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

September 4, 2020

Delivered by email to: CMM.Taskforce@ontario.ca

Ontario Capital Markets Modernization Taskforce

Re: Response to Ontario Capital Markets Modernization Taskforce Consultation Report

The Ombudsman for Banking Services and Investments (OBSI) is pleased to provide our comments to the Ontario Capital Markets Modernization Taskforce (Taskforce) on certain proposals contained in the Taskforce's recent consultation report.

OBSI is a national, independent and not-for-profit organization that helps resolve and reduce disputes between consumers and financial services firms from across Canada in both official languages. OBSI's mission is to be responsive to consumer inquiries, conduct fair and accessible investigations of unresolved disputes, and share our knowledge and expertise with stakeholders and the public. If a consumer has a complaint against an OBSI participating firm that they are not able to resolve with the firm, OBSI will investigate at no cost to the consumer and will work to facilitate an outcome that is fair to both parties in all the circumstances of the case.

We support the central goal of the Taskforce proposals to improve the innovation and competitiveness of the province's capital markets and help build Ontario's economy, in part through the strengthening of investor protection in the province. Greater protections for investors and enhanced awareness of investor protection concerns among financial services market participants serves to positively reinforce Ontario's strong, dynamic financial services sector and maintain the public's confidence and trust in this vital sector.

Access to financial ombudsman services is an important component of the investor protection framework because it assures investors of fair treatment and access to justice if they find themselves in a dispute with a financial services provider. Such assurance is necessary because other mechanisms of redress, such as the legal system, are generally not cost effective or efficient for unrepresented consumers and those with modest claims. Ombudservices are designed to deliver accessible service and fair outcomes to investors and firms efficiently and effectively, and to appropriately address the disparities of power and information that characterize financial services disputes.

Consumer confidence is of paramount concern in the financial services industry, where broad public participation is necessary for the proper functioning of the industry. However, without adequate safeguards in place, this confidence can be undermined by the significant asymmetries of power and knowledge as between investors and the financial services providers. The laws, regulations and

obligations applicable to the industry are complex, as are the features of the financial products themselves. Investors understand their disadvantage in this regard, yet they are increasingly required to take responsibility for their own retirement savings and planning. In this environment, investors reasonably expect that the financial services industry and the government systems will establish adequate systems to protect them from wrongdoing. They expect and should have access to help when they feel that they need it.

Financial ombudsman services serve another important function in the investor protection framework by removing any economic incentives that firms may have to disregard or abuse aggrieved consumers. By providing consumers with access to ombudsman services, policymakers and industry leaders can help level the playing field between responsible firms that acknowledge wrongdoing and compensate investors fairly and those that do not.

Increasingly, financial ombudservices are also an important source of data for regulators, policymakers and industry leaders interested in better understanding points of greatest difficulty or friction for consumers in the marketplace and identifying potential systemic issues.

Further systemic advantages are provided by OBSI because we provide services to a wide range of financial consumers, including both federally-regulated banking and provincially-regulated securities industries, which helps to insulate consumers from the complex and fragmented regulatory structures that characterize the financial industry, reducing confusion and better aligned with consumers' own understanding of the financial services they use.

OBSI has been providing dispute resolution services to the Canadian securities industry since 2002. In the 18 years that we have been serving the industry, we have responded to over 90,000 consumer inquiries, investigated and resolved over 5,700 disputes between Canadian investors and firms, and facilitated settlements of over $30 million.

Our comments below respond directly to the queries posed in relation to proposal #47 in the Taskforce's recent consultation report.

Power to issue binding decisions

QUESTION 1: WOULD COMMENTERS THINK THAT THE PROPOSAL TO GIVE A DESIGNATED DISPUTE RESOLUTION SERVICES ORGANIZATION THE POWER TO ISSUE BINDING DECISIONS IS APPROPRIATE?

OBSI has long sought greater powers to secure redress, particularly with respect to securities disputes, chiefly because the current system of name and shame gives firms the ability to act on the economic incentive they have to offer to settle complaints below (sometimes far below), the compensation amounts that we consider fair in all the circumstances of the case, and leaves consumers with no realistic option but to accept such settlements. The practice of name and shame, when it does occur, can also unfairly tarnish public perception of the industry as a whole.

Inadequate powers to secure redress for investors can also lead to inefficient and unnecessarily protracted facilitated settlement processes. We have observed that for some firms, the perceived lack of

serious consequence leads to disengagement or minimal engagement in our investigative and settlement processes.

