February 28, 2024

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Meg Tassie
Senior Advisor, Legal Services,
Capital Markets Regulation
British Columbia Securities Commission
1200 - 701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, British Columbia V7Y 1L2
Fax: 604 899-6506
mtassie@bcsc.bc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, ON M5H 3S8 Fax:
416-593-2318
comments@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514 864-8381
consultation-en-cours@lautorite.qc.ca

1850 - 14th Street SW Calgary, Alberta T2T 3S9 | Tel. 403.252.5222 or Fax 1.877.303.3233
www.portfoliostrategies.ca

Dear Sirs/Mesdames:

Re: CSA Notice and Request for Comment – Registered Firm Requirements Pertaining to an Independent Dispute Resolution Service

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About Portfolio Strategies Corporation

Portfolio Strategies Corporation ("PSC") is a Calgary-based dealer, member of the Canadian Investment Regulatory Organization, registered mutual fund dealer and exempt market dealer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador, and the Northwest Territories, and investment fund manager in Alberta and Ontario.

Comments

Basic premise of assumptions are false

The concerns raised in this CSA Notice and Request for Comment have been grossly exaggerated by OBSI and CSA senior executives for some years now. They state, "In Canada, while ***most retail clients' complaints are resolved by firms***, the CSA has observed historic refusals to pay complainants at all and patterns of settling disputes for less than OBSI recommends." These recurring statements, while politically attractive and well meaning, ignore the facts as presented in OBSI's own statistics. For example, the last refusal to pay by a still operating member was back in 2016, almost eight years ago. In 2020 two defunct Exempt Market Dealers Becksley Capital Inc. (Ontario) and Wealth Terra (Alberta) refused to compensate investors after an OBSI investigation recommended settlement. Both EMDs had either already surrendered their registration voluntarily or had it revoked. Considering the fact that no active OBSI Members have refused to compensate investors since 2016, and the CSA has acknowledged "most retail clients' complaints are resolved by firms…", where is the supposed crisis in need of a solution?

At the February 7, 2024 CIRO conference in Toronto a senior OSC executive admonished the investment industry for "not agreeing with OBSI recommendations that are usually for amounts under $10,000" or words to that effect. That was a shocking and uninformed statement for a senior CSA member to make when you look at OBSI's own statistics in Table 1 of this paper on page 8, for the 2018-2022 period. The actual data shows that only 1% of OBSI settled cases for amounts under $10,000 were settled below OBSI's recommended amount. In other words, 99% of cases were settled for the OBSI recommended amount. The investment industry should be applauded for following OBSI's compensation recommendations, not criticized by the CSA and

consumer advocacy groups. Such public statements also erroneously assume that OBSI investigation conclusions and recommendations are 100% correct all of the time. That simply is not the case for a number of reasons – complainants change their story during the investigation when the facts don't support the complaint, undefined "fairness principles" used by OBSI ignore written evidence over many years, and E&O insurance providers disagree with the amount of the compensation recommended and refuse to pay it. If you also consider OBSI recommended amounts from $10,000 to $49,999 the evidence states that the investment industry followed OBSI's recommended compensation 87% of the time. If the CSA truly wants to do the right thing when looking at giving OBSI binding authority, it can't ignore the facts provided by OBSI themselves. Further, OBSI's data is a bit misleading if it includes defunct members who did not reach into their pockets after their registration ceased.

There are several comments in this paper that make reference to "power imbalances" which are nothing but anecdotal hearsay, and not supported by any facts. In most complaints the complainant is assisted by an informed family member or friend, and occasionally a lawyer, when submitting their complaint. Salaried member compliance staff, the vast majority of which are not lawyers or trained in the legal profession, investigate these complaints and respond with their conclusions, following OBSI's recommendations 91% of the time for amounts up to $49,999. Where is this supposed "power imbalance"?

