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Ms. Deborah Battell
Independent Evaluator
Ombudsman for Banking Services and
Investments (OBSI), Canada
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P.O. Box 5
Toronto, ON M5H 2Y4

Dear Ms. Battell:

RE: OBSI Independent Evaluation

We are writing to provide comments on behalf of the Members of The Investment Funds Institute of Canada (IFIC) with respect to the independent evaluation of the Ombudsman for Banking Services and Investments (OBSI). IFIC is the voice of Canada's investment funds industry, bringing together 150 organizations – including fund managers and distributors – to foster a strong, stable investment funds industry through which investors can realize their financial goals. We are proud to have served Canada's mutual funds industry and its investors for more than 50 years.

Our comments focus on four key areas: the regulatory context in which OBSI operates; whether OBSI is fulfilling its mandate; the potential for better collaboration between OBSI and its industry stakeholders; and some specific operational suggestions.

Context for the Independent Evaluation

The Independent Evaluation Terms of Reference mandates the Evaluator to 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. Furthermore, the Terms of Reference requires the evaluator to conduct a high-level benchmarking exercise that compares OBSI to other financial Ombudsman schemes.

In order to properly assess whether OBSI is fulfilling its obligations as outlined in its MOU with the CSA, the evaluation must take into account OBSI's position within Canada's robust investor protection policy framework.

Investors in Canada are protected in a number of ways. First, provincial and territorial securities regulators set detailed rules governing every aspect of investing in Canada. These rules mean that investment firms and financial advisors must register and comply with strict requirements

governing their conduct, while investors must be placed in suitable investments and provided with world-class disclosure around the cost and performance of their investments.

Second, Canada has an additional layer of regulatory protection for investors, unlike most other countries. Canada's SROs - the Mutual Fund Dealers Association (MFDA) and the Investment Industry Regulatory Organization of Canada (IIROC) - oversee the day-to-day operations, standards of practice and business conduct of all of Canada's mutual fund and investment dealers. In addition to their standard setting, compliance and enforcement activities, the SROs also investigate client complaints. Securities regulators and SROs work in tandem to ensure that Canadian investors are well-protected and that issues are quickly identified and resolved.

The vast majority of investors have a lasting and positive relationship with their advisor. However, if something happens to go wrong and the investor wishes to make a complaint, they have a number of options at their disposal. Typically, investors first speak directly with their financial advisor. Most investor complaints are resolved through this initial conversation, particularly when the issue is the result of a misunderstanding or simple human error.

If the financial advisor cannot resolve the investor's issue, investors can contact the dealer firm directly. Once the complaint has escalated beyond the financial advisor, the SROs require dealer firms to follow a strict set of complaint handling requirements. All firms must have an internal complaint handling process in place, and must assess every complaint fairly and promptly. Once a firm receives a complaint, it generally must provide an initial response to the client within 5 business days. Unless the complaint is resolved informally, the firm then generally has 90 days to provide the complainant with a substantive response to their complaint. This letter must provide an outline of the complaint, the results of the firm's investigation, the reason for its final decision, and information describing the clients' options should they remain unsatisfied with the response. Among these options is the ability to complain to OBSI. Investors can also complain to the appropriate SRO at any point; they do not need to wait for a response from the firm.

Even when concurrently investigating a complaint, the SROs and OBSI fulfil different roles in the complaint handling process. SROs investigate complaints to determine if any rules were broken. If a firm or individual is found to have broken the rules, the SRO can take a variety of enforcement actions, ranging from a warning to fines or suspension. OBSI, by contrast, seeks to provide an objective and impartial dispute resolution service for both the investor and the firm. OBSI's mandate is not to investigate if a firm or individual broke securities rules, but rather to resolve complaints with a view to what is fair and reasonable under the circumstances of each individual complaint.

OBSI's important position within Canada's broader investor protection framework should be taken into account in this evaluation. The effectiveness of Canada's SROs means that, unlike Ombudservices elsewhere, OBSI does not and should not fulfil a regulatory, enforcement or market conduct mandate. OBSI's value is in its focused mission - providing investors and firms with an accessible, effective and impartial dispute resolution service – and this should be clearly captured within the evaluation and, in particular, within any international benchmarking exercise.

Is OBSI Meeting its Obligations under the MOU?

In the period since its previous independent evaluation, OBSI has largely met its obligations under its MOU with the CSA.

This is a testament to the efforts of OBSI's staff, Board of Directors and regulatory partners. Since 2011, OBSI has:

- Successfully cleared the backlog of "stuck" cases and established an improved standard for complaint handling timeliness;

- Implemented significant governance reforms, including a new structure for its Board of Directors, improved governance policies and the creation of a regulatory oversight body – the Joint Regulators Committee (JRC);
- Revised and published changes to its suitability and loss calculation methodologies;
- Expanded its membership to include exempt market dealers (EMDs), portfolio managers and scholarship dealers; and
- Successfully resolved more than 99 percent of cases that it receives.