Internationally, binding authority is recognized as the best practice for financial ombudservices, and multiple external reviews of OBSI have recommended that OBSI's powers be expanded to include it. In the most recent review of our securities mandate in 2016, the independent reviewer noted that:

> ***"OBSI is unlike other comparable international financial sector ombudsmen in that it does not have the authority to bind firms to observe its compensation recommendations (binding authority). This drives its operating model and prevents it from fulfilling the fundamental role of an ombudsman, securing redress for all consumers who have been wronged"***

A further advantage of binding authority for OBSI is that such powers would level the playing field economically between those firms who take seriously their responsibility to resolve disputes fairly with their consumers (and therefore engage meaningfully in the dispute resolution process and pay fair recommendation amounts), and those firms that are less responsible.

Other proposals to ensure fair investor compensation

QUESTION 2 - ARE THERE OTHER PROPOSALS THAT THE TASKFORCE COULD CONSIDER TO ENSURE RETAIL INVESTORS WHO HAVE BEEN HARMED AND LOST AN AMOUNT TOO LOW TO CONSIDER A COURT ACTION ARE COMPENSATED?

We propose two specific initiatives that the Taskforce should consider with respect to ensuring fair investor compensation: the establishment of an investor protection fund to ensure redress is available to consumers, and the endorsement of a singular financial services ombudsman.

Enhanced investor protection fund

The Taskforce should consider the establishment of a fund, or the use of an existing industry fund, to ensure that where investor losses are attributable to a firm that is no longer solvent or no longer registered, compensation is available for harmed investors.

OBSI publications of firm refusals in the recent past have commonly involved firms that are in financial distress, have been de-registered, or are being wound down. Unfortunately, in these circumstances redress for investors who have been harmed by the actions of the firm or its agents is typically impossible to achieve, resulting in injustice and allowing such firms to externalize the costs of their negligence.

An investor redress fund established to address such shortcomings would support investors' confidence in the regulated provision of investment products and services, and would provide an incentive for firms and industry associations to self-monitor, mutually encouraging higher levels of investor protection.

Endorsement of a single financial services ombudsman

We note that in its consultation report, the Taskforce's recommendation refers to "designated dispute resolution services *organizations*, such as the Ombudsman for Banking Services and Investments". OBSI

is the only dispute resolution service provider serving the Canadian investment sector and this has been an intentional and thoroughly considered public policy choice by Canadian securities regulators.

A multiple dispute-resolution provider model, such as the one that currently exists in the federally-regulated banking sector, can have a negative impact on consumers' perceptions of the fairness and impartiality of the system as a whole and has the potential to undermine one the principal purposes of effective complaint handling, which is to enhance consumers' trust and confidence in the financial system.

These observations are supported by the findings of the Financial Consumer Agency of Canada's (FCAC) recent report on the multiple ECB framework for banking. FCAC observed:

> ***"FCAC's review has validated some of the broader concerns raised about the multiple-ECB model by consumers and consumer groups. The multiple-ECB model is not consistent with international standards. It introduces inefficiencies and increases the complexity of the external dispute resolution system for consumers. FCAC also has concerns about how allowing banks to choose the ECB negatively affects consumers' perceptions of the fairness and impartiality of the system. Finally, the Agency questions whether the one-sided competition between ECBs for member banks is accruing benefits to consumers."***

Conversely, there are many benefits of consolidated ombudservices for multiple diverse financial services sectors.

The Taskforce should recommend the designation of one dispute resolution service for all financial services disputes within the provinces' jurisdiction. Such a system offers multiple benefits, including:

- Reduced costs to industry as a result of economies of scale and scope
- Reduced public confusion resulting from the fragmented regulatory environment for financial services
- Greater alignment with public expectation, particularly in the modern era of increasingly consolidated financial services branding and marketing
- Increased consumer awareness of the protections available to them, including their right to escalate a complaint, resulting in higher levels of confidence
- Improved accessibility and utility of data about consumer complaints, making it easier for regulators, policymakers and industry participants to use to improve systems and conduct research
- Reduced complexity of regulatory supervision of the dispute resolution process and increased accountability of the ombudsman service

Expertise in complex capital markets matters

QUESTION 3 - DO COMMENTERS CONSIDER OBSI TO BE SUITABLY EQUIPPED TO MAKE BINDING DECISIONS ON COMPLEX CAPITAL MARKETS MATTERS, SPECIFICALLY ON EXEMPT MARKET ISSUES?

