but suggested that it be applied on a portfolio basis (addressed below).	We are pleased to see a significant level of support for our current approach from investor protection advocacy groups and some industry associations. We also note that many commenters expressed general support while suggesting only minor changes to the approach. The Market-Adjusted Damages approach used by OBSI is the approach typically applied by courts and arbitrators when calculating damages in securities cases involving unsuitable portfolios. Financial harm is calculated by comparing actual investment performance against suitable benchmark alternatives, considering market conditions, risk factors, and investment objectives, with the goal of placing the consumer in the position they would have been had they received suitable advice.
Increase transparency	Two consumers expressed support for OBSI's approach and suggested that OBSI should be transparent about	OBSI has not published an approach when dealers do not agree to take back securities because this has never occurred in practice. While firms have

	the process used when the dealer does not agree to take back the security. An industry association emphasized the need for fairness and transparency in OBSI's loss calculation methodology. They stated that OBSI's approach should align with industry practices and regulatory requirements to ensure consistency and fairness.	occasionally told us that receiving securities was not acceptable to them, in all cases to date, we have worked with the firm to address their unique concerns and all firms have ultimately agreed to either take back the security or take an interest in the residual value of the security. If a firm did refuse to take back an unsuitably sold illiquid security, we would work with the firm and consumer to find a settlement approach that responded to the concerns that the firm had raised and was fair to both parties. Any such approach would be specifically tailored to the circumstances of the case. We agree with the commenters on the importance of transparency, and we are committed to working consistently to improve our transparency, including through consultations such as this. Industry best practices and regulatory requirements are central considerations in all cases that we investigate because they inform our assessment of the reasonableness of the parties' conduct and their reasonable expectations.
Establish a high threshold for investor responsibility	A consumer proposed that any application of investor responsibility or mitigation principles by OBSI should consider the asymmetry of experience and knowledge between the consumer and the advisor or firm. The commenter expressed the view that advisors and firms should also have an obligation to assist consumers in mitigating losses.	When considering consumer responsibility or partial responsibility, OBSI considers all relevant facts and circumstances of the case, including the knowledge and experience of the consumer and the professional obligations of the firm.
Work with firms to ensure clarity of valuation approach	An investor protection advocacy group recommended that OBSI should publish how it considers and assists firms in establishing evidence for the value of securities.	We work closely with firms to ensure that they understand the importance of the valuation process and are able to provide us with as much information as they can to ensure that we have all available evidence relevant to the valuation of each security.

	A participating firm acknowledged the difficulties in valuing exempt market securities. The firm did not present an alternative method but suggested prioritizing the determination of investment values by working with issuers before defaulting to assigning a zero value, especially for real estate-based investment products where industry-standard methods and historical transactions can be referenced.	During our investigations, we rarely have access to issuers. The firm is generally best positioned to request and receive relevant information from issuers. OBSI also has access to a range of financial analysis tools that we will use to independently establish a security's value. We share all of the data we use in valuing any security with the firm involved.
Avoid unjust enrichment	An investor protection advocacy group expressed the view that it is important to ensure that complainants do not use OBSI's process as insurance against normal market losses. They expressed the view that the total loss calculation should account for market risk without unjustly enriching the consumer, and that the alternative return should relate to the risk the investor was willing to take at the time of investment.	We agree. Investment gains and losses are a normal part of every investor's experience and are not relevant to a suitability determination. We will only undertake an assessment of financial harm after we have made a determination that the investments in question were unsuitable for the investor. When we undertake financial harm calculations, we will compare the consumer's actual investment performance against the performance of a suitable benchmark, thereby incorporating a suitable level of market risk into our analysis and avoiding concerns of unjust enrichment.
Approach is costly and burdensome	One industry association argued that OBSI's approach of returning securities was operationally costly. The association also observed that appointing auditors to assign valuations can also be costly. One industry association expressed the view that OBSI's approach places an undue burden on participating firms.	When an exempt market security is sold to an investor for whom it is unsuitable, significant financial harm can result. When the investor seeks redress for this harm, OBSI's role is to investigate and recommend fair compensation. Our goal is to achieve a fair outcome that considers the impacts on both the investor and the firm. When an investor has incurred financial harms because of a firm's unsuitable recommendation, it is fair that this harm should be borne by the firm, though we will always consider the conduct of the investor and consider whether the circumstances are such that they should share responsibility. As between the parties, however, firms are generally best placed to ensure compliance with regulatory requirements and avoid such losses.

		Firms selling high risk securities to retail investors should be prepared for the financial risks associated with such a business model. If a firm lacks sufficient capital to fairly compensate consumers for the harms that they may be responsible for, insurance may provide an appropriate coverage for such risk.
Use third-party valuators	An industry association expressed the view that professional valuators can assess the value of illiquid securities, and assigning a zero value ignores the inherent value that may exist. A participating firm also suggested that OBSI should consider consulting third-party valuation experts to provide a fairer reflection of potential residual value. In addition, they recommended that OBSI should consider: 1) Engaging independent auditors or appraisers to perform valuations where possible 2) External information, such as recent transactions or third-party appraisals if they indicate potential value 3) That securities tied to ongoing projects or ventures with a reasonable expectation of future returns may require alternative valuation methods	OBSI's investment analysis team is qualified and equipped with the appropriate expertise and tools to professionally value securities, including exempt market securities, where reasonable and reliable information is available. All of our senior investment analysts hold the Chartered Financial Analyst (CFA) designation. Our analysts also hold or are pursuing other professional designations and certifications, including the Certificate in Investment Performance Measurement (CIPM), Financial Risk Manager (FRM), Chartered Alternative Investment Analyst (CAIA), and professional accounting designations. OBSI does not engage external third-party valuators. Such valuations are costly and time-consuming, which is inconsistent with OBSI's accessible, efficient and cost-effective dispute resolution process. However, parties are welcome to provide professional valuations (prepared independently or by the firm itself) and OBSI will consider any such valuation provided.
Reduce limitation period	An industry association suggested implementing a limitation period for claiming unsuitable securities to mitigate the burden on firms.	For fairness reasons, we impose a limitation period on claims that consumers bring to us. Our rule is found in section 5.1(e) of our Terms of Reference (TORs). This limitation period was recommended by an external review in 2012 and was added to our TORs in December 2013 following a public consultation process. The OBSI limitation period is six years for all claims, starting when the consumer knew or ought to have known about the problem giving rise to their complaint.