Despite these achievements, OBSI is sometimes characterized as a failure due to the small number of cases that it is unable to bring to a successful resolution. The existence of these rare unsuccessful resolutions, a number of which involved firms that subsequently went bankrupt, in turn has led to calls for OBSI to be given binding decision-making authority.

The debate around whether OBSI should have binding decision-making power distracts from the qualities that have made it possible for OBSI to resolve the vast majority of complaints it receives. OBSI is designed to be an impartial, efficient and low-cost alternative to the legal system. With binding decision-making authority, OBSI would lose some of these virtues. OBSI's dispute resolution process would become more formal and expensive, as participating firms and investors would be forced to take a legalistic approach to their dealings with OBSI. Binding decision-making would need to be accompanied by an appeals mechanism for participating firms, which would necessarily introduce further legal formality into the process.

Shifting OBSI towards a strictly legalistic arbitrator ultimately would call into question its role and value, as other external dispute resolution services could just as easily arbitrate client complaints under a more formalized model. OBSI's value is not as a formal arbitrator, but as an informal dispute resolution body. We do not agree that abruptly altering OBSI's purpose within the wider investor protection framework is warranted based solely upon the fact that OSBI is unable to resolve one percent of the cases it receives.

A more pressing concern involves clarifying OBSI's purpose and boundaries. OBSI clearly states that it is not a regulator and that, because it is impartial, it does not advocate for consumers or the industry; however, we suggest that OBSI could better emphasize this message in all its stakeholder interactions. Despite OBSI's clear written mandate, the perception still exists among some in the industry that OBSI sees itself as a quasi-regulator or investor advocacy body. This perception is partly a result of confusion about OBSI's application of the "fairness standard" and how this standard relates to the existing framework of regulatory requirements governing firms and their representatives. It is a particular issue in cases where a firm has been found to have fully complied with the relevant securities rules.

Clarifying the fairness standard and how it differs from existing regulatory requirements would help OBSI to secure full buy-in from its industry stakeholders. Our members would welcome further guidance in this area, and recommend that OBSI and its regulatory stakeholders work together to clarify and communicate their respective roles within Canada's investor protection framework.

Opportunities for Stakeholder Engagement

Having largely resolved its most significant challenges in recent years, OBSI can improve further by strengthening its stakeholder engagement.

1. Consultations

This proactive engagement could begin with OBSI's consultation process. Consultations are an opportunity for OBSI to work with its stakeholders in order to improve its operations and practices. Consultations should be public and transparent, and as other stakeholders have noted, should provide sufficient time for well-considered responses. We recommend that all OBSI consultations should be accompanied by a minimum 90-day comment period.

On technical changes that affect participating firms – such as altering the protocol by which firms transmit case files to OBSI – we encourage OBSI to proactively engage with its stakeholders, in order to identify outstanding issues and unintended consequences. IFIC would welcome the opportunity to facilitate informal discussions between OBSI and participating firms on technical matters.

2. Independent Evaluation Process

In order to ensure that OBSI continues to fulfil its mandate as its membership grows, OBSI should be subject to independent evaluations every three years, instead of the current five year cycle.

Suggested Operational Improvements

1. Dispute Resolution Transparency

Proactive engagement should extend to the dispute resolution process itself. Our members report providing case materials to OBSI as requested, only to hear nothing from OBSI for months before they are suddenly presented with a compensation recommendation. Just as complainants need to know the status of their case as it proceeds, so too do OBSI's participating firms. OBSI should strive to communicate with firms throughout the dispute resolution process. Such transparency and ongoing dialogue will increase the likelihood that firms and complainants can resolve the dispute fairly and quickly.

2. Fee Model Transparency

For many stakeholders, OBSI's fee structure remains opaque. Article 2 of the MOU provides that OBSI should have a fair, transparent and appropriate process for setting fees and allocating costs across its membership. However, we note that there are two different fee calculation methodologies depending on the registrant categories. The fee model for exempt market dealers and portfolio managers is $165 per registered dealing or advising representative. By contrast, the fee model for MFDA members is based on assets under administration. It is not clear why OBSI applies two different fee models, especially in light of its commitment to "the principle that no sector or registrant category should subsidize another". OBSI should therefore provide further clarity regarding its fee structure and ensure that fees are levied fairly and transparently upon all participating firms.

IFIC Contact

Please contact Graham Smith, Senior Policy Advisor, for further information; he can be reached by phone at 416-309-2328 or by email at gsmith@ific.ca.

Yours sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA

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