



By E-Mail Only

August 12, 2013

Mr. Tyler Fleming
Director, Stakeholder Relations and Communications
401 Bay St.
Suite 1505, P.O. Box 5
Toronto ON M5H 2Y4

Dear Mr. Fleming:

Re: Consultation on Proposed Changes to OBSI's Terms of Reference

As one of Canada's largest independent mutual fund dealers, Portfolio Strategies Corporation ("PSC") is pleased to provide comments on the *Consultation on Proposed Changes to OBSI's Terms of Reference*. PSC is a member of the Mutual Fund Dealers Association of Canada and, as such, is required to be an OBSI Participating Firm.

PSC believes that the availability of a dispute resolution service, such as OBSI, is important to Participating Firms and Customers and to the integrity of the securities industry generally. A dispute resolution service should offer all parties a knowledgeable and unbiased review of a complaint and of the Participating Firm's conclusions on the complaint without incurring the expense and time required for litigation.

As an overall comment, PSC believes that the proposed changes to the Terms of Reference ("TOR") are premature and that no changes to the TOR should be made until the Canadian Securities Administrators ("CSA") has completed its deliberations regarding its proposals regarding OBSI and implemented an accountability framework and oversight protocols over OBSI. Subject to that overall comment, PSC has the following comments on specific sections of the draft revised TOR:

Section 8

OBSI purports to evaluate complaints using its self-determined standards of what is "fair". PSC believes that complaints should be evaluated using the legal standard applied by the courts regarding whether liability exists and, if so, in what amount. The legal standard is appropriate because any liability is created by the legal relationship between the parties. It is more objective because court decisions are subject to review and refinement upon appeal to superior levels of the courts. It will be more consistent because it applies both to complaints submitted to OBSI as well as to complaints that are litigated.

In PSC's experience OBSI's "fairness" standard has been both uncertain and vague and has given OBSI staff wide and unreasonable latitude in making recommendations. For example, PSC has a file in which the OBSI investigator concluded that a PSC representative had an obligation to provide advice to a client regarding an investment where: the client acknowledges that he found out about the investment from a co-worker; the client acknowledges that bought the investment from a company that is not related to PSC or to the representative; the client did not ask for advice about the investment from the representative; the investment was not held in a PSC account and was held in an account at an unrelated trust company; and the representative was not registered to trade in or advise on the type of investment in question. Regarding the last point, it would have been illegal for the representative to advise about the investment and he could have been subject to regulatory sanction up to and including the loss of his registration if he had done so. Nonetheless, using the "fairness" standards the investigator concluded that the representative should have advised the client about this investment and that because he did not provide advice – that is, because he *did not* break the law – he should reimburse the client's losses on the investment. For obvious public policy reasons, the courts do not require people to break the law and will not hold them liable for failing to do so.

Section 9

While a Participating Firm may often, even typically, have vicarious liability for the actions of its representatives, PSC believes that the TOR should recognize that vicarious liability will not exist 100% of the time to allow for the instances where the courts would find that it does not exist.

For the process to be genuinely fair to all parties involved, PSC also believes that OBSI's process should not create unnecessary obstacles to the recovery from representatives of any amounts owed to clients, which will also need to allow for recovery from the representatives' errors and omissions insurance where applicable.

Section 9 should be reconsidered in both respects.

Section 11

OBSI has provided no justification for having a limitation period which differs from the limitation periods provided by the respective provincial and territorial statutes. PSC recommends that OBSI apply the statutory limitation period based on the client's jurisdiction of residence.

The six year limitation period risks being unfair to both Customers and Participating Firms since delays diminish both the quality and availability of evidence. Allowing Customers to delay that long also encourages them to wait to see how the market performs rather than mitigating their losses. Participating Firms should not be expected to compensate clients for any further losses that occur because the client decided to retain an investment or maintain a strategy rather than immediately taking steps to mitigate.

Section 14

A number of commenters have suggested increasing or eliminating the monetary limit on complaints that OBSI can handle. PSC recommends that the limit be maintained and that it not be increased unless and until there is an acceptable independent appeal process to review OBSI recommendations. The comment regarding Section 8 gives an example of the types of situations where additional procedural safeguards, including an appeal process, would be needed if Participating Firms will be exposed to higher liability.

PSC believes that 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. The terms of reference should mandate that Customers be required to sign a release where they and the firm accept an OBSI recommended settlement. Failure to require that diminishes the efficiency OBSI as a dispute resolution service.

Section 20

The proposal to prohibit Participating Firms from responding to OBSI's version of a complaint is patently unfair and calls into question whether OBSI itself is committed to being just, reasonable, and unbiased. Last fall, for example, OBSI engaged in what can reasonably be viewed as an aggressive public relations campaign (at Participating Firms' expense, no less) to expand its mandate and powers. During that same time OBSI published case summaries which omitted details that a reasonable person would expect to have been included for fair and balanced presentation. There was frequent mention by OBSI about Participating Firms involved in "stuck" cases being offered the opportunity to have an independent review of the cases, with the clear implication that those who declined the independent review were simply not interested in a fair outcome. However, at least one of those firms informed PSC that that the cost for a review started at \$15,000 which was many times the amount in dispute. By failing to disclose the cost of a review during the publicity campaign, PSC believes that OBSI conducted itself in a manner that is detrimental to the industry. In securities regulatory terms, the publications were less than "full, true and plain".

Each instance of publication regarding a refusal PSC recommends that the Board must approve the case summary before OBSI publishes it, and that the Participating Firm must be allowed to appear before the Board or a committee of the Board before the Board can approve the case summary. This final review before publication would work towards OBSI fulfilling its mandate of making decisions that are just, unbiased, equitable, and in accordance with its TOR. It would also appropriately place responsibility on the Board in its governance role for oversight of OBSI staff.

Section 31

Although there may be valid reasons for the Board not to involve itself with specific Complaints prior to the conclusion of the Complaint, it is difficult to see how the Board can exercise appropriate oversight of OBSI staff if it never considers or reviews how staff handled specific Complaints once the files are concluded. The Board will have no basis on which to assess how

well senior management, investigators, and other staff are carrying out their duties and responsibilities. It would be akin to the board of an automobile manufacturer not being allowed to inquire into the conduct or quality of the company's manufacturing activities.

Section 36

PSC's experience indicates that more frequent, not less frequent, evaluation of the work of OBSI would be appropriate. The additional responsibilities that the CSA is proposing to add to OBSI's current mandate further indicate that the review cycle should not be extended. If Section 31 provides that the Board cannot review individual files, it would be irresponsible for the Board to allow the review cycle to be any longer than three years since the independent review would be the Board's only insight into OBSI's operations, other than information provided by management.

Thank you for considering these comments. If you wish to discuss any of them, please contact the undersigned.

Yours truly,

"Kenneth Parker"

Kenneth Parker, CA
Vice President, Compliance & Finance