

June 12, 2013

Consultation on Proposed Changes to OBSI's Terms of Reference

OBSI's Terms of Reference embody the dispute-resolution mandate that our organization performs for the banking and investment industries. They expand on the mandate contained in OBSI's Bylaw and Articles by describing the principal powers and duties of the Ombudsman, the duties of participating firms, the scope of the mandate, and the process of OBSI for receiving, investigating and seeking resolution of financial services customer complaints.

OBSI is now issuing a revised set of Terms of Reference for public consultation. This is another step in the governance reform process, initiated in 2011, that saw, among other things, a new corporate Bylaw adopted and significant renewal of the Board of Directors, including the appointment of a new Chair.

There are different rationales for the various proposed changes. Some are required by the Financial Consumer Agency of Canada (FCAC) as part of their application process for external complaint bodies for the banking sector. Others are intended to improve the efficiency of our process. Some revisions have been proposed over the years by various stakeholders and OBSI agrees they have merit. Finally, many changes are merely housekeeping in nature.

This consultation document outlines the changes to the Terms of Reference that OBSI's Board of Directors considers to be noteworthy or material. Changes that are purely housekeeping in nature are not detailed in this document.

The [proposed Terms of Reference](#) as well as a [blacklined copy](#) are available on our website.

PROPOSED CHANGES FOR PUBLIC COMMENT

Section 1: "Ombudsman" vs. "OBSI"

OBSI's original Terms of Reference were created for OBSI's predecessor organization, the Canadian Banking Ombudsman (CBO), back in 1996. When it launched, the CBO consisted of only one person, the Ombudsman. Since then the organization has evolved and grown but the term "Ombudsman" has continued to be used throughout the Terms of Reference even when describing organizational roles and responsibilities.

Given the evolution of the organization, we are clarifying most such references in the Terms of Reference as being "OBSI". These provisions should be interpreted as references to OBSI

management or staff exercising the powers and performing the duties of the Ombudsman's office that have been delegated to them.

Section 2(a): Definition of "Participating Firm"

OBSI's mandate is limited to investigating complaints about products and services in the banking sector and those that fall under the jurisdiction of securities regulators. This does not include entities whose main business is the provision of insurance products or services. The definition of a "Participating Firm" is being modified to make this clear, as well as incorporate the affiliates concept. The greatest consequence of this change will be that OBSI will refer the investigation and analysis of segregated funds to the Ombudservice for Life and Health Insurance (OLHI) even if they form a part of a larger portfolio that is the subject of a complaint to OBSI.

Section 2(a) and former Section 11: Systemic issues

OBSI took on the mandate to investigate systemic issues at the request of financial regulators, including the federal Department of Finance, in response to a 2007 independent review of our operations. These are issues that are discovered during the investigation of an individual complaint that OBSI believes may have affected or have the potential to affect a large number of consumers at the same firm.

In developing regulations concerning banking dispute resolution that were finalized in April 2013, the Department of Finance adopted a new policy direction: any potential systemic issues identified in the investigation of an individual complaint should be referred by external complaint-handling bodies such as OBSI to the FCAC for investigation. As a result, OBSI is removing the systemic issue investigative powers from our Terms of Reference (former Section 11), which also necessitates a change to the definitions section.

This change to the Terms of Reference eliminates OBSI's ability to investigate systemic issues on the investment side of our mandate as well. OBSI's Board believes that there should be one policy on systemic issues for the entire organization, and the decision by the Department of Finance has necessitated this policy change. The Board understands that securities regulators are supportive of this position.

Section 4: Delegation of powers and duties

The Terms of Reference are being changed to reflect the evolution of our organization. This section now more accurately describes how the powers of the office of the Ombudsman are shared throughout OBSI, reflecting the fact that the decision to delegate various functions is more of a management decision rather than one of the Board.

Section 6: Code of Conduct and privacy policies

Staff have always been required to acknowledge their understanding of, and compliance with, the Code of Conduct and privacy policies and procedures upon being hired, and periodically thereafter. The language in the Terms of Reference is being modified to be explicit about this.

Section 7: Threats to participating firm staff or property

OBSI will report to a participating firm any threats to staff or property that come to light during an investigation. However, this section of our Terms of Reference is being modified to make clear that participating firms must keep confidential the specific identity of the OBSI staff person who reported the threat to them.

This change is being made as a result of several incidents over the years in which a threat was reported by OBSI to a participating firm. Those firms then identified to the threatening complainant the name of the OBSI staff member who passed along the information. In these instances, OBSI's staff member was then exposed to threats and/or risks of violence from, or felt threatened by, the same person who made the threats against the participating firm. OBSI believes proper protections for its own staff should be in place if we are to provide this information to firms.