		In our experience, limitation arguments from firms are rare and when such arguments are made, they generally have not significantly hindered case resolutions. When considering the KYC information in a case, our goal is to assess whether the documented KYC information is reasonable based on the information available to the firm at the time it was recorded. In some cases, such as suitability disputes that span several years, relying on personal recollection may not be possible and raises significant credibility concerns. In these cases, we rely primarily on contemporary documentary evidence from both the consumer and the firm.
Avoid retroactive risk determinations	An industry association stated that redetermining KYC is problematic and suggested implementing a limitation period due to unreliable memories and financial incentives for clients to disclaim former KYC documentation. A participating firm expressed the view that OBSI should not retroactively apply new KYC information to support recommendations.	Despite the challenges presented by the passage of time, it would not be fair to consumers or firms to impose arbitrary cut-off dates as events of the past are often relevant to present disputes and it may take years for consumers to realize that they have a potentially valid claim. We do not apply new KYC information retroactively. Our goal is to determine whether the KYC information documented at the time of a recommendation was reasonable based on the information available at the time it was recorded. We may also consider whether the KYC information was updated appropriately, given the circumstances of the case and the regulatory requirements in effect at the time.
Use appropriate benchmarks	An industry association recommended that OBSI should use appropriate medium-high or high-risk indices, such as the MSCI TR World Index. A participating firm recommended that OBSI should use appropriate high-risk indices, such as the MSCI Global Private Capital Closed-End Fund Index, to evaluate gains and losses, rather than medium-risk indices or GICs.	We use the MSCI TR World Index as one of our benchmark indices in cases where the consumer's KYC indicates that a medium international equity exposure would have been suitable. Our detailed approach to loss calculations includes our most commonly used benchmarks. When establishing a comparative portfolio for loss calculation purposes, we will use a benchmark (or a combination of benchmarks) that best reflects the investments that would have been suitable for the consumer at the time the unsuitable investments were recommended. For example, if a consumer's KYC information indicated that high-risk or private investments were unsuitable,

	Another industry association requested clarity on the rationale for selecting indices used for comparison and suggested that benchmarks should reflect the unique attributes of private investments. A consumer stated that an index or combination of indices may not always be appropriate; the objective should be to make the complainant whole in the fairest manner possible.	we would use benchmarks which reflect the consumer's KYC information (i.e., lower-risk or publicly traded investments). However, if a consumer's KYC information indicated that high risk private investments were suitable but the specific investments in their portfolio were not (e.g., for overconcentration or other reasons), we would work with the firm to determine an appropriate alternate benchmark and would consider using appropriate MSCI global private equity indices as a benchmark, if such investments were reasonable and suitable for the investor. As described in our detailed approach to loss calculations, the goal of our comparative performance analysis is to place the consumer in the position that they would have been, had the unsuitable recommendation not been made. We do not always use indices for this purpose. In cases where we determine that a consumer should not or would not have invested if given suitable advice or where no suitable alternative investments can be identified, we may simply use the investor's actual losses as their financial harm. In response to these comments, we plan to publish a comprehensive approach to benchmark selections in order to improve our transparency and to help stakeholders better understand the benchmarks we use in our loss calculations.
Approach is inconsistent with impartiality	An industry association expressed the view that our approach to determining financial harm is inconsistent with our Terms of Reference, which require OBSI to be independent and impartial. The association argued that our current approach favours complainants because they say it systemically redistributes risk and assumes loss in favour of consumers.	Independence and impartiality are essential to all of OBSI's processes and are considered in every organizational decision. Our approach to determining financial harm does not inherently favour either party and does not redistribute risk or assume loss. We will only calculate financial harm after we have made a determination that a firm or its representative has made an unsuitable recommendation. The use of a comparative portfolio when unsuitable investments have been sold serves to place the consumer in the position they would have been had this wrongdoing not occurred. Only the risk associated with unsuitable securities is redistributed to the firm responsible for the unsuitable advice.

