



Susan Copland, B.Comm, LLB.  
Director

Tyler Fleming  
Director, Stakeholder Relations and Communications  
401 Bay Street – Suite 1505 – PO Box 5  
Toronto, ON M5H 2Y4  
[governance@obsi.ca](mailto:governance@obsi.ca)

August 12, 2013

Dear Mr. Fleming

**Re: Consultation on Proposed Changes to OBSI’s Terms of Reference (the “Proposed Amendments”)**

The Investment Industry Association of Canada (“IIAC” or “the Association”) appreciates the opportunity to comment on the Proposed Amendments. OBSI’s continuing consultation with stakeholders relating to the operation and proposed changes to its framework and operations is an important component in maintaining support for this important institution.

The Association believes that the existence of an impartial and credible dispute resolution service for the Canadian investment industry as a whole, is important to the integrity of the industry. Ideally, firms providing investment services should be served by a common ombudservice to ensure that clients and firms are subject to a consistent fairness standard and recommendations in the event of client disputes.

In respect to the Proposed Amendments, the IIAC has the following comments and concerns.

**Section 2(a): Definition of “Industry OmbudService”**

The language should be revised to clarify that the term includes any dispute resolution service provider approved or recognized by a Regulator.

### **Section 2(a): Definition of “Participating Firm”**

The language should be refined to clarify that in order to be subject to OBSI jurisdiction, the affiliated entity of the Member must also be providing financial products or services to customers in Canada.

### **Section 2(a) and former Section 11: Systemic Issues**

Consistent with our past submissions on this issue, the Association supports the proposed elimination of OBSI’s ability to investigate systemic issues in respect of investment investigations. This function properly resides with the relevant regulators.

### **Section 6: Code of Conduct and privacy policies**

The IIAC supports the inclusion of the Code of Conduct and privacy policies in the Terms of Reference. We believe this reinforces the importance of such policies and provides a form of public accountability in respect of compliance with the Code and policies.

### **Section 7: Threats to participating firm staff or property**

The provision requiring OBSI to report information about threats to the firm’s staff or property is appropriate to allow firms to take steps to ensure the safety of their staff and property. However, the requirement that the firm keep the identity of the person who made the report confidential should be subject to exceptions, such as where there is legal or regulatory action compelling the disclosure of the name of such person or circumstances where such disclosure is required to ensure that people or assets are protected. In addition, in a case where such threats have been made, OBSI should have the discretion to report the case to law enforcement authorities, and to discontinue the review of the case.

### **Section 8: OBSI’s mandate**

We seek clarification in respect of the provision in the Fairness Statement that OBSI will “Treat all parties to a complaint *equitably* with due respect for differences circumstances and needs.” It would be helpful if examples were provided to illustrate what sort of differences, circumstances and needs would be considered in making an assessment. We question whether these factors apply solely to the complainant, or if the size of the firm in question would be factored into differences and circumstances in making an assessment of fairness. We are concerned that the use of this provision may result inconsistency and unpredictability in OBSI recommendations.

We are also concerned that the word “equitably” as opposed to “equally” may also introduce increased uncertainty as to what can be expected in similar fact situations.

### **Section 9: Firm responsibility for actions of their representatives**

We seek clarification as to the scope of the activities for which firms would be responsible for the actions of their representatives. While it is clear that firms would be responsible for actions of their investment advisors in regard to securities related business, it is unclear if this responsibility extends to “Outside Business Activities” undertaken by the representative. It should be made clear that firms are not responsible for activities that would not be undertaken in the course of the representatives’ employment with the firm.

### **Section 9(c) 180 day guideline for escalating complaints**

It should be made clear that, except where the firm has not provided notification to the complainants of their right to bring a complaint to OBSI, it is only under rare and extenuating circumstances that OBSI would receive and investigate a complaint after 180 days from the rejection or proposed resolution by a firm. In such cases, OBSI should provide the Participating Firms with reasons, in writing, for its decision to investigate the complaint.