OBSI is well equipped to make binding decisions on complex capital markets matters, which we have been demonstrating on a daily basis for the securities industry for almost 20 years.

As mentioned above, since receiving the mandate to provide dispute resolution services to the investment industry in 2002, we have responded to over 90,000 consumer inquiries, investigated and resolved over 5,700 investment-related disputes between Canadian investors and firms, and facilitated settlements of over $30 million for the industry.

OBSI submits to a detailed independent external review every five years. The findings of each of these expert reviews over many years supports the conclusion that OBSI has sound and well-documented dispute resolution methodologies and that we are well able to continue to meet the needs of Canadian investors and investment firms. In our 2016 external review, the reviewers noted specifically that:

> ***"OBSI … has performed well within its current mandate: its decisions are fair and consistent with those made internationally; and with its loss calculation tools, its ability to determine fair amounts of resolution is world leading."***

2011 review and 2016 review specifically commented on the apparent disconnect between expert reviewers' findings and some industry sentiment regarding the OBSI's competence. The reviewers in 2016 commented that:

> ***"We heard criticisms of aspects of OBSI's decision-making approach with respect to calculating losses, criticisms that persist despite consultation and previous review findings, and that appeared to have morphed into mythology. We say mythology because we looked carefully for evidence to substantiate these long-held concerns but found very little basis for criticising OBSI's decisions. In fact, we think firms should have a high degree of confidence."***

OBSI has an open and transparent approach to significant policies and approaches. On our website, we have an extensive inventory of published documentation relating our approach to a wide range of case types and issues. We also publish our strategic plan, a record of all public consultations we have undertaken on important policies such as our loss calculation methodologies, and extensive information relating to our case data and statistics. Additionally, participating firms have access to detailed firm and sector-specific data through our Firm Portal, which gives them real-time access to key data in relation to their own firm's complaints and OBSI's experience with their sector.

Further information relating to OBSI's capability and expertise, as well as our commitment to continuous improvement, can be found in the results of the participating firm surveys that we conduct. Each year, we survey all investment firms that have had at least one consumer complaint investigated by OBSI on an anonymous basis. We publish the results of these surveys (as well as our consumer surveys) every year in our annual report and website. Notable highlights from our 2019 survey of investment firms include:

- 80% of responding firms indicated that "**OBSI staff who investigated the complaint(s) were knowledgeable about applicable laws and regulations**"
- 94% of firms agreed that "**OBSI staff demonstrated a good understanding of our firm's applicable policies**"
- 72% of responding firms agreed or strongly agreed the "**OBSI's staff was effective in providing a resolution for our client's complaint**". A further 10% neither agreed nor disagreed.
- 62% of responding firms agreed or strongly agreed the "**OBSI added value to our firm's complaint handling process**". A further 14% neither agreed nor disagreed.
- 75% of responding firms agreed or strongly agreed the "**OBSI's staff kept our firm appropriately informed on important developments concerning OBSI policy**". A further 10% neither agreed nor disagreed.

In addition to these formal methods of receiving feedback from participating firms, OBSI staff at all senior levels engage in regular outreach to consumer and industry stakeholders, including participating firms and industry associations, to ensure that we are accessible to these stakeholders and to canvass views on our performance and opportunities for improvement. In recent years, feedback from this outreach to all sectors has been largely positive, with the exception of some negative feedback we have received from certain exempt market industry participants.

Expertise with respect to exempt market issues

EXPERTISE WITH RESPECT TO EXEMPT MARKET ISSUES SPECIFICALLY

The exempt market is a vital and important part of Ontario's capital markets and plays a key role in early-stage capital formation. This market provides an efficient and effective vehicle for investment in sectors and companies not represented in public capital markets.

For this marketplace to reach its full potential as a capital raising mechanism for Ontario businesses and an investment vehicle for Ontario investors seeking an alternative to public markets, it is essential that the market support investor confidence by ensuring that they are adequately protected – including that investors have access to dispute resolution mechanisms and fair compensation where appropriate.

Such protections are the hallmark of a mature and responsible industry that is committed to upholding high standards of quality, accountability, and fair treatment of consumers. Adequate investor protections also avoid the negative risk of undermining investor confidence in capital market formation when investment failures involving substantial numbers of investors occur and are publicized.