Section 8: Fairness

Above all else, OBSI's mandate is to investigate complaints with a view to resolving them in a manner that is fair to the parties. This key principle is being emphasized in this new section of the Terms of Reference, with readers directed to the [Fairness Statement](#) available on our website.

Section 9: Firm responsibility for actions of their representatives

OBSI's jurisdiction to make recommendations extends to participating firms. In most cases, however, the errors or maladministration that cause customer losses are caused by staff, advisors, or other representatives of the firm. This section is reinforcing the concept that firms, not their representatives, are responsible for paying complainants the compensation that OBSI recommends. Whether the firm then goes back to the representative to try to recover any compensation paid is a business decision for the firm to make and is not part of OBSI's process.

Participating firms are responsible for the actions of their representatives, including advisors, by virtue of their participating in OBSI's service and the nature of OBSI's jurisdiction. While OBSI is not a court proceeding, on this point we believe that case law is clear that investment firms are vicariously liable for the actions of their investment advisors in regard to securities-related business.

Section 9(c): 180-day guideline for escalating complaints

OBSI's Terms of Reference have previously established a 180-day guideline for individuals to bring their complaint to our office following receipt of their firm's final response to them. However, OBSI has also always reserved the right to accept complaints beyond the 180 days if there are circumstances which make us believe it would be fair to do so, as noted in the Terms of Reference.

The proposed amendments to this section clarify what those circumstances generally would be. Specifically, the principal reasons why OBSI would accept complaints beyond 180 days have to do with whether, and the manner in which, the complainant was notified of the right to bring the complaint to OBSI, including information on the 180 day deadline. We will also consider whether any regulatory complaint-handling requirements have been followed in providing this information.

Notwithstanding these specific considerations, there may still be other limited circumstances where OBSI believes it would be fair to accept a complaint beyond 180 days, such as if the complainant had medical or other issues that prevented them from escalating their complaint.

Section 9(e) and 10(b): Other proceedings related to the subject of a complaint

Amendments to these sections clarify that OBSI may investigate complaints about matters that are or have been the subject of regulatory hearings. As an example, many self-regulatory disciplinary hearings involve firms or advisors that are the subject of complaints brought to our office. However, the role of those hearings is not to provide compensation to the affected investors. It *is* OBSI's role, however, where the facts of the case warrant it. The two processes are not the same and the existence of a regulatory proceeding, whether in process or already-concluded, should not preclude a complaint from being brought to OBSI.

Additional revisions to Section 10(b) are meant to address circumstances around firm-initiated court proceedings. In certain types of cases (for example, a bank foreclosing on a home), a complainant will contact OBSI in an effort to stop the proceedings. The firm almost always argues that this is merely a delay tactic and OBSI should not open a file. In most instances, we agree. However, there are some cases where there is prima facie evidence that the firm made an error, did not follow its policies and procedures or treated the complainant unfairly. OBSI may open an investigation in such instances and this is being specified in the Terms of Reference.

Section 11: Self-imposed limitation period

OBSI's process is not a court proceeding and so we are not subject to statutory limitation periods. As we have previously [announced](#), however, OBSI has established a self-imposed limitation period for new complaints of six years from the time when a complainant knew or

reasonably ought to have known of a problem. This new section of the Terms of Reference reflects the adoption of a self-imposed limitation period.

The self-imposed limitation period notwithstanding, we note that OBSI will often need to open a file and begin an investigation before being able to determine that an individual took too long to complain to their firm. OBSI's right to determine for itself whether the period has expired is also being included in this section of the Terms of Reference.

Section 12: OBSI/Ombudsman has a material interest in a complaint

Given the earlier-noted evolution of OBSI from a one-person office, there was a need to distinguish between organizational and individual conflicts of interest. This section of the Terms of Reference expands on the old Section 9 to make this distinction.

An example of a complaint where OBSI might have, or be perceived to have, an organizational conflict would be if a bank's internal Ombudsman or a member of its senior management team escalated a personal complaint to OBSI about their own or another participating firm. Given the now-competitive environment for banking dispute resolution, OBSI might recuse itself from considering this complaint, instead referring it to an outside expert.

In instances where it is the Ombudsman who has the material interest, their role in the investigation and settlement of a complaint will continue to be delegated to an internal staff member.

Language specifying a pecuniary or personal interest as being examples of "material interest" is added to mirror the FCAC's application guide.

Section 14(a): Compensation limit

OBSI's limit for recommending compensation remains \$350,000. In addition, regulators' advice to OBSI was that we should not limit the rights of complainants to pursue claims in other forums for amounts over and above OBSI's \$350,000 limit should they so choose. The language has been modified to reflect this.