		In addition, the use of comparative portfolios does not inherently favour one party over the other. It is not uncommon, particularly in declining markets, that our financial harm calculations using a comparative approach find that the consumer did not incur financial harm because the suitable investments would have led to greater losses than the consumer actually experienced from the unsuitable investments. In cases where the unsuitable securities outperformed the suitable securities, we make no recommendation for compensation. Many firms use a comparative approach when addressing client complaints, and courts also use this approach in suitability cases. OBSI's methodology has been consistently endorsed by independent expert external reviewers. In our most recent external review, the reviewers concluded that "OBSI's loss calculation methodology is first-rate, enabling all parties to agree on underlying assumptions and ensuring that prices from the relevant time are used, bringing a high level of efficiency, consistency and fairness to the process."
Adopt valuation methodologies from NI 31-103	An industry association stated that OBSI had not provided sufficient detail on its valuation methodology, making it difficult to assess the fairness of the approach. It recommended that OBSI defer to the valuation methodologies adopted by participating firms, aligning with National Instrument 31-103 and other relevant rules.	OBSI's approach is consistent with the methodology set out in NI 31-103 and its Companion Policy. NI 31-103 Companion Policy Section 14.11.1 states that "where possible, market value should be determined by reference to a quoted value on a marketplace … Registered firms should ensure that any quoted values used to determine market value do not represent stale or old prices that are not reflective of current values. If no current value for a security is quoted on a marketplace, market value should be determined by reference to published market reports or inter-dealer quotes." The Companion Policy states that in instances where the market value is not obtainable using the above methods, a consistently applied valuation policy that is based on reliable valuation inputs and assumptions would be accepted. In some cases, it may be reasonable and appropriate to value at cost, where there has been no material subsequent event affecting value. If after applying this methodology, a registered firm cannot determine the market value of a security, it must report the value as "not determinable" and exclude it from client statements. The Companion Policy also states that if the market value of

		a security cannot be determined for a prolonged period, that fact may be an indication that the market value of the security should be determined to be zero. Our loss calculation approach is consistent with this methodology. Where possible, we use the market value quoted on a marketplace/published market reports assuming the market value is reflective of current values. If not obtainable, we will rely on the firm to provide a valuation based on a valuation policy that is consistently applied and assesses the reliability of any valuation inputs and assumptions (as described in NI 31-103CP). If a firm is unable to provide this, we will use our best efforts based on any reliable information the firm can provide to assess value. We will use a value of zero only as a last resort and where the value of the security has not been determined for a prolonged period of time. A detailed description of our valuation methodology can be found on page 6 to 9 of our consultation document and on our EMP Loss Calculation approach. However, in response to this comment, we plan to publish an updated technical loss calculation methodology approach document intended to provide more complex and detailed information for stakeholders.
Apply methodology to the entire portfolio	An industry association recommended applying Market-Adjusted Damages to an investor's entire portfolio rather than individual investments to align with the CSA's portfolio-based suitability framework.	We use a portfolio-based approach in cases where there is evidence that the investment recommendations were made on a portfolio basis. However, in cases where the investments were sold individually, we will evaluate suitability and calculate financial harm on that basis.
Consider residual value	A participating firm observed that assigning a zero value may not capture scenarios where residual or potential value exists but is indeterminable. A consumer stated that while assigning a zero value to illiquid exempt market securities in the absence of reliable market data is a logical starting point, it needs refinement, as the rigid application of a zero-value	Where residual value of an unsuitably sold security can be determined, we will use it to calculate the investor's financial harm. Where residual value cannot be determined, however, we must have another basis for calculating the investor's compensable harm, and we use the approach of assigning a zero value to the security. We do not rigidly apply a zero-value approach, instead the zero-value approach is our last resort.

	approach ignores the possibility that some securities may retain residual value, which could either overcompensate investors or unfairly disadvantage firms. Firms should have the option to either accept the security and any residual value or pay a nominal residual value to the investor without transferring the asset. OBSI should provide clear guidelines on the timeframe within which firms must realize any residual value. If the firm fails to do so within a defined period, the security's ownership should revert to the investor.	Assigning a value of zero to the unsuitable security is the equivalent of assuming a total loss on the value of the unsuitable investment. This means that in our loss calculations the firm will compensate the consumer as if the unsuitable investment had no residual value. If the consumer is compensated on this basis and also retains ownership of the security, there is the potential for double recovery if the security has any residual value. The reason that we recommend assigning the security back to the firm is to avoid double recovery and to shift the burden of illiquidity and delay in realizing value from the investor to the firm that made the unsuitable recommendation.
Name individual advisors	A participating firm stated that OBSI should implement a system to "name and shame" advisors responsible for unsuitable trades to enhance accountability and transparency.	It is common in suitability cases that the person directly responsible for an unsuitable recommendation is the registered representative or advisor who personally works with the consumer. Individual registrants do not belong to OBSI and are often no longer with the firm or in the industry at the time of our investigation. Individual registrants involved in a complaint may or may not participate in our investigation. Firms belong to OBSI and are responsible for the conduct of the registrants who are their employees or agents. Firms have regulatory responsibilities to appropriately oversee all registrants that work for them and also have legal liability for the actions of their employees and agents. When a firm is held liable for the actions of its employee or agent, it may be able to recover these costs from the employee or agent. OBSI rarely publishes "name and shame" reports. We have published only 22 such reports in our 29-year history. In these reports, we do not name the individual registrant involved in the cases because our objective is to reach a fair settlement between the consumer and the firm, and our focus is on the firm's liability. The individual registrant has usually not been involved in this settlement process.

Question 2a

If we maintain our general approach of assigning a value of zero to unsuitable illiquid exempt market securities when a value cannot be determined and requiring investors to return these securities to firms as part of any settlement:

a. are there exceptional situations or specific circumstances where such an approach should not be used?

Most industry associations suggested exceptions and situations where additional considerations should be taken into account. Many emphasized the importance of careful attention to valuation.

Most investor protection advocacy groups, consumers and one participating firm stated that they were not aware of any situations where exceptions would be warranted but many also stressed the importance of accurate suitability determinations and flexibility in exceptional circumstances.

