

OSC Investor Advisory Panel
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Dear Mr. Wetston:

The Investor Advisory Panel of the Ontario Securities Commission appreciates the opportunity to comment on external dispute resolution services in Canada, including developments with the Ombudsman for Banking Services and Investment (OBSI). By way of background, the IAP is an independent body that was appointed by the Ontario Securities Commission in August, 2010. We are charged with representing the views of investors and providing input on the Commission's policy initiatives, including proposed rules and policies, the annual Statement of Priorities, concept papers and other issues.

Introduction

Maintaining and building trust between consumers and financial services companies should be a central goal of Canadian regulatory and governmental policy – a goal endorsed by the G20 meeting of world leaders in February, 2011.¹ How the industry handles consumer complaints is an essential component of that trust. However, knowing where to turn with complaints and navigating the bureaucracies of large financial institutions can be overwhelming for many consumers and small businesses.

The Investor Advisory Panel believes wholeheartedly in the importance of an independent, impartial, and financially accessible body that provides Canadians with an effective way to resolve disputes with banks and financial institutions. We believe in a process that facilitates

¹ The Group of Twenty (G20) has called on the Organization of Economic Cooperation and Development (OECD) and others to develop specific policies regarding consumer financial protection: see the G-20 Finance Ministers' Communiqué, (Paris: February, 2011), online: <http://uk.reuters.com/article/2011/02/19/uk-g20-text-idUKTRE71I2IQ20110219>. Earlier, in October, 2011, the OECD published a report recommending that: "Jurisdictions should ensure that consumers have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient. Such mechanisms should not impose unreasonable cost, delays or burdens on consumers. In accordance with the above, financial services providers and authorised agents should have in place mechanisms for complaint handling and redress. Recourse to an independent redress process should be available to address complaints that are not efficiently resolved via the financial services providers and authorised agents' internal dispute resolution mechanisms. At a minimum, aggregate information with respect to complaints and their resolutions should be made public": OECD, "G20 High-Level Principles on Financial Consumer Protection" (October 2011) at 7, online: <http://www.oecd.org/dataoecd/58/26/48892010.pdf>.

financial redress for consumers. Formal legal proceedings are often not a viable alternative because they are costly, complex, and not readily accessible to most Canadians for disputes of this kind.

Recommendations

Our recommendations are as follows:

First, we call on the Ontario Securities Commission as an important member of the Joint Forum of Financial Market Regulators to push for broader and more robust protection for consumers and investors.

Second, such protection should include a statutory fiduciary obligation for all advice-based financial service providers. If strong regulation exists *ex ante*, the likelihood of disputes arising *ex post* presumably decreases.

Third, a truly independent, objective, accessible and effective external dispute resolution (EDR) regime is likewise an integral component of investor protection. To be effective and to avoid the conflicts of the past several years,² such a dispute resolution regime cannot rely on the voluntary participation of banks and other financial institutions. Participation in an independent, universal EDR service should be a legal requirement for all firms in the financial services industry. The decisions of this body should be binding on all participants with limited rights of appeal to an independent tribunal supervised by the regulators and it should have the statutory authority and resources required to provide timely, effective and impartial decisions to Canadians. Such a regime would bring Canada to the standard now implemented in other common law countries including the United Kingdom, Australia and New Zealand.³

Accordingly, we believe that the Joint Forum of Financial Market Regulators which oversees OBSI should seek to prevent further departures of participating firms from OBSI and endorse the decisions of the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association (MFDA) to require participation in OBSI. We support compulsory participation in OBSI by all banks and financial services providers, including the two banks that have recently departed.

The interests of Canadian consumers, including the cultivation of public trust in the domestic financial services industry, are not served by the increasing fragmentation of ombuds services for consumer financial complaints. No party in a dispute, including banks and other financial institutions, should have the right to choose its own adjudicator, particularly when those

² Specifically, the controversy surrounding the recent withdrawal of the banking divisions of Toronto Dominion (TD) Bank and Royal Bank of Canada (RBC) from OBSI: see e.g. Ellen Roseman, "TD Bank leaves complaints agency; It's a race to the bottom by banks, says ombud" *The Toronto Star* (October 27, 2011) ("Roseman").

³ Phil Khoury, "2011 Independent Review of the Ombudsman for Banking Services and Investments," The Navigator Company (2011), ("Navigator Report").at 84-88

adjudicators are private, for-profit providers.⁴ Such a system has an inherent lack of independence. A profit-seeking dispute resolution service chosen by and paid for by the banks cannot be impartial and independent.