### **Section 10(b) Other proceedings related to the subject of the complaint**

We believe it is inappropriate for OBSI to open a file on a complaint where litigation has been initiated by either the complainant or the firm, as it could lead to duplicative or inconsistent decisions. A complainant has a choice whether to use the courts or the OBSI for dispute resolution. If a complainant does not first bring the matter to the OBSI but chooses to go straight to the courts for dispute resolution, then the OBSI should not accept jurisdiction for dispute resolution. Where the courts have made a judicial determination, the matter should be considered res judicata and the same fact pattern should not then later be investigated by the OBSI.

### **Section 11: Self imposed limitation period**

The Association strongly believes that client claims for financial loss should be subject to a two year statute of limitations period, commencing from the date that the client knew, or reasonably ought to have known of the trading or advising activity giving rise to the complaint. If a client is aware of a problem, and is aware of their ability to utilize OBSI to address the problem, a two year time limit to take action provides them with a reasonable time frame to initiate action. Extending this period to six years can amount to granting a client the opportunity to observe and unfairly benefit from market conditions, rather than taking action to mitigate their losses when they became aware of them. Allowing for a six year time frame also erodes the integrity of the process, and

is contrary to the movement in provincial legislation to shorten limitation periods, recognizing that memories fade, documentation may be difficult to locate, and witnesses (the advisor in this case) may not be available, locatable or alive.

**Section 12: OBSI/Ombudsman has a material interest in a complaint**

This section should state that any OBSI staff member that has or may reasonably be perceived to have a material interest in a complaint should cease to be involved in the complaint.

**Section 14(a): Compensation limit**

We recommend the original language restricting the client from making claims above the \$350,000 in another legal forum be reinstated.

We believe it is inappropriate to permit clients to access the OBSI process to obtain restitution up to \$350,000 without releasing the firm from future liability for any further amounts that they may pursue in other forums. This removal of this restriction is contrary to the objective of having a compensation limit, which is to provide an expedited and less formal mechanism to settle client disputes. If the possibility of further action on a settled claim is possible, firms are unfairly exposed to defending themselves multiple times on the same complaint. This strips the process of its efficiency, and may lead firms to refuse to compensate on such claims, preferring to settle the entire matter in a legal forum. This does not benefit the firm or the client, as matters that may have been settled more efficiently and less expensively through the OBSI process would be subject to a much more expensive and time consuming process for both parties. The terms of reference should mandate that a complainant is required to sign a release where they, and the firm accept an OBSI recommended settlement.

**Section 18(c): Tolling agreement**

The Association agrees that a uniform tolling agreement will provide for a more efficient process. It is critical, however, that the development of the standardized agreement be done with appropriate industry consultation and be subject to the publication and comment process.

**Section 20(c): Escalation process**

This section is very problematic, as it does not permit a firm to provide facts that it considers relevant to OBSI's Board or the regulators in the event that it disagrees with OBSI's findings on an investigation. This denial of a firm's ability to make a proper response to OBSI's findings is contrary to any concept of impartiality and fairness. It is likely in many cases that firms will dispute certain findings of "fact" by investigators or have different views on the importance of certain information. In order to ensure the

recommendation is balanced, it is critical that the Board and regulators be provided with such information from the Participating Firm prior to OBSI making a public recommendation about the liability of a firm, and potentially making damaging allegations in a news release.

Where OBSI elects to release the details and outcome of the investigation in a news release, firms should not be restricted to responding only to the facts disclosed by OBSI. This restriction on public disclosure unfairly prejudices the firm where there are facts that the firm considers material that have not been disclosed. Given the damage that publication of an OBSI decision may have on firms, they should be able to make a full defense in the public forum where OBSI has published the details of its findings.

**Section 20(d): Disclosure to third parties**

In situations where OBSI elects to involve third parties when investigating a complaint, such parties should be required to sign a confidentiality agreement.

Thank you for considering our comments. If you have any questions please don't hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Copland', written in a cursive style.

Susan Copland