Some consumers and firms suggested that there may be circumstances where a partial valuation is possible, particularly where recovery appears likely.

Some commenters also made suggestions for changes to OBSI's policies and procedures that are beyond the scope of this consultation or for regulatory changes that are not within OBSI's jurisdiction. We have read and considered these comments but have not included them in this response document.

Theme	Summarized comments	OBSI responses
Consider tax benefits	An industry association suggested that the tax benefit of flow-through shares should be considered in loss calculations. One participating firm encouraged OBSI to consider the tax consequences and benefits for clients holding illiquid investments in registered plans like RSPs or RIFs.	We take the tax benefit of flow through shares into consideration in our loss calculations. Our general approach is to take tax benefits into account if the tax benefit is an integral part of the investment strategy. This is generally the case for flow through shares. In general, the account type is not relevant to the valuation of the securities in an account. We do not usually consider tax consequences for investments in registered accounts because these accounts shield investors from income tax consequences (positive or negative). Investing in illiquid assets within registered accounts, particularly RRIFs, also poses specific risks that will be taken into account in the suitability analysis. Where unsuitable illiquid investments are held in registered accounts, transfers

		of the security back to the firm may be difficult or impossible. However, such situations are rare and are resolved on a case-by-case basis.
Approach not appropriate if firms not operationally able to accept illiquid securities	An industry association suggested that firms should not be required to repurchase the securities if they are not operationally able to accept illiquid securities. An industry association stated that firms should not be required to take back securities years after a sale if a liquidity event has not occurred.	This is quite rare in our experience. In almost all cases, we have found that firms are operationally able to accept ownership of securities, though they may prefer not to. Where direct ownership of the securities is not feasible, alternative approaches can include the assignment of an interest or a contractual agreement that the consumer will transfer any residual value to the firm if it is realized. The passage of time since an investment has been sold and the lack of a liquidity event are prejudicial to the holder of the security whether it is the investor or the firm. This consultation concerns how OBSI should fairly resolve the harms that an investor has incurred as a result of the sale of unsuitable investments by the firm. In these cases, we must consider which party should bear the inconvenience and/or prejudice of holding an illiquid security into the future.
Approach not appropriate if illiquid securities are suitable for the investor	An industry association suggested that firms should not be required to repurchase the securities if a complainant's KYC information and investment patterns support investing in exempt market securities, but their investments are deemed unsuitable for other reasons (e.g., overconcentration).	This suggestion does not address the central problem, which is how OBSI can calculate financial harm and appropriately account for any residual value of a security with an unknown present value. The return of the security to the firm is intended to address concerns about double recovery after a settlement has been made, in the event that the security ultimately has value. In cases where illiquidity is suitable but the specific investments are not, this methodology would only apply to the unsuitable investments in the portfolio that cannot be reasonably valued.
Approach not appropriate unless the investment horizon elapsed	An industry association suggested that if the complainant's investment horizon has not elapsed, firms should not be required to repurchase the	All suitability determinations are based on an assessment of what was reasonable in the circumstances at the time that the investment recommendations were made. A change in a consumer's circumstances within the time horizon does not impact the suitability of the original

	securities and the loss claim should be considered premature.	recommendation. This means that the suitability of the investment recommendation can be assessed at any time following the recommendation. Investment time horizon is an important component of suitability and must be considered in determining the suitability of any investment recommendations. However, if unsuitable investments are sold to a consumer, it would not be fair or reasonable to require them to hold those securities until the end of their investment time horizon before allowing a claim.
Approach not appropriate if illiquidity is caused by unforeseeable circumstances	An industry association suggested that firms should not be required to repurchase securities if illiquidity is caused by systemic market forces or other intervening events.	Market forces and intervening events are not relevant to a suitability analysis because all suitability determinations are based on the circumstances at the time of the recommendation. If a security was not illiquid at the time of the recommendation, any subsequent illiquidity would not be taken into account in assessing the suitability of the recommendation. Such illiquidity may, however, impact our ability to determine the present value of the security. Additionally, if the firm has an ongoing relationship with the investor, they may have ongoing suitability obligations to monitor for changes and risks in their client's portfolios.
Approach not appropriate if securities are subject to resale restrictions	An industry association suggested that firms should not be required to repurchase securities containing resale restrictions.	Where fairness requires any residual value of the security to be transferred to the firm as part of a settlement, but resale restrictions prevent the transfer of a security, we will recommend an alternative approach such as the assignment of an interest or a contractual agreement that the consumer will transfer any residual value to the firm if it is realized.
Approach not appropriate if partial evidence of residual value available	A consumer stated that in cases where there is credible evidence suggesting the security may recover some value soon (e.g., recent valuations, third-party estimates, upcoming corporate events), OBSI should adopt a more flexible approach and assign a nominal or estimated value.	We will consider all available evidence when assessing the value of a security, including the probability of recovery and the likely time horizon for the security's potential value to be realized. In our assessment of what is fair in all of the circumstances of a case, we will consider whether it is reasonable and appropriate that, as part of our

