



Mutual Fund Dealers Association of Canada
Association canadienne des courtiers de fonds mutuels

January 31, 2008

Terms of Reference Review
Ombudsman for Banking Services and Investment
PO Box 896, Station Adelaide
Toronto, ON
M5C 2K3
E-mail: publicaffairs@obsi.ca

Re: Proposed Amendments to OBSI's Terms of Reference

The Mutual Fund Dealers Association of Canada ("MFDA") is the national self-regulatory organization ("SRO") for mutual fund dealers. We are writing in response to your invitation to provide comments on the proposed amendments to the Ombudsman for Banking Services and Investments' ("OBSI") Terms of Reference published on December 3, 2007.

As a national SRO, the MFDA fully supports the efforts of OBSI to improve its dispute resolution services. However, we have some concerns for your consideration which are set out below.

As a general comment we note that many of the amendments to the Terms of Reference would expand the scope of OBSI's powers beyond that of a dispute resolution service and may potentially be regulatory in nature. We believe it is important for OBSI to be perceived by both the public and by Participating Firms as balanced in its approach to resolving disputes as this enables OBSI to maintain broad based support among Participating Firms. Such support strengthens the effectiveness of OBSI and ensures that its recommendations are ultimately followed by Participating Firms. We believe that the introduction of any regulatory function into OBSI's process may disturb the perception of OBSI as balanced in its approach to resolving disputes as well as result in investor confusion.

1. Systemic Issues

Under the revised Terms of Reference, OBSI may identify Systemic Issues at a Participating Firm and recommend that a Participating Firm adopt measures to prevent future occurrences of the Systemic Issue. In our view, this is duplicative of the role of the MFDA to set standards for its Members. The ability to set standards goes beyond the core competency of OBSI as a dispute resolution service and enters the sphere of regulation.

If OBSI were able to make such recommendations there is no guarantee that they would be in alignment with the interpretation of MFDA rules by MFDA staff. Inaccurate interpretations by OBSI staff could result in recommendations that are contrary to the standards applied by the MFDA. Such a scenario would create a system of dual regulation and cause undesirable regulatory uncertainty. It is our view that the appropriate response to the discovery of a Systemic Issue is for OBSI to refer the matter to the appropriate regulatory or law enforcement agency as such organizations are in the best position to determine an appropriate regulatory response.

In addition, MFDA Members are required to participate in the OBSI process pursuant to MFDA By-law 24.A. The purpose of the By-law is to provide complainants with an effective means of seeking compensation from, and resolving a dispute with, an MFDA Member. The By-law does not contemplate that OBSI could review issues or make recommendations for matters beyond those involving a dispute between a complainant and a Member. In particular, the By-law does not contemplate that OBSI could recommend class-action type awards to individuals who have not submitted a claim to OBSI. Finally, under the By-law, the MFDA has no jurisdiction to discipline Members that refuse to cooperate with an OBSI review or recommendation involving a Systemic Issue. As such, an effective mechanism to ensure that Members comply with an OBSI review or recommendation involving a Systemic Issue is lacking.

We understand that the Joint Forum of Financial Market Regulators acknowledged that OBSI should be able to review Systemic Issues. The concerns set out above would be mitigated if the proposed Terms of Reference were to include a limited definition of “Systemic Issue”. In our view, Systemic Issues should be defined as matters of a routine and administrative nature such as overcharge errors and interest rate calculation errors.

2. Providing Information on Members

We are unclear as to the purpose of the proposed amendments to section 3(g) of the Terms of Reference which delete the prohibition on providing general information about a Participating Firm. This change could be interpreted to allow OBSI to provide general information about Participating Firms. We are concerned as to what kind of information this would entail. For example, it would be inappropriate for OBSI to provide information about other matters under review at a Member to a particular complainant.

