



INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

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Director

Tyler Fleming
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Ombudsman for Banking Services and Investments
Suite 1505 - 401 Bay Street – P.O. Box 5
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November 29, 2010

Dear Mr. Fleming:

Re: Revisions to OBSI Terms of Reference

The Investment Industry Association of Canada (IIAC) appreciates the opportunity to comment on the proposed changes to OBSI's Terms of Reference, published October 29, 2010.

OBSI has characterized the proposed amendments as being of a housekeeping nature and providing clarification of its operations and mandate. Acknowledging that intent, we are concerned, however, that the revised language is material, and may support future, substantive changes in OBSI's processes, which could be introduced without triggering the consultation process that accompanies changes to the Terms of Reference.

Specifically, we are concerned about the amendment to section 27, which directs the Ombudsman to make public the name of the Participating Firm, the recommendation and the circumstances of *the investigation and the case*" in the event that the Participating firm does not accept the recommendation of the Ombudsman. The addition of the word "investigation" potentially adds considerable scope to what may be disclosed by OBSI, including information that investigators may become privy to in the course of an investigation, but which may not be directly related to the case. In order to properly limit the scope of this provision, we recommend that the proposed phrase "circumstances of the investigation and the case" be replaced with "facts of the case".

In addition, we are very concerned that the addition of the phrase "*Subject to the disclosure contemplated by Section 27*", in section 18, when combined with the addition of the word "investigation" in section 27, potentially gives the Ombudsman unlimited discretion to disclose any details about the investigation and the firm processes should the firm not accept the Ombudsman's recommendation.

This open ended discretion is inconsistent with the provisions in section 18, which provide assurances to participants that *“the discussions and correspondence of the Complainant, the Complainant’s representatives, the Participating Firm, the Participating Firm’s representatives and the Ombudsman that may form part of the dispute resolution process will not be disclosed or used in any subsequent legal or other proceedings”* and *“the files of the OBSI are confidential and are protected from disclosure for all purposes unless mandated by law or a regulatory authority”*.

By tying confidentiality to the acceptance of the Ombudsman’s recommendations, the process becomes inherently biased against the Participating Firms. The consequences of rejecting the Ombudsman’s recommendations include not only the one-sided disclosure of OBSI’s perspective of the facts of the case, but potentially other information about the firm that OBSI may discover in the course of an investigation. Publication of such information, particularly without the ability of the firm to respond in OBSI’s press release, may not only unfairly damage the firm’s reputation, but could also hinder the process and ability to resolve a complaint by making the parties less inclined to openly discuss issues, and may also invite future legal proceedings.

As noted above, we recommend language that limits the scope of the OBSI’s disclosure directly to facts of the relevant case, rather than opening it up to the investigation as a whole. In addition, in order to introduce fairness and balance into the process, Participating Firms should be afforded the opportunity to present their reasons for rejecting the OBSI’s recommendation in the release in which OBSI presents its perspective.

In respect of the amendment to section 26, we agree that that the sentence indicating that the Ombudsman should seek to achieve a resolution that is “satisfactory” to the Complainant and the Participating Firm does not reflect OBSI’s mandate. However, we do believe it is appropriate to ensure that the principles of fairness to both parties are referenced in this paragraph. Given that this principle is discussed in section 25, we recommend that the first sentence in paragraph 26 reference not only section 12, but also section 25, so that it reads *“Subject to sections 12 and 25, the Ombudsman shall not recommend compensation....”*.

Thank you for considering our comments. We would be pleased to discuss alternate wording with you at your convenience.

Yours sincerely,

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

Susan Copland