Exempt market dealers have been required to be members of OBSI since 2014, when our mandate was expanded by Canadian securities regulators to include portfolio managers, exempt market dealers, and scholarship trust plan dealers.

The EMD market is very large in Ontario, however, this is overwhelmingly an institutional market. Retail sales of exempt market products are much lower in volume than institutional sales, but still accounted for $2.2 billion of the total capital invested in Ontario's exempt market in 2017, and the retail segment of the exempt market is growing and maturing. Further, while most volume in the exempt market is

institutional, most investors are individuals. Individual investors accounted for 77% of the 28,500 exempt market investors that year.

OBSI exclusively provides services to investors and firms engaged in the retail segment of the exempt market, which is robust in Ontario and can be expected to grow as low interest rates and lower returns from traditional investments drive investors to search for yield in alternative investments.

Since 2017, we have investigated and resolved 74 complaints involving exempt market products. These cases have largely involved investors in Ontario (32%), Alberta (31%) and British Columbia (24%), with a smaller number of investors contacting us from Saskatchewan (8%), Quebec (3%) and Manitoba (1%).

Of these 74 complaints, 53 (72%) were closed with no recommendation for compensation, and 21 (28%) resulted in a compensation recommendation. The total amount recommended in these cases was $1,061,569, and the total amount of final settlements received by investors was $888,718.

Assertions from some exempt market industry participants that OBSI lacks sufficient understanding of their products and business model are false. But they do reflect a number of bona fide and informed differences of opinion that exist between some exempt market participants and OBSI with respect to certain OBSI approaches to the problems that can arise for investors in exempt market products. Industry advocates naturally prefer approaches and outcomes that lead to lower settlement amounts, while OBSI's approaches reflect a fair balance between the interests of firms and investors.

There are three key areas of disagreement between OBSI and industry advocates with respect to the exempt market:

1. OBSI's approach to suitability assessment and firm accountability

Investor complaints about unsuitable investment advice are common. Because exempt market securities are typically categorized as high-risk investments due to their illiquidity and potential for significant loss/gain, suitability is often at issue in our investigation in cases involving these investments.

The rules that apply to firm conduct with respect to the sale of exempt market investments to retail investors are fundamentally similar to those that apply to the sale of non-exempt investments to retail clients – the essential rules for all sectors in relation to know-your-client (KYC), know-your-product (KYP) and suitability are set out in NI31-103 and related instruments. OBSI's investigation criteria reflect this. While IIROC and MFDA firms have some additional and more detailed requirements, all investment dealers are subject to the fundamental principles of KYC, KYP and suitability. The exempt market also has some unique regulations, principally designed to limit the amount of retail investor exposure to exempt investments.

In cases involving exempt market dealers, we have observed a substantial, sometimes exclusive, reliance on signed risk acknowledgement forms, even in cases where the investor characteristics should objectively call into question the suitability of high-risk investing (e.g. low net worth, short investment time horizon, need for liquidity, dependence on investment income, and low levels of investment experience). In such circumstances, we do not consider signed risk acknowledgements, in and of themselves, to be sufficient evidence of suitability, and this is consistent with securities regulators' published policy and guidance on this issue. Disagreement with exempt market dealers on such issues sometimes leads to baseless accusations that we do not understand the exempt market dealer business

model or marketplace. It is our position that we do understand the exempt market dealer business model and marketplace but disagree with some firms' interpretation of the application of KYC and suitability rules.

2. OBSI's approach to compensation for opportunity costs

If OBSI has determined that a firm has been negligent and/or recommended unsuitable investments and should be responsible for an investor's losses, our recommendations are calculated to place the investor in the position they would have been in had the negligent conduct/unsuitable advice not occurred. This includes calculating opportunity costs, which may increase or decrease our assessment of a consumer's financial harm, as well as assessing equitable client responsibility factors such as investors' duty to mitigate and contributory negligence, which may decrease our assessment of fair compensation to the consumer.

Some industry advocates have expressed disagreement with our approach to this issue and believe a book-loss approach to be more appropriate and less subjective.

We note that the opportunity-cost approach is neither inherently positive nor negative for consumers. In rising markets, an opportunity-cost approach generally leads to higher compensation recommendations (because suitable investments would usually have done better). However, in declining markets, the opposite is true, and the opportunity-cost approach generally results in lower recommendations for compensation (because the consumer would have lost money on suitable investments).