If the CSA truly wants to see further improvements with these settled amounts, they should compel advisors to be willing participants in the OBSI process. Members have been making these suggestions for many years now. Get the advisor to the table, compel them to participate in the OBSI investigation, and if they refuse to cooperate or contribute towards the settlement, then they risk being "named and shamed" in addition to the member. This could have been implemented years ago, and we firmly believe that it would have resulted in faster investigations and better compensation results for complainants even when the advisor walked away from the member firm to work elsewhere. Unfortunately, there was no political will to do this at OBSI or the CSA because it is simply easier for OBSI to pursue members. So we have ended up with a less than perfect ombudservice because doing what is "easy" triumphed over doing what is "right".

Principles of Law

Another major concern of OBSI members is that OBSI does not appear to follow principles of law, that most members will already be familiar with, in their investigations. Instead OBSI uses unpublished or unknown "fairness" principles, that dismiss written evidence such as client signed documentation, where OBSI investigators appear to retroactively create their own KYC documents to match the OBSI conclusion. Member compliance staff perform the compliance function based on "real" documentation, and not "imagined" documentation from investigators to support their conclusions.

There needs to be transparency in OBSI's processes and decisions, which should be available to the public at a high level. Currently OBSI puts a gag order on its member firms, preventing them from presenting their side of the story or their own loss calculations if they disagree with OBSI's loss calculations. How is this in the public interest? It is not fair and balanced, and it perpetuates this myth that OBSI is correct in their analysis 100% of the time.

Complainants need to be held accountable for making false or fraudulent statements, such as their stated income on a KYC or investment loan application at the time of sale, because that is what member firms rely on when they approve transactions. Complainants face no repercussions for making these false statements, while members provide documentary evidence as required. This really is a "power imbalance" in favour of the complainant and it needs to be addressed. Compensation awards should be binding on both parties, and complainants should be prevented from using settlement amounts to fund litigation to pursue amounts beyond OBSI's $350,000 maximum limit.

We have serious concerns about the ombudservice being "excluded from arbitration acts and if necessary, other legislation that sets out procedural requirements for tribunals." This is another wrongheaded approach that emphasizes simplicity or speed, over what is legally correct and fair. A "power imbalance" once again.

No appeal

We are concerned that there is no formal appeal process through an independent third party. Instead, it is proposed that an internal review be conducted by senior executives of OBSI – likely the same executives that hired and trained the OBSI investigators. Speaking from personal experience, having dealt with OBSI since its inception, OBSI management and senior executives have almost always backed their investigator's conclusions despite obvious flaws or errors in their investigation conclusions. You simply cannot argue that this is an impartial process, as it is an obvious conflict of interest. When we challenged the conclusions and recommendations of an investigator several years ago to a senior OBSI manager we were asked "if we had ever considered the feelings of the investigator"! No, quite frankly we were focused on correcting errors in the analysis, whether it be with false assumptions or errors in math. Surely the CSA can recognize these inherent conflicts of interest.

This paper instead offers up the possibility of a judicial review but that is limited to reviewing the legality or reasonableness of the process, and not with a view to correct obvious errors in the facts, or OBSI's loss calculations. This is exacerbated by the fact that OBSI uses unknown or unpublished "fairness" principles, whereas OBSI members work from stated CSA guidance or legal principles. If a member firm considers an investigator's process to be procedurally unfair, what guidance will be present in a judicial review to correct this? No guidance found in this paper. As stated by many commenters, the CSA proposes to exclude OBSI from legislation that sets out requirements for tribunals, thus further limiting the member's ability to participate in a

procedurally fair process. The CSA, once again, appears to be focused on “easy” or “fast” instead of what is fair or reasonable. Without these basic protections, judicial reviews will likely side with OBSI, unchallenged.

Industry Impact

OBSI has to function within its stated mandate, such as conducting an investigation only after a formal complaint has been made to the member and the dealer member has completed its investigation and reported its findings to the complainant. This happened to our firm a few years ago when we assisted OBSI in their investigation of the previous mutual fund dealer that the complainant transferred in from. We repeatedly asked for a copy of the complaint against our firm, but OBSI kept sending us their complaint intake form naming the previous dealer. We reported this to two CSA members, but they said they had no jurisdiction over OBSI, or words to that effect, and that they could only pass our concerns on to OBSI management. Further, we have seen instances where OBSI investigators have encouraged complainants to file complaints against other dealers rather than just focusing on the dealer member that is the subject of the original complaint. We find this practice to be unacceptable.