	A participating firm said that if an illiquid security has undergone partial liquidation or shows potential for future recovery, assigning a zero value may not be appropriate.	recommended resolution of the dispute, the consumer should continue to hold an unsuitably sold security for an extended period of time.
Approach should apply if firms withholding evidence	A consumer expressed the view that firms should be required to provide comprehensive documentation, including valuations, forecasts, or corporate updates related to an illiquid security, and that if firms cannot substantiate their claims, the zero-value approach should apply. The consumer recommended that OBSI should penalize firms that fail to cooperate fully in providing valuation data by using the zero-value approach as a punitive measure, and that more flexible arrangements can be applied when transparency is maintained.	Firms are required to cooperate fully in our investigations pursuant to our Terms of Reference and, generally speaking, it is in the firm's interest to provide us with evidence of a security's value, if available. In cases where firms refuse or are unable to provide sufficient documentation of a security's value, our ability to determine the value of the security will be diminished and the likelihood of a zero-value assignment is increased.
Approach not appropriate if issuer is in distress	An industry association argued that assigning a zero value should not be used when an issuer is in bankruptcy proceedings. They also proposed an "Exigent Circumstances Protocol" to defer valuation until the monitor or trustee completes their assessment.	When an issuer is in bankruptcy, the record of proceedings and professional reports prepared for the proceedings can often be of assistance in determining or estimating the value of the issuer's securities. In some cases, it may be clear that the value is zero. In other cases, the evidence may help to clarify that the securities do have residual value that is yet to be determined. However, we note that bankruptcy proceedings can often be complex and lengthy. Where this is the case, we will consider the fairness of requiring the consumer to continue to hold unsuitably sold securities for lengthy periods of time, as opposed to transferring or assigning the value of those securities to the responsible firm.
Approach should be applied flexibly in unique circumstances	An industry association recommended maintaining the general approach outlined in the consultation document but emphasized the need for flexibility in exceptional situations and additional considerations. For example, they suggested that if the firm objects to	We agree with these comments. Flexibility in unique and exceptional circumstances is important to ensuring that we are able to recommend resolutions that are fair in all of the circumstances in each case that we consider.

	receiving the securities as part of a settlement, or the securities cannot be transferred to the firm due to restrictions in the offering documents, insolvency of the issuer or cease trade orders, OBSI should work with the parties to arrive at a fair and reasonable solution. This could include legally binding agreements to transfer beneficial ownership or agreements to pay over any amounts received in a receivership context. An investor protection advocacy group did not suggest any specific situations where this approach should not be used but supported adjusting the approach if unexpected, exceptional circumstances arise to ensure fair outcomes. An industry association urged OBSI to employ a flexible approach where it is not possible to effectuate a transfer of the securities in question to achieve a resolution that is fair to all parties. A consumer emphasized the need for more flexibility and clarity in OBSI's methodology to ensure fair outcomes for all parties.	Where the transfer of a security back to the firm is not possible due to the unique circumstances of the case, we may recommend an alternative approach such as the assignment of an interest or a contractual agreement requiring the consumer to transfer any residual value to the firm if it is realized.
Benchmark should reflect the dealer's available product shelf	An investor protection advocacy group stated that for exempt market dealers that only distribute securities of related or connected issuers, OBSI should consider the dealer's limited investment strategy when calculating the performance of an alternative suitable investment or portfolio.	When making a recommendation in a case involving unsuitably sold securities, our goal is to place the consumer in the position they would have been had they received suitable advice. When assessing the suitability of a consumer's portfolio, we take into account both the consumer's characteristics and the firm's regulatory obligations. We note that NI 31-103 stipulates that firms have an obligation to decline a client if they do not offer securities that are suitable for the client. For example, if all of the securities offered by a firm are high-risk and a consumer's KYC information

		indicates that high risk securities should make up only 50% of their portfolio, the firm is obligated to decline the other 50% of the business, allowing the investor to source suitable investments elsewhere. If the firm did not do this, and the case escalated to OBSI, then when calculating the financial harm of the unsuitably sold investments, we would use a suitable benchmark and it would be unfair to the consumer to restrict our comparative portfolio to only investments offered by the firm. However, if the firm offers securities that are suitable for the consumer, we will use a comparative portfolio that reflects the product shelf of the firm. For example, if the firm offers securities in only one economic sector, and this concentration is suitable for the consumer but the specific securities sold to the consumer are not, we will use a comparative portfolio that is limited to that sector.

Question 2b

b. are there any other considerations or steps that we should take in the recommendation and settlement process that would improve the fairness of outcomes for consumers and/or firms in cases where illiquid exempt market securities have been unsuitably sold?

Theme	Summarized comments	OBSI responses
Maintain/improve communication	An investor protection advocacy group encouraged OBSI to continue engaging with industry stakeholders, particularly EMDs, to address any concerns and prevent misinformation about the methodology. They also highlighted the need for EMDs to improve their compliance processes, particularly in suitability determinations, to reduce unsuitable sales.	OBSI regularly shares information and best practices from our cases with firms and other stakeholders through various channels including our case studies, newsletters, firm bulletins, firm portal and our firm helpdesk. We regularly engage with participating firms and consumer advocacy organizations through a range of channels to raise awareness of our services, approaches and methodologies, including: - We hold semi-annual meetings with industry associations to provide an opportunity to share updates from OBSI and discuss key issues.