OBSI has engaged in extensive public consultation on our loss calculation methodologies. Our approach to loss calculation is consistent with the approach that would be taken by courts of law in assessing financial harm in similar cases and is similar to the approach taken by large ombudservices in other countries such as the UK Financial Ombudsman Service and the Australian Financial Complaints Authority. In our 2016 external review, the reviewers noted specifically that:

> ***"We agree with the 2011 independent review findings that OBSI's loss adjustment methodology leads the ombudsman world. Approaches are also consistent with underlying international policies (e.g. the use of indices, opportunity cost)."***

As an alternative to the legal system, it is fair and appropriate that OBSI's general approach to compensation and investor responsibility should reflect the legal approach to compensation and investor responsibility.

3. OBSI's approach to calculating losses where the current value of an exempt market investment cannot be determined

To assess an investor's losses on an investment, the current value of that investment must be calculated. This is difficult or impossible for many exempt market securities for which no market exists, or so few arms-length transactions occur as to be unrepresentative of true value and therefore no market price exists.

Where no market price exists, we will attempt to determine the current value of the investments based on any relevant available information that the firm or others can provide. Typically, however, inadequate information for valuation exists.

Where current value cannot be determined, but wrongdoing has occurred and investor losses must be calculated, our approach is to assign a current value of zero to these securities and include as part of our recommendation that the investor transfer the unsuitable securities back to the firm to ensure that the benefit from any remaining value in the securities accrues to the firm and there is no potential for double recovery.

This reflects a fair resolution to the problem that exists when an illiquid investment has been unsuitably recommended to an investor, and this approach is often acceptable to firms in exempt market cases. Occasionally, however, firms complain to OBSI that this solution is unacceptable and is evidence of a lack of understanding of their business model. Again, it is our position that this is not evidence of our lack of understanding of their business model, but rather a disagreement about what is fair in the circumstances of such cases.

Upon receiving representations from some exempt market dealers that this approach to loss calculation is not acceptable to them, we have met with industry organizations to discuss this issue and request their input or suggestions of an alternative valuation methodology. We remain committed to working with industry to improve our approaches and practices wherever possible.

Structural or governance requirements

QUESTION 4 - WHAT STRUCTURAL OR GOVERNANCE REQUIREMENTS SHOULD THE OSC IMPOSE ON OBSI AS PART OF THE DESIGNATION PROCESS?

Presently, OBSI provides services to the investment inudstry pursuant to a memorandum of understanding with Canadian Securities Regulators (MOU), who oversee OBSI operations through a committee known as the Joint Regulators' Committee (JRC). The MOU provides an oversight framework that includes standards of governance, independence, fairness, timeliness, setting of fees and costs, appropriate resources, accessibility, systems and controls, core methodologies, information sharing and transparency. The MOU also sets out the framework of meetings and consultations, the reporting of systemic issues and independent evaluations through which the JRC conducts its oversight of OBSI operations. Overall, this framework has proven robust and effective.

OBSI is committed to working collaboratively with OSC and other regulators in the interests of further developing accessible ombudservices for the Canadian financial services industry and the Canadians it serves. If the Taskforce or the OSC is of the view that changes or enhancements of the oversight requirements are appropriate, OBSI is open to working towards that outcome.

Independent internal appeal process

One internal function mentioned in the Taskforce consultation report is the development of an independent internal appeal process. Such appeal processes are not found in all financial ombudservices around the world, even those with binding authority, but are not uncommon.

Any appeal or reconsideration process from OBSI decisions must be designed in a manner that does not undermine the key benefits and imperatives of financial ombudsmanship, particularly: efficiency, low cost and accessibility to unrepresented complainants and firms. Any appeal mechanism that relies on

procedural legal formalities such as direct discovery or cross-examination is unlikely to meet these imperatives.

An example of an internal reconsideration process that provides an effective appeal without derogating from the key imperatives of an ombudservice is the process in place at the UK Financial Ombudsman Service, where cases are investigated and adjudicated by teams of professional adjudicators, and either party can appeal the decision of the adjudicators to an ombudsman who has had no engagement in the earlier investigation for final resolution. The ombudsman will give both sides the chance to present whatever facts or arguments they feel are relevant to the case before a final and binding decision is made. Ombudsman decisions can be judicially reviewed by the courts in the UK, but this will generally focus on the way an ombudsman arrived at their decision, rather than the facts and merits of the case itself.