In the past OBSI has pressured member firms to settle on extremely tight and unreasonable deadlines (a few days, after an investigation took six to twelve months), threatening “name and shame” if they don’t immediately comply. In many of these cases an E&O insurance claims team is involved, with their own external legal counsel. They need time to assess the merits of the complaint, interview member staff or advisors, and they will not offer insurance coverage to settle claims if members settle directly with OBSI, and without the insurer’s approval. This is yet another example of where “fairness” or reasonableness take a back seat to OBSI’s desire to settle cases within a given timeframe. The CSA and OBSI appear to be under some mistaken impression that members have sufficiently deep pockets to fund larger awards, but the majority of member firms do not have deep pockets. Portfolio Managers only require $25,000 of excess working capital, and exempt market dealers $50,000, so we fail to see where this mindset of deep pocketed members comes form.

To make matters worse, many E&O insurers have completely withdrawn from the market in offering coverage to Exempt Market Dealers, or made the terms so ridiculously uneconomic as to not be worth considering. Some firms are looking into starting their own self funded E&O program for exempt market products only, for that very reason. Insurer coverage offered was uneconomic and nonsensical. A large award from OBSI could easily put a small to medium sized firm out of business due to the actions of one advisor who is not subject to OBSI membership, and we do not feel that this is in the public interest.

We note in this Request for Comment that the CSA has not put forward any alternatives to OBSI, including CIRO’s long standing binding arbitration process that could be tweaked to satisfy the CSA’s stated objectives in this paper.

Definition of complaint

On page 19 of the CSA Notice and Request for Comment it is proposed that the definition of "complaint" be amended to include any "expression of dissatisfaction" that relates to a trading or advising activity of a firm or a representative of a firm. It is entirely unclear as to why the CSA feels this amendment is necessary, since OBSI members already comply with all of these stated requirements. We fail to see where this added power to demand corrective action to correct erroneous information a firm provided to a credit bureau or the Canada Revenue Agency regarding a complainant, actually stems form. Member firms don't report to credit bureaus, unless you are a bank perhaps, nor do most members deal with CRA in any manner regarding complainant accounts. If a nominee dealer reports a $20,000 RRSP withdrawal to CRA, then that is a statement of fact. If the complainant forgets they were told about the 30% withholding tax, then changes their mind, why should OBSI have the power to "Force" a correction for a smaller amount at a lower withholding tax rate? This proposed amendment to the definition of complaint is puzzling, and we require more information from the CSA as to why they feel this change is necessary.

ANSWERS TO QUESTIONS IN THE PROPOSED AMENDMENTS

1. *The CSA contemplates that under the proposed framework, an IDRS would be authorized to issue binding decisions in circumstances where it is designated or recognized in a jurisdiction as the identified ombudservice. It is possible that some CSA jurisdictions may not designate or recognize OBSI as the identified ombudservice at the same time, resulting in the status quo (e.g., OBSI making non-binding recommendations only) applying in those jurisdictions until OBSI were designated or recognized as the identified ombudservice. If jurisdictions designate or recognize OBSI as the identified ombudservice at different times, what operational impacts, if any, would you anticipate from an IDRS being designated or recognized in some but not all jurisdictions? How can these impacts best be managed?*

   If the various CSA jurisdictions do not designate or recognize OBSI as the identified ombudservice at the same time, while not ideal, we do not foresee any operational impacts in working under the status quo. We would assume that the resident jurisdiction of the complainant would guide dealer members in assessing whether OBSI's recommendations were binding or not. Having said that, OBSI's own statistics have shown that 99% of investment cases with an OBSI recommended amount under $10,000 are settled in full in any event, without the need for binding authority, so it seems obvious to us that the industry has demonstrated a willingness to pay out on OBSI's recommendations without having been compelled to do so.