	An industry association expressed the view that indices and calculations used in decisions should be disclosed to firms to ensure transparency and fairness. A consumer proposed that OBSI should also publish redacted complaint cases to allow stakeholders to assess the implementation of its loss calculation methodology. An industry association also called for greater transparency and accountability in OBSI's processes, including publishing clear guidelines and methodologies. A consumer recommended that OBSI should educate EMDs on the role of a modern financial ombudsman service to eliminate misconceptions and improve understanding of the loss calculation methodology. They also recommended that OBSI should form a committee on best practices in complaint handling and loss calculation to ensure staff continue to use best practices in complaint resolution. An investor protection advocacy group suggested that OBSI should also clarify and publish its approach to cases involving dealers with limited investment strategies or shelves. A consumer recommended that OBSI should prepare a feedback report based on complaints data to help EMDs improve due diligence, KYC data capture, and complaint handling processes. A consumer suggested that:	- We also hold one on one meetings with industry associations and participating firms on a request basis. - We have quarterly meetings with firms with higher complaint volumes to ensure an open dialog and discuss any issues or concerns. We also offer presentations on our loss calculation methodologies to better support industry and consumer understanding of our approach and to answer questions. We have presented our detailed loss calculation methodologies to the PCMA, the IIAC, the Investment Funds Institute of Canada (IFIC), the Investment Industry Regulatory Organization of Canada (IIROC), the Mutual Fund Dealers Association of Canada (MFDA), several individual firms, and a group of interested consumer advocates among others in recent years. We also work directly with firms to help them understand our processes and their obligations and best practices in relation to complaint-handling and consumer redress. The Firm Helpdesk is an example of one of our initiatives to assist firms in understanding our historical risk ratings and help firms improve their complaint-handling processes. When we're working with firms in the context of specific complaints, we work closely with them to ensure that they fully understand the context and background assumptions of our calculations. This includes full disclosure of indices and calculations to ensure they have the full opportunity to respond or suggest changes. We accept the suggestion that we should publish redacted complaint cases and we will publish a series of technical case studies later this year. We are committed to transparency. Our approaches are guides to help consumers and firms to better understand how we reach our decisions on complaints about products, services or issues. We also publish all public consultations, including our consultations on our loss calculation methodologies which can be found here.

	- OSBI should publish anonymized cases on its website for transparency in decision-making, especially when it acquires a binding decision mandate. - OBSI should periodically submit selected case decisions to an independent third-party assessor and make the assessment results public. - OBSI should report all cases to the applicable regulator/JRC where there is concrete evidence that the EMD has not demonstrated due diligence in assessing the eligibility of the investor to purchase exempt securities.	We are also committed to accountability for our processes and recommendations. We engage in expert independent external reviews of our processes and methodologies every 5 years. Links to these review findings as well as our responses can be found here. We will review and update all of our loss calculation methodology disclosures following this consultation. We also note that our next independent external review will take place in 2026. With respect to communicating our approach to dealers with limited strategies and investment products, we ensure that firms and consumers involved in these specific cases are aware of what we will consider in their case. As described above, our approach is to ensure that the firm has complied with their suitability obligations. All firms have an obligation to ensure the securities they sell are suitable for their clients. Dealers with limited strategies and offerings may be obligated to decline clients more often than dealers with broader offerings. To the extent reasonable and possible, we use benchmarks and comparative investments that reflect the securities available to the firm at the time a recommendation was made. To improve our transparency, we plan to publish a document outlining this approach on our website later this year. Additionally, as committed above, we also plan to publish a number of technical case studies, which will include this scenario. In accordance with our systemic issues protocol, we report all identified potential systemic issues to securities regulators when we see cases or evidence of issues that may impact multiple consumers.
Hold securities in escrow until valuation is possible	An industry association suggested that OBSI should extend decisions until securities can be valued and hold securities in escrow until a value can be determined. A participating firm stated that OBSI should implement mechanisms for future contingent payments based on	We disagree with these recommendations. For illiquid exempt market securities with insufficient information available to fairly determine a value, the amount of time required before adequate valuation information is available could be significant and, in some cases, there may never be sufficient evidence to determine the value of the securities. Holding such securities in escrow and imposing lengthy wait times on consumers holding unsuitable investments would impose a significant burden on those consumers and would be inconsistent with our mandate to resolve complaints efficiently and fairly.

	eventual outcomes for securities showing potential for future returns.	To the extent that there must be a holding period before any value can be realized, it is fair that any necessary waiting period should be experienced by the firm that is responsible for the unsuitable recommendation.
Apply approach to original recommending firm only	An industry association recommended that in cases where an unsuitable illiquid security has been transferred from the original recommending firm to a new firm, OBSI should seek the authority to require investors to return securities to the original salesperson or firm. The association recommended that the second dealer should have the option to decide which dealer receives the security. A participating firm stated that OBSI should ensure firms that initially sold unsuitable investments face clear, enforceable obligations to rectify the situation. They recommend that if an unsuitable illiquid investment has been sold to a client and transferred to a new firm, the original dealer should take back the security at the current market value or the original purchase price. This ensures investors are not left holding unsuitable investments with little to no value. An industry association observed that determining responsibility between new and relinquishing dealers for locked-up real estate is complex.	In situations where a security is sold by one firm and the consumer then moves their portfolio to another firm, both firms have suitability and professional advisory responsibilities. In these cases, which are rare, we will first determine the liability of each firm. If the investment was unsuitable when initially sold, we will recommend that the original firm be liable and if the securities cannot be valued, that this firm takes back the security. However, where the original firm is not liable, but the second firm is liable (e.g., where a security is suitable when sold but becomes unsuitable after transfer to a new firm), we may recommend that the security be transferred to the second firm as part of the resolution. In some very rare cases, both firms have responsibility for the harm to the consumer and in these situations we will tailor our recommendation to the unique circumstances of the case.
Hold individual advisors accountable	An industry association recommended that OBSI should involve advisors in the process and support dealers in recovering compensation sums from advisors.	Where possible, we engage advisors in our process because they are usually closely involved in the events relevant to our investigation and their evidence is important to our understanding of the circumstances of the case. However, advisors are not required to be members of OBSI and in many cases, are no longer working with the firm involved in the case or are no longer working in the