On the issue of the compensation limit, we note that neither the Department of Finance's *Bank Act* regulations governing external complaint-handling nor the FCAC's *Application Guide for External Complaint Bodies* specify a compensation limit. This section of the Terms of Reference may need to be revisited should OBSI learn that the federal government prefers there be no compensation limit for banking complaints.

Section 18(c): Tolling agreement

All participating firms are already required, where permitted by law, to enter into an agreement with the complainant and OBSI to suspend the applicable limitation period (a "tolling

agreement”) while OBSI considers a complaint. In most instances, this has taken place on an individual basis via OBSI’s consent letter, signed by both the firm and the complainant. Most banks have also voluntarily signed a separate blanket tolling agreement that automatically suspends the limitation period for all complaints about their banking divisions. Our Terms of Reference are being modified to make clear that all participating firms must sign a blanket tolling agreement if requested by OBSI, and that any tolling agreement be in a form determined by OBSI.

There are several reasons for this, most of them related to efficiency. Our consent letter is a standard template used for all cases. Many firms continue to debate with us over the language of the tolling provisions of the consent letter, expending OBSI staff resources and extending the time it takes to resolve a complaint. In addition, even when there are no attempts to modify the language, firms’ legal counsel may take time to review the tolling provisions based on the particular case at hand, also causing OBSI to waste staff resources repeatedly checking on the status of the consent letter. All of this also provides uncertainty to complainants, which blanket tolling agreements would solve.

OBSI would not unilaterally impose a blanket tolling agreement without consulting with industry on the language first, going through the various industry associations as the points of contact.

Section 19: SRO complaint-handling rules

This section contains requirements of participating firms when handling complaints. Investment Industry Regulatory Organization of Canada (IIROC) and Mutual Fund Dealers Association of Canada (MFDA) member firms must follow the complaint-handling rules of their respective self-regulatory organization (SRO) and as such are exempt from the requirements of Section 19. The SROs were previously identified in an appendix to the Terms of Reference, but this has been brought into the main body of the document.

Section 19(d): Substantive written responses

The Terms of Reference previously stated that a participating firm should provide a complainant with a substantive response within 90 days of receipt of a complaint. This was to be in a form determined by OBSI and include information on the complainant’s right to escalate the complaint to OBSI. The language is being clarified to say that the expectation is of a written response.

Section 20(c): Escalation process

If a firm refuses an OBSI recommendation to compensate a customer, OBSI must publicize the refusal as well as our investigation’s findings under Section 27 of our Terms of Reference. This power, often referred to as “name and shame”, is the principal tool that OBSI has to incent firm cooperation, established by industry and regulators at the time of our office’s creation.

However, this power was never intended or expected to actually be used. Instead, it was meant to serve as a deterrent to ensure that the non-binding nature of OBSI's recommendations would be effective.

Given that we have now entered an environment where OBSI has already announced several compensation refusals and expects that there will be more in the future, it has been necessary to clarify the escalation process in the event of a refusal.

This process has already been [outlined](#) by OBSI, but the Terms of Reference require some modification to the confidentiality provisions to be consistent with Board policy. Before announcing a compensation refusal publicly, OBSI's management will first escalate the matter to the Board of Directors and the relevant financial regulator(s). The Terms of Reference are being clarified to say that in such an event, and if contacted by a regulator, the firm is free to discuss the matter with the regulator. Once OBSI goes public with a refusal, the firm may respond publicly as well, referring only to the facts that have been released publicly by OBSI. Except for these scenarios, the confidentiality of the process otherwise remains in place and must be respected by the parties.

Section 20(d): Disclosure to third parties

OBSI will sometimes need to involve third parties such as legal counsel while investigating a complaint. This section clarifies that OBSI may disclose information not only to its employees but also agents, advisors and consultants in the course of carrying out its activities.

Sections 31-37

The FCAC's *Application Guide for External Complaint Bodies* contained several prescriptive requirements for information that must be contained in the Terms of Reference. This information has been added to the Terms of Reference in these sections.

In several instances, reference is made to OBSI's website if that is the more appropriate place for certain information required by the FCAC (e.g. a full list of OBSI's hundreds of participating firms). The precise website addresses for the information are identified in the footnotes and not the main body of the document; if an address changes in the future (as is common for website information), the Terms of Reference may be corrected without requiring a full public consultation.

REQUEST FOR COMMENTS

OBSI invites written comment on the proposed changes to the Terms of Reference. After receipt and consideration of comments, OBSI's Board of Directors will approve new Terms of Reference, which will be published on OBSI's website.

Comment letters may be addressed to:

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Comments will be accepted until August 12, 2013 and will be posted on OBSI's website.