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May 31, 2018

Dear Sir/Madam:

**Re: OBSI Terms of Reference Renewal Project (the “Proposed Amendments”)**

The Investment Industry Association of Canada (the “IIAC” or “Association”) appreciates the opportunity to comment on the Proposed Amendments. While we understand the Proposed Amendments were not intended to change the existing scope of the current Terms of Reference, certain changes have added uncertainty and could possibly be interpreted to materially change practice under the existing Terms of Reference.

In particular, we have questions/concerns with the following provisions of the Proposed Amendments.

**Definitions**

**Complaint** - The definition has been amended to add “a Complaint includes issues identified by OBSI in the course of its investigation whether such issues are raised by the Complainant or not.” The addition of the phrase “whether such issues are raised by the Complainant or not” is inappropriate, as it goes beyond assisting the Client articulate their complaint, to the creation of a new complaint. We believe this expands the role of OBSI to becoming an investor advocate rather than an impartial complaint resolution body. It also creates procedural unfairness, as it introduces a new complaint into the process that the firm would not have had an opportunity to deal with internally. We recommend that OBSI remove the phrase “whether such issues are raised by the Complainant or not” from the definition.

**Customer** – We understand that the addition of the phrase “regardless of whether the Financial Service was received through an account at the Participating Firm” is intended to capture off-book transactions. The addition of this phrase introduces significant uncertainty as to what types of issues can be brought to OBSI on behalf of a Customer. For example, will a spouse of a customer that is not a customer of the firm, have standing as a Customer if he/she is the beneficiary of a spousal RRSP? Would beneficiaries of

informal trusts (who are technically not a client) become a Customer? This provision, when coupled with the term “requested” in relation to a Financial Service potentially opens up the definition of Customer beyond those conducting off-book transactions through the firm. The amended definition could allow an individual that received informal advice in a consultation, but never became a client of the firm to undertake a transaction through another channel and seek compensation through the firm. The definition should be amended to be more targeted to address the concern with off-book transactions.

**Financial Service** – The phrase “including any aspect or mode” used in relation to the provision of such services is problematic, in that it removes the need to connect the service provided with the particular activity that is the subject of the complaint. For instance, the means by which a client obtains the funds to invest in a particular security could now be added to the complaint, even if the complaint itself is unfounded. For instance, a client could have taken a line of credit, or devised various tax strategies to facilitate cash flow to make an investment. If that investment does not work out, through no fault of the advisor, the new wording in the definition could broaden the advisor’s exposure to the financing decisions made by the client, outside of the advice provided to the client regarding the specific investment decision.

**Provision of a Financial Service in Canada** – We seek clarification as to whether the addition of this definition would allow for a situation where a client of a Canadian financial institution with a foreign affiliate seeks advice through the foreign affiliate, but has some element of the transaction undertaken in Canada in order to better facilitate the transaction to be able to access OBSI’s services if they are unhappy with some element of the transaction.

**Representative** – We seek clarification as to who the following wording is intended to refer: “any individual responsible for ensuring that the Financial Service was provided to the Complainant in accordance with all applicable laws and regulations”. This is very broad, and could potentially include Compliance officers, internal and external auditors, and legal counsel among others.

#### **Section 5.1(h) – No previous OBSI investigation**

We suggest that the provision be amended to read that “OBSI has not previously investigated the Complaint or, if OBSI has done so, that new material *that was not reasonably available from a previous complaint* has become available.....”

#### **Section 5.5(c) – OBSI may extend time for filing Complaints**

It would be helpful for the Terms of Reference to provide examples of what might be considered to be “extraordinary circumstances”.

#### **Section 5.8 - Effect of class proceedings**

This new provision introduces the possibility of that a Complainant would be able to recover their losses twice, through OBSI and the court process, where the Complainant is a member of the class but is not named as a representative plaintiff. Recourse to OBSI should not be permitted where the Complainant is a class member. It should also be clearly stated that class members cannot avail themselves of the OBSI process after the class proceedings are complete.

**Section 11.2(d) – Fair Practices**

Requiring the firm to inform the Complainant in writing about limitation periods may be considered to be providing legal advice, and as such should not be the responsibility of the firm. If OBSI requires this information to be provided, we suggest that it be permitted to be included as part of an information package given to clients at account opening, and also include the information about time limitations in 11(c).

**Section 12.2(c)(d) - Providing relevant documents, records and things in a timely manner**

This new requirement for the firm to provide privileged documents is inappropriate and inconsistent with processes imposed by industry regulators. The result of providing such documents could be a deemed waiver of legal privilege. It is the firms' decision to waive legal privilege, and generally even a court cannot compel disclosure. It is inappropriate to expect firms to relinquish privileges established under processes for which there are significant due process protections, particularly in respect to an OBSI investigation which does not have such protections.

**Section 12.3 - Extent of obligations**

We are concerned about the rewording of this provision, which appears to require a firm not involved in an OBSI complaint to provide information and documentation to OBSI. This is a significant and inappropriate expansion of OBSI's powers. Firms that are not the subject of an OBSI complaint should not be subject to OBSI's investigative powers. This is particularly problematic, given that the definition of Complaint allows OBSI to create new Complaints where the client has not identified a matter as a subject for OBSI redress.

**Section 14.1 – Request for reconsideration**

This section should make clear that where new information forms the basis for reconsideration, firms should be afforded the ability to negotiate a settlement outside of the OBSI process. It should also be made clear that "new information" should not include information that was in possession of the Complainant at the time of the initial Complaint. This is consistent with the approach of civil courts.

**Section 14.3 – OBSI may extend time**

It would be helpful if IIROC would provide guidance or examples of what would be considered "good cause for missing the time limit."

**Section 14.5 – Reopening of Complaint**

Where a complaint is being reopened, firms should be provided with an opportunity to respond to the Complaint outside the OBSI process. Only if an agreement is not reached should OBSI be re-introduced into the process.

**Part 16 – Confidentiality and Disclosure**

It would be helpful if OBSI would disclose all material facts of all settled cases on an anonymized basis to promote transparency and facilitate better understanding of dispute settlement practices in the industry. The case studies that are currently released do not provide sufficient guidance to the industry.

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