Another possible avenue of appeal that has been suggested in the past would involve the development of a roster of acceptable subject matter experts to provide arbitration-like services on an ad hoc basis for appealed cases where the parties to the appeal would be the firm and OBSI. However, we share the concerns with such a process expressed in OBSI's most recent independent expert review, which stated:

> ***"It would be rare for an award to be overturned on its merits, provided the position reached was one that was open to a reasonable decision maker. If a decision were to be substantively appealed to any other authority, for example the courts or an independent arbiter, it would effectively negate the purpose of an ombudsman and undermine the ombudsman's authority. Having an appeal process would also undermine the purpose of ombudsman offices: fair, fast and informal resolution as an alternative to the court system. We understand judicial review would not be an appropriate option given OBSI's current mandate, however we consider that some form of review rather than appeal is desirable. We therefore consider that an internal review process should be established alongside binding authority."***

Maximum binding compensation amount

QUESTION 5 - WHAT SHOULD THE MAXIMUM BINDING COMPENSATION AMOUNT PER MISCONDUCT POTENTIALLY IMPOSED ON A REGISTERED FIRM BE CONSIDERING THAT THE OBJECTIVE IS TO PROVIDE COMPENSATION TO RETAIL INVESTORS WHO LOST SMALLER AMOUNTS?

As the Taskforce points out in its report, OBSI's present recommendation limit of $350,000 has been in place for many years and is not subject to any form of regular inflationary increase.

Every year, we are asked to assist with cases that appear on their face to exceed our limit and we generally will do so on the clear understanding of the parties that our recommendation will not exceed $350,000. However, such cases represent a small minority of the hundreds of cases we investigate and resolve each year.

Among those cases where we recommend compensation, recommendation amounts below $20,000 are typical. For example, the average compensation settlement for investment complaints addressed by

OBSI in 2019 was $14,291, while the median was $2,114. These 2019 figures are slightly below the average and median amounts that we have historically observed but are illustrative.

A possible approach to the question of binding authority that may address the concerns of undue complication of the ombudsman process for the majority of complaints would be to establish a threshold limit for binding decisions that is different from OBSI's recommendation limit. For example, OBSI's recommendation limit could be increased to $500,000 as proposed by the Taskforce, with binding decisions up to $200,000. We would consider such an approach to be an incremental improvement over the status quo, but in our view, such a differential limit is not necessary and could drive unintended consequences, such as inclining investigators to recommend amounts at or slightly below the threshold amount, even in circumstances where they feel a higher recommendation would be fair in all the circumstances of the case.

Internationally, the award limit at FOS UK was increased in 2019 from £150,000 to £350,000, and all awards are binding. In Australia, where AFCA decisions are also binding, the monetary compensation limits vary depending on the subject matter of complaint. For example, the limit is AUS$250,000 for complaints relating to General Insurance Brokering and AUS$1 million for small business loans. The limit that applies for general securities complaints at AFCA is AUS$500,000 and the amount claimed by the complainant must not exceed AUS$1 million.

Overlap of investor redress and regulatory proceedings

QUESTION 6 - WOULD THERE NEED TO BE A MECHANISM IN PLACE TO AVOID THE RISK THAT REGISTERED FIRMS MAY BE PENALIZED MORE THAN ONCE FOR THE SAME MISCONDUCT IF THEY ARE REQUIRED TO MAKE A BINDING PAYMENT AND ARE ALSO SUBJECT TO ENFORCEMENT PROCEEDINGS BY THE OSC OR SROS?

When considering concerns regarding multiple penalties for the same misconduct, it is important that the Taskforce distinguish between penalties and regulatory costs on the one hand, and investor compensation on the other. Most Canadian securities regulators (with some exceptions) do not have the power to directly order compensation to consumers.

Furthermore, such powers are generally not sought or exercised by securities regulators because the nature of determining investor compensation is inherently time consuming and complex, and the settlement of claims that fundamentally relate to civil liability is rarely directly relevant to the overarching regulatory purposes of these organizations. For example, the wrongdoing of a single negligent advisor can lead to losses for dozens of investors, all with slightly different circumstances and concerns, but securities enforcement staff need only demonstrate negligence in a handful of representative instances to secure maximum regulatory penalties. Given the limited resources of all regulatory agencies, it is necessary for them to prioritize enforcement resources on those issues that are of greatest impact and to allow a specialized organization, such as OBSI, to resolve liability and loss assessment issues.