2. *The proposed rule amendments include a new provision requiring compliance with a final decision of the identified ombudservice. Under the proposed framework, we contemplate that both a recommendation or decision of the identified ombudservice could become a final decision that will be binding on the firm under certain circumstances. Specifically:*

    a. *With respect to a recommendation made by the identified ombudservice following the investigation and the recommendation stage, we contemplate the recommendation becoming a final decision where (i) a specified period of time has passed since the date of the recommendation, (ii) neither the firm nor the complainant has objected to the recommendation, and (iii) the complainant has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice (the deeming provision). What are your general thoughts about the deeming provisions and the circumstances that trigger it? Please also comment on whether 30, 60, 90 days would be an appropriate length of time to be specified for a recommendation to be deemed a final decision under the deeming provision.*

    We have no concerns about the deeming provisions or the circumstances that trigger it. Since there is a distinct possibility that members may be surprised with the recommendation and disagree with it, based on the evidence previously submitted, members will likely have to call on their staff to review and discuss OBSI's recommendation. Allowing for vacations and holiday season or other breaks, we feel that 90 days would be appropriate for a final decision under the deeming provision.

    b. *With respect to the decision made by the identified ombudservice following the review and decision stage, we contemplate the decision becoming final where (i) a specified period of time has passed since the date of the decision (the postdecision period), and if the complainant did not trigger the review and decision stage, (ii) the complainant has not rejected the decision and has not otherwise withdrawn from the process in a manner authorized by the identified ombudservice. Please comment on the provision of this post-decision period and whether 30, 60 or 90 days would be the appropriate length for the post-decision period.*

    For the reasons given in 2a) we feel that 90 days would be the appropriate length for the post-decision period.

3. *The proposed framework contemplates that complainants could not reject a decision of the identified ombudservice if they initiated the second-stage review of the recommendation by objecting to it. What are your views on this approach?*

We agree that complainants should not be able to reject a decision of the identified ombudservice if they initiated the second – stage review of the recommendation. The decision should be binding on **both** parties.

4. *Please provide any comments on maintaining the compensation limit amount of $350,000.*

   Based on previous consultations and reviews of OBSI, with accompanying comment periods, and OBSI's own disclosures, we saw no evidence that recommendations made by OBSI ever approached $350,000 in the past, so we objected to increasing the upper limit beyond $350,000 in our previous submissions.

   The CSA question/comment here excluded the term "binding" but we assume that you intended to say, "binding authority up to a limit of $350,000". We strongly object to any notion of granting binding authority for recommendations exceeding $50,000 because any amount larger than that could bankrupt many small to medium member firms due to the actions of one individual registrant, either through error or firm belief in recommendations made, where registrant oversight procedures were reasonable.

   Using OBSI's 2018-2022 investment case data on page 8 of this Request for Comment, the proposed $50,000 binding limit would capture 497 cases out of 546 cases. That's 91% of all cases, and a very significant benchmark indeed. There is no evidence to support the notion of increasing the compensation limit beyond $350,000.

5. *The proposed framework does not contemplate an appeal of a final decision to either a securities tribunal, or a statutory right of appeal to the courts (although parties could still seek judicial review of a final decision). What impact, if any, do you think the absence of an appeal mechanism will have on the fairness and effectiveness of the framework for parties to a dispute?*

   We strongly object to the notion that there will be no appeal process of a final decision to either a securities tribunal, or a statutory right of appeal to the courts. We have observed many OBSI recommendations that were deeply flawed, had serious errors in the loss calculations, did not follow basic legal principles, and were unreasonable based on client signed documentation. The absence of an appeal mechanism is blatantly unfair. Further, there is no evidence to support the opinion that a power imbalance exists between complainants and a member firm. In almost all cases, member firm responses are investigated and written by salaried compliance staff, and not lawyers. There is no power imbalance.
   Based on our own initial research, and reading the opinions of other commenters, a judicial review will not address the