Fourth, we call for a simple, accessible, and *universal* EDR service for all consumer financial and investment complaints in Canada. The scope of this service should not be constrained by sector or product type, but should encompass complaints relating to segregated (insurance) funds, and limited and exempt market dealers as well as banks and all financial institutions. Canadians should not be subject to different levels of protection and compensation depending on who sold them their investment. As an interim step, the separate insurance and investment dispute resolution bodies should at least share a common discovery process, so that consumers do not have to “learn” multiple systems in order to have their complaints adequately addressed.

Placing Industry Complaints in Context

Over the past three years, two major banks have withdrawn from OBSI, and several members of IIROC have attempted to do so.⁵ The extent and merit of the industry’s criticism have been challenged:

- The independent review of OBSI’s activities published in 2011 (The Navigator Report)⁶ concluded that the industry’s complaints lacked substance. The Navigator report also established that the industry wins 69% of the complaints referred to OBSI, compared to the average of 50% in other common law jurisdictions.⁷
- Total compensation paid to consumers by financial institutions on 255 closed cases under OBSI mediation was \$3.8 million in 2010.⁸ Of this amount, banking services customers received average compensation of \$5,676 per settled complaint, with a median of \$2,000, and investment services customers received average compensation of \$19,121 per settled complaint, with a median of \$8,205.⁹

In concordance with the Navigator Report’s findings,¹⁰ we do not think that OBSI membership imposes an unduly costly or onerous burden on the financial industry.

⁴ Note the departure of TD Bank and RBC, *ibid*, for the private EDR service ADR Chambers.

⁵ Roseman *supra* note 2; Ellen Roseman, “Brokers battle with ombudsman” *The Toronto Star* (May 25, 2011).

⁶ Navigator Report *supra* note 3.

⁷ *Ibid* at 19.

⁸ OBSI, “2010 OBSI Annual Report” (2010) at 47, online: http://www.obsi.ca/images/document/up-2OBSI_Annual_Report_2010_HR.pdf

⁹ *Ibid*.

¹⁰ According to the report, there is “No indication that the Canadian financial sector is being unreasonably hampered by complaints about its service”: Navigator Report *supra* note 3 at 20.

Fiduciary Requirement, Universal EDR

A legally explicit fiduciary duty for financial advisors would improve Canadians' trust in the financial system and may reduce the volume and severity of complaints, in our view. Industry objections regarding Know Your Client forms, client risk tolerance, client knowledge and responsibility for investment decisions would lose force. Indeed, the Investor Advisory Panel's own consumer research¹¹ demonstrates that investors believe that such a fiduciary duty already exists. This false belief may contribute to the existing volume investor complaints, i.e., if investors place undue trust in their advisors on this basis, and this trust is broken, they rightly believe that they should have some recourse.

Certain financial services firms¹² have criticized OBSI for disregarding or not adequately accounting for clients' contribution to their own misfortune, i.e., through investor ratification or the failure to mitigate investment losses. The protection of investors and consumers in financial markets has long supplanted the raw idea of caveat emptor as it should in this case. The introduction of an explicit fiduciary duty would clarify the advisor-client relationship, further protect consumers and likely reduce the frequency and severity of complaints. It is long overdue.

Conclusion

The existing system is confusing for Canadian financial consumers. Many Canadians are unaware of OBSI's services and powers. They lack clarity regarding which disputes should be addressed to the OBSI and the circumstances which entitle them to refer their complaints to it. The present and further fragmentation of EDR services in Canada is a regressive step in consumer financial protection. The implementation of a truly national and universal EDR service for all investor complaints would address these issues. The office should include as members dealers of segregated (insurance) funds as well as limited and exempt market dealers in order to simplify access to dispute resolution services for Canadian investors.

Once again, we appreciate the opportunity to comment on this important matter. We feel strongly about these issues. Please contact us if you wish to discuss the matter further which we would be pleased to do.

Yours very truly,

The Investor Advisory Panel

Anita Anand, Nancy Averill, Paul Bates, Stan Buell, Lincoln Caylor, Steve Garmaise, Michael Wissell

¹¹ See Lori Bottrell and Ed Weinstein "Retail Investor Focus Group Report – Investor Advisory Panel" The Brondesbury Group (April 7, 2011) at 10, online: http://www.osc.gov.on.ca/documents/en/Securities-Category1-Comments/com_20110427_11-765_ananda.pdf (Appendix A).

¹² See e.g. Letter of RBC Dominion Securities to OBSI (July 25, 2011), online: http://www.obsi.ca/images/document/RBC____July_25_2011.pdf.