An additional consideration for the Taskforce in this regard is that protections against "double jeopardy" with respect to compensation of investors already exist, though perhaps they could be formalized. It is a virtually universal practice for securities regulators to consider any compensation paid by a firm to

harmed investors to be a mitigation of wrongdoing and to reduce the amount of any penalty imposed. Certainly, compensation paid to investors would be taken into account in any disgorgement order for those regulators who have that power. If compounding of penalties is of concern, however, this practice could be formalized.

With respect to OBSI recommendations specifically, it is important to recognize that OBSI processes are fundamentally different than regulatory processes and our decisions are based on different considerations. Whereas regulators are concerned with violations of regulatory rules and guidelines, whether they cause client harm or not; in most cases, OBSI is concerned exclusively with liability in negligence for financial damages to a particular individual.

Whereas regulators may impose administrative fines that are prospective and deterrent in nature or may revoke licenses or impose restrictions on capital markets participants; OBSI does not base its compensation recommendations on such considerations, but rather on financial damages incurred by an investor for which the firm should be held responsible.

OBSI's process does not punish, penalize, or fine firms for any conduct, whether we find evidence of regulatory breach or not. Rather, we seek to estimate legal liability and firm responsibility for investors' financial harm or to recommend non-financial measures such as apologies, return of documents, or the correction of credit bureau records.

While we do have a broader systemic goal of helping firms and consumers to reduce complaints by improving systems and practices prospectively and we use our experience and data for this purpose, our compensation recommendations are not calculated to impose any deterrent effect.

In certain cases, the underlying basis for an OBSI recommendation may be the same as the basis for a regulatory decision, but this is relatively rare. For example, consider the situation if an investor complains to both OBSI and a regulator that an unsuitable investment recommendation caused them financial harm:

- OBSI would investigate the conduct of the advisor and the investor. If we concluded that unsuitable advice was given by the advisor, we would calculate the losses that the investor suffered as a result, taking into account the investor's own potential responsibility or contributory negligence. We may determine that there was no financial harm, in which case there would be no recommendation for compensation, but if we found there was financial harm caused by the unsuitable advice from the advisor, we would recommend that the firm pay on the basis of its vicarious liability for the harms caused by its employee/agent.
- Based on the perceived severity of the potential offence and available resources, a regulator may or may not choose to investigate whether unsuitable investment advice was provided to the client and take disciplinary action against the advisor. They may also consider whether the firm failed to appropriately supervise the advisor. They may find that one or the other of these regulatory violations occurred and would not necessarily be concerned with whether the breaches caused losses to the investor or in what amount. Any financial fine imposed would be imposed on a prospective basis to motivate improvement and deter future wrongdoing. The firm would not be liable to pay any fine imposed against the advisor but might be fined separately for failure to supervise. Some regulators in Canada have the power to order firms to disgorge profits earned by misconduct, but this amount is generally not correlated to the losses of any particular investor or group of investors.

While the underlying misconduct is the same in both examples, the focus of the proceedings and the basis of the financial consequences at OBSI and at a securities regulator is fundamentally different. Additionally, OBSI's process is generally faster, sometimes concluding years before regulatory actions related to the same conduct.

Compensation increases based on cost of living adjustments

QUESTION 7 - AS A SEPARATE RECOMMENDATION THE TASKFORCE ALSO PROPOSES A ONE-TIME INCREASE OF THE LIMIT ON OBSI'S COMPENSATION RECOMMENDATIONS TO $500,000 WITH SUBSEQUENT INCREASES EVERY TWO YEARS BASED ON A COST OF LIVING ADJUSTMENT CALCULATION. WOULD COMMENTERS SUPPORT SUCH AN INCREASE TO THE LIMIT ON COMPENSATION RECOMMENDATIONS?

As described above, OBSI's present recommendation limit of $350,000 has been in place for many years and is not subject to any form of regular inflationary increase. In a small number of cases each year, this limit reduces the amounts we would recommend as fair compensation to the investor.

We support the Taskforce's recommendation of an increase to $500,000 with regular cost of living adjustments.

As described above, the award limit at FOS UK is currently £350,000, and in Australia, AFCA's limit for general securities complaints is AUS$500,000. A $500,000 limit for OBSI recommendations would therefore accord with these international precedents, and regular inflationary adjustments would prevent a misalignment of this amount developing again in the future.

We would welcome the opportunity to meet with the Taskforce or provide further feedback on this important initiative.

Sincerely,

Sarah P. Bradley
Ombudsman & CEO