

Susan Copland, LLB, BComm
Managing Director
scopland@iiac.ca

November 18, 2019

Ibrar Ahmed
Policy Counsel, Member Regulation Policy
Investment Industry Regulatory Organization of Canada
iahmed@iicroc.ca

Dear Mr. Ahmed:

Re: Proposed Amendments Respecting Disclosure of Information by Ombudsman Service to IIROC (the “Proposed Amendments”)

The Investment Industry Association of Canada (the “IIAC” or “Association”) appreciates the opportunity to comment on the Proposed Amendments.

The IIAC recognizes the importance of information sharing in respect of facilitating IIROC’s mandate to govern and regulate its members to protect investors and foster appropriate business standards and practices. To this end, IIROC members are currently subject to robust compliance and enforcement rules and procedures, and IIROC has significant enforcement powers to compel disclosure from its members as appropriate.

The IIAC understands that the declared objective behind the Proposed Amendments is to ensure consistency between the OBSI Terms of Reference and IIROC rules. However, the IIAC is of the view that IIROC rules are not necessarily inconsistent with the OBSI Terms of Reference.

Considering this, the IIAC would like to better understand why IIROC wishes to obtain disclosure of information beyond what is currently permitted under subsection 9504(3) of its rules. The IIAC would like to obtain clarifications on how IIROC intends on using this new power to compel disclosure, as the practical effect of the Proposed Amendments will be to allow IIROC to access all of the information in the ombudsman’s possession, regardless of the circumstances. In particular we seek clarification regarding:

- In what context will IIROC be communicating with OBSI – when it already has an investigation on-going or under other circumstances as well?
- What information will IIROC be seeking to obtain from OBSI?

- Will IIROC be asking for a copy of the complete file, or will it list out the specific information it is seeking?
- Will there be any limits to the information that IIROC can obtain? Why or why not?
- Will IIROC expect to obtain a copy of all information in OBSI's file, including those subject to privilege such as settlement privilege?
- What is IIROC's intent in terms of the use of the information obtained from OBSI – how does it intend on managing the information it will be receiving?
 - What weight does IIROC intend on conferring to the subjective observations or impressions contained in the notes it will be receiving?
- Can the information obtained from OBSI form the basis of regulatory action?
 - What evidentiary rules would be applicable to the information obtained from OBSI in the context of regulatory action?
- Will sharing the information with IIROC make the file accessible/available through access to information requests?

We are concerned that the Proposed Amendments may have unintended consequences affecting the objective that OBSI provide an accessible, low cost and non-legalistic process to investors and firms. Firms have always considered a resolution of OBSI matters to be without prejudice, good faith, negotiations.

Currently, advisor interviews with OBSI are unsworn and often conducted on a casual basis over the telephone, without using formal recording devices, and with the investigator taking notes. These notes, which would not necessarily contain verbatim records, and contain impressions of the investigator are currently not provided to the advisor or the firm.

Given that the notes only form the basis of OBSI recommendations, and not regulatory action, firms have generally been comfortable with this process, and have not required counsel to be present, or transcripts to be provided.

If the content of the interviews could now form the basis for regulatory action, the Proposed Amendments could be construed as OBSI effectively undertaking an interview for the IIROC enforcement department. This would change the tone of relations between advisors, firms and OBSI, as OBSI will be in a position where it may be viewed as having a regulatory function. In addition, once the materials are provided to IIROC, they may be discoverable in civil litigation. Given the potential regulatory and other legal implications for advisors and firms, it is likely that firms will require additional safeguards to ensure that the meetings are documented accurately, and questions and answers are confined strictly to issues under review. Firms and advisors will wish to minimize the chances of human error in the form of mis-documentation, or inaccurate impressions. This will likely result in the

involvement of legal counsel acting for the advisor, the firm or both, and requests for transcripts which would increase costs, for OBSI as well as for the firms and advisors.

In addition, the knowledge that the notes from interviews, and any other investigative materials may be shared with IIROC and the parties to the investigation, may result in an additional level of discipline and consistency in the conduct of investigations to accommodate due process concerns. While such consistency among investigations would benefit participants, it is important that the current benefits of OBSI's non legalistic approach be retained as much as possible.

If, under the Proposed Amendments, IIROC is able to request all documentation from OBSI, it is important that at a minimum, firms and advisors be able to have access to those materials provided to IIROC from OBSI. In this way, firms and advisors would be able to ensure the record accurately reflects their recollection of any interviews, and also allows them to put these records in a proper context if necessary.

Given that advisors subject to an OBSI investigation may move to another firm after the opening of the investigation and the interview, and the conduct of an IIROC investigation, it would be appropriate to allow the advisor, the prior firm and the new firm to have access to the relevant materials.

Considering these concerns, our suggestion is to replace subsection 9504(3) with a provision resembling the following:

(3) Should the ombudsman provide IIROC with any information or records of its service received in relation to a review or investigation, IIROC will provide the Dealer Member (previous and current, if applicable) with a copy of the information received."

In addition, the Proposed Amendments should contain an explicit exception for claims of privilege. We suggest that subsections 9504(1) and (2) specifically be "subject to any claims of privilege made by the Dealer Member, Approved Person and/or other person subject to IIROC's authority.

Finally, we also recommend that further guidelines be developed on the use the information obtained from OBSI, which could be added to section 9504 of the IIROC rules.

In order to ensure an appropriate balance in respect of information sharing and due process, OBSI's Terms of Reference and processes will also have to be adjusted to ensure these new quasi-regulatory functions do not detract from its role as an independent dispute resolution body.

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

Yours sincerely,



Susan Copland

Cc: Sarah Bradley, Ombudsman, OBSI