		securities industry at the time of our investigation. In these cases, we rely on the firm's evidence and available file materials to determine a fair outcome. Generally speaking, firms are liable for the actions of their employees and agents and are responsible for fairly compensating consumers who have incurred financial harm as a result of the actions of their employees or agents, even where the firm itself has not made an error or engaged in wrongdoing. A firm that has paid compensation to their client as a result of employee or agent wrongdoing and later seeks to recover this amount from their employee or agent would do so on the basis of their contract with the employee or agent. OBSI does not have a role to play in this process.
Refine comparative analysis methodology	An industry association expressed the view that OBSI should avoid over-fitting the back-test model and consider historical outlier events, liquidity/redemption restrictions, and contemporaneous KYC in suitability assessments. A consumer stated that the cost of acquiring and holding an index should be considered in the loss calculation. They also recommended that OBSI should consider the investor's overall circumstances and investment time horizon, especially for exempt securities.	These suggestions are consistent with OBSI's current approach. We look at the actual timeframes of investment, consider liquidity and redemption restrictions, and only consider contemporaneous KYC in our suitability assessments. We consider the cost of holding an index and incorporate reasonable advisory fees/management fees in our loss calculations. We also consider all relevant KYC information, including time horizons in our suitability analysis.
Report systemic issues	A consumer recommended that OBSI should inform the JRC of any systemic issues regarding the advice and sale of illiquid exempt securities to ensure all similarly harmed investors are informed and compensated.	OBSI follows this practice closely and informs the JRC regularly of systemic issues, in accordance of our reporting requirements in our MOU with securities regulators.

Give firms time to find a buyer	An industry association stated that firms should be given a reasonable opportunity to find a buyer for the security before it is deemed illiquid.	If the firm requests a reasonable period of time for this purpose, we would consider it if it were not unfair to the consumer and did not impose significant delays in our process. To our knowledge, this has never been requested.
Consider market impacts	An industry association stated that OBSI should avoid negatively impacting the market for exempt products through a punitive approach to loss calculation.	OBSI does not have a mandate to impose penalties or make punitive recommendations. Our mandate is to recommend fair outcomes for unresolved disputes between consumers and participating firms. When our investigation determines that a firm's error or wrongdoing has caused a consumer financial harm, our approach is designed to put the consumer in the position they would have been had the firm's error or wrongdoing not occurred. The overall value of our recommendations involving exempt market securities is typically less than $500,000 per year in aggregate. Given this low volume, it is unlikely that the market for exempt products would be impacted by our dispute resolution recommendations.
Consider all available evidence of valuation	An industry association stated that assigning a value of zero should be a last resort. The association also recommended that OBSI should prioritize relying on information from portfolio managers, third-party appraisals, independent research, and reasonable estimates to ascribe a value to securities. A participating firm urged OBSI to ensure firms provide comprehensive documentation of any attempted sale, transfer, or appraisal of the security during the resolution process.	In the course of our investigations, we ask firms for all available information related to valuation and we work with them to understand the nature of the information we need. We will take into account all sources of information provided by the parties or determined by our own research when attempting to establish the value of a security. Our process contemplates assigning a value of zero as a last resort.
Use a portfolio approach	An industry association stated that OBSI should use a portfolio approach to evaluating suitability rather than an investment-level approach.	When assessing the suitability of a consumer's investments, we will use a portfolio level approach if the evidence in the case indicates that the advisor made investment recommendations on the basis of a portfolio-level suitability analysis.

	An industry association stated that OBSI should be consistent in its approach. They recommended that OBSI should focus on the portfolio-level suitability of the securities rather than looking at individual securities in isolation. The association observed that this aligns with the Client Focused Reforms, which encourage registrants to assess suitability based on the client's overall financial circumstances. A consumer stated that exempt investments in managed accounts must be discussed with all investors prior to making the investment, and the account should be assessed on a total portfolio basis.	If an advisor says they used a portfolio approach, we ask to see supporting evidence (such as an asset allocation plan) to show that a portfolio approach was used when the investment recommendations were made and that the recommended investments, when considered together, are consistent with the consumer's documented risk tolerances. We also ask whether the advisor explained to the investor that taking a portfolio approach may result in the consumer holding some securities that are beyond their overall risk tolerance. A portfolio that contains some securities beyond the consumer's risk tolerance may be suitable if the investor was aware of and understood the implications. In cases where the firm cannot demonstrate that a portfolio approach was used at the time the investment recommendations were made, we will assess suitability on the basis of the individual recommendations.
Compensation should reflect actual and not comparative losses	A participating firm expressed the view that financial harm should be assessed based on quantifiable losses rather than theoretical differences in relative gains. They believe that harm must involve actual losses to be considered compensable damages.	Our approach to financial harm calculation is to determine an amount that will place the consumer in the position they would have been had the error or wrongdoing not occurred. Our use of comparative analysis is fair to both the consumer and the firm and is consistent with the approach that would be taken by the courts in a civil case considering the same matter. It is important to recognize that a comparative approach to financial harm calculation does not specifically favour one party or the other when contrasted with a "book loss" approach. The comparative approach takes into account any gains that a consumer actually realized on unsuitably sold investments and considers losses that the consumer may have experienced had they been suitably invested. Using this approach, it is not unusual for us to find that a consumer who has been unsuitably invested did not incur financial harm as a result. During periods of market decline, the comparative approach typically results in lower recommendations than would be recommended using a "book loss" approach.
Use partial/ nominal values	A consumer suggested introducing a tiered approach that reflects varying levels of evidence. A nominal or	Our goal is to be fair to both consumers and firms. In situations where it appears there might be some value but not enough evidence to quantify the value, we recommend that the securities be transferred back to the firm so that the