3. Referral of Matters to Regulators

a) For Regulatory or Criminal Breaches

Section NS(d) of the proposed Terms of Reference states that OBSI may refer matters identified during a review of a Systemic Issue that involve potential regulatory or criminal breaches to the appropriate regulatory or law enforcement agency. In our view, certain types of regulatory or law enforcement matters of a serious nature, such as theft, fraud and forgery, must be referred to the appropriate regulator or law enforcement agency. We propose that the types of breaches requiring mandatory referral would be

similar to those that the MFDA requires Members to report through the METS system and enumerated under section 6.1(b) of MFDA Policy 6. Breaches requiring referral should include those discovered as part of a review of a single complaint, and not just those identified as part of a review of a Systemic Issue. As such, we propose that OBSI modify its Terms of Reference, or work with regulators to ensure that when such matters are discovered by OBSI they are referred to the appropriate regulatory agency.

b) For Failure to Cooperate with OBSI

Section 25 of the proposed Terms of Reference states that where a Participating Firm fails to cooperate with OBSI, OBSI shall publish the details concerning the Participating Firm's non-cooperation and may inform the regulating authority of any non-cooperation. MFDA Members are required to cooperate with OBSI's review of complaints pursuant to MFDA By-laws. Any failure by a Member to cooperate with OBSI is a breach of MFDA By-laws, and accordingly, the obligation to inform the MFDA of any non-cooperation by a Member with OBSI should be mandatory. As such, we propose that the word "may" be replaced with the word "shall" in the last sentence of this section.

Further, OBSI should not publish details of Member non-cooperation. Such cases should be investigated as part of the ordinary MFDA enforcement process and brought to a public hearing before an MFDA hearing panel where warranted. In our view, MFDA regulatory processes are best suited to handle such matters and the publication by OBSI of details concerning a Member's non-cooperation would be duplicative of the MFDA enforcement process.

4. "Inconvenience" as a Threshold for a Recommendation of Compensation

The comments to section 20 states that the addition of "inconvenience" and the deletion of "damage or harm" as thresholds was made to, "avoid generating false expectations about compensation for general damages, pain and suffering and other awards." In our view inconvenience would include pain and suffering as it is a lower threshold. The proposed amendments are likely to create further false expectations as complainants who review the Terms of Reference are likely to believe that they will be compensated for time lost, or aggravation involved, in their dealings with a Participating Firm.

5. Setting Complaint Handling Standards for Members

Subsections 15(a), (b), (c), (f) and (h) of the revised Terms of Reference set standards for complaint handling for Members. Such standards are duplicative, and in some cases inconsistent with MFDA standards. We recognize that such standards may be beneficial for Participating Firms operating in industries where there are no requirements in place. However, as the MFDA is the body that sets regulatory standards for Members, we are of the view that MFDA Members should be exempt from these requirements.

6. Assistance where OBSI is Seeking Information on General Industry Practice or Standards

Subsection 15(d)(ii) of the revised Terms of Reference requires Members to provide OBSI with information on general industry practice or standards upon request whether or not OBSI has received a complaint about the Member. As mentioned above, MFDA By-laws contemplate participation in OBSI for the purpose of resolving complaints. OBSI's ability to request information from Members should be limited to situations where OBSI has received a complaint about a Member.

7. Lack of Oversight over OBSI

As a final comment we note that several of the concerns raised above are magnified by the fact that OBSI is not subject to any formal oversight with respect to its decision making process and its application of industry standards. In our view, such functions should be subject to review by the organizations that require its members to participate in the OBSI framework, such as the MFDA, or by a governmental body, such as the Canadian Securities Administrators ("CSA"). Additionally, we have concerns with the lack of formal checks and balances with respect to the approval process of the proposed amendments to the Terms of Reference. We note that SROs must receive approval from both their Members and the CSA before a new rule can be implemented. There is no comparable process for the approval of amendments to the OBSI Terms of Reference. Formal oversight over OBSI would introduce a system of checks and balances that would help to ensure that OBSI continues to be perceived as an independent and impartial arbiter of complaints. We propose this concept be studied further along with the proposed amendments to OBSI's Terms of Reference.

We would be pleased to discuss our comments with you and provide such further particulars as might be helpful in your work going forward.

Yours truly,

A handwritten signature in black ink, appearing to be 'Mark T. Gordon', with a long horizontal line extending to the right.

Mark T. Gordon
Executive Vice-President