

OBSI AND ADRBO APPROVED AS BANKING EXTERNAL COMPLAINT BODIES

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On June 5, 2015 the Ombudsman for Banking Services and Investments ("**OBSI**") and ADR Chambers Banking Ombuds Office ("**ADRBO**") were approved as External Complaint Bodies ("**ECB**") for the banking sector by the Minister of Finance. The approval will take effect 60 days following the announcement. The practical significance of this announcement is the establishing of Canada's bifurcated banking external complaints system under a new regulatory framework.

This announcement marks a significant step in a series of regulatory reforms that began in 2010 with amendments to the *Bank Act* (the "**Act**") requiring Schedule I banks, Schedule II banks and authorized foreign banks (collectively, "Banks") to become members of an ECB. Bank client complaints that could not be resolved internally would be referred to the ECB for non-binding alternative dispute resolution.

OBSI was created in 1996 as a quasi-judicial independent non-profit arbitrator for disputes between consumers (including entities) and financial institutions. While Bank membership in an ECB is mandatory, they may choose between OBSI and other complaint bodies. OBSI can issue recommendations to Banks including recommending compensation to customers, however, it does not have a mechanism to enforce such recommendations.

Several Banks have withdrawn from OBSI membership, using instead ADRBO, a private mediation firm, to serve as their ECB. The resulting bifurcated banking complaint system has been the subject of much public and legislative debate.

On September 2, 2013 certain regulations under the Act, the *Complaints (Banks, Authorized Foreign Banks and External Complaints Bodies) Regulations* (the "**Regulations**"), came into force and were intended to bolster consumer protection in the banking sector. The Regulations brought the previously self-regulating ECB system under the mandate of the Financial Consumer Agency of Canada ("**FCAC**") which would provide oversight and ensure compliance with the Regulations. A new ECB approval framework was established, requiring all entities seeking to operate as an ECB in the banking sector to satisfy a series of prerequisites before being recommended by FCAC to the Minister of Finance for final approval.

Now that OBSI and ADRBO have been approved as ECBs under the new regime, these ECBs will face regulatory scrutiny and can no longer rely exclusively on their self-determined terms of reference. Specifically, the ECBs will be required to meet ongoing conditions set out in section 7 of the Regulations in order to maintain their approved ECB status.

Banks should be aware of the now salient section 7 obligations imposed on their ECB and how these duties might affect each Bank. ECBs are required to advise the Commissioner of FCAC (the "**Commissioner**") without delay if a complaint raises a systemic issue. ECBs must submit a comprehensive annual report to the Commissioner covering essentially every aspect of their activities. This report must be made available to the public, along with information about the all sources of the ECB's funding, its terms of reference, constitution, governance and the identity of its members.

Banks should also be aware that since the Regulations came into force in 2013, it is more onerous to switch membership from one ECB to another. Section 10 requires Banks to give their ECBs and the Commissioner written notice of a request, or an intention to make a request, to become a member of another ECB at least 90 days before doing so. The use of the word "request" in section 10, suggests that the Commissioner will have discretion to disallow a Bank from changing its ECB.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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