	discounted value could be assigned when firms provide evidence of potential value.	consumer receives full compensation and the firm receives any residual value, ensuring that there is no double recovery. We do not use a nominal value approach because in cases with only partial evidence of value, assigning a nominal value risks being unfair to either the consumer or the firm since by definition the value used would be inaccurate and would leave the consumer holding illiquid investments that are unsuitable for them.
CSA should approve loss calculation methodology	An industry association stated that OBSI's loss calculation methodology should be reviewed and approved by the CSA to address structural conflicts of interest. An investor protection advocacy group urged the JRC to formally endorse OBSI's methodology to enhance its credibility among firms.	OBSI is an independent, not-for-profit organization and our mission is to fairly resolve disputes between consumers and participating firms and help to ensure a fair, effective and trusted financial services sector. We are not aligned with and do not advocate for the interests of consumers, industry participants or any other stakeholder. We rigorously guard against any form of actual or perceived conflict of interest. Our loss calculation methodologies are designed to be fair to all parties and are based on over 20 years of experience resolving disputes in the securities sector. Our methodologies were originally adopted following a public consultation process and we publicly consult on any significant changes. Our methodologies are also subject to review and analysis by independent expert reviewers every 5 years, most recently in 2021. These independent expert reviews have consistently concluded that our methodologies are fair, reasonable, and consistent with international best practices. The CSA is fully informed of our approach to loss calculations, and our analyst team regularly provides detailed presentations of our loss calculation methodologies to industry, consumer, and regulator audiences. We also remain committed to continuous improvement in all aspects of our work and regularly make adjustments to our processes and methodologies in response to suggestions, changes in our environment, and prevailing best practices.

		The goal of this transparency and accountability is to ensure that all participants in our process can have confidence in the fairness and quality of our processes and methodologies.
Consider consumer responsibility	An industry association suggested that OBSI should consider partial suitability determinations to reflect the complexity of investment decisions. They recommended that OBSI should consider shared responsibility between investors and EMDs in cases of financial harm. An industry association recommended that OBSI should consider whether investors were provided with appropriate notice and risk disclosures in accordance with relevant regulations. A participating firm suggested that OBSI should address cases where clients knowingly pursued "off-book" investments through rogue advisors. A consumer suggested that while it may be reasonable for an investor to be held partially accountable for losses in some cases, this depends on the financial competency of the investor and other factors such as health issues or diminished capacity. The consumer argued that the firm has the primary responsibility for recommending suitable advice and should be held accountable if they fail to recommend an exit strategy for the unsuitable investment.	OBSI's current practices reflect many of these suggestions. We do consider partial suitability in consumer portfolios and we consider consumer responsibility in every case. We also consider any notices and risk disclosures that have been provided to consumers as this is relevant to their willingness to accept risk. However, we are mindful that providing risk disclosures does not make an otherwise unsuitable investment suitable. For cases involving "off-book" investments, a primary focus of our investigation is whether the consumer knew or reasonably ought to have known that the advisor was not representing the firm in the transaction. If a client knowingly pursued "off-book" investments, we generally would not consider the firm to be responsible for those investments or any negative consequence to the consumer. We note, however, that firms have regulatory obligations to supervise, train, and make clear to individual registrants that they are not to engage in off-book transactions. In cases where we find that this obligation has not been met, and the evidence indicates that proper supervision may have prevented the transactions from occurring, we may consider recommending compensation on that basis. A consumer's personal characteristics, including financial knowledge and capacity should form a part of the KYC information gathered by the firm and be taken into account when assessing the suitability of any recommended investment. A consumer's personal characteristics are also relevant to our determination of whether the consumer should share liability for financial harms that they have incurred.
Do not facilitate low settlements and do not allow non-disclosure	A consumer suggested that OBSI should refuse low ball settlements to prevent firms from undermining the compensation calculated by OBSI's loss calculation methodology. The consumer argued that sellers of	The goal of OBSI's process is to facilitate the settlement of all disputes where possible. To promote settlement, our policy is to share all settlement offers from either party with the other party. It is up to the firm and consumer involved to

agreements in settlements	illiquid or other exempt market securities, including EMDs, must be prohibited from using "gag orders" to restrict complainants from informing other potential victims. A consumer stated that firms should not use NDAs in complaint settlements.	consider the pros and cons of any prospective settlement and if they both agree to settle a dispute, we will close our investigation on that basis. A key weakness of our current "name and shame" mandate is that consumers have relatively few alternative options if our process is unsuccessful. This places the consumer in a disadvantageous position when considering a low settlement offer because their realistic alternative if no settlement is reached and we publish the case may be receiving no compensation. Releases and non-disclosure agreements (NDAs) are very common and are requested by the firm in virtually all settlements of any significance. NDAs are also typical in settlements of legal proceedings. They serve a number of important purposes and OBSI's position is that releases and NDAs are acceptable in our process, provided that they are reasonable, not overly broad, and are limited to the subject matter of the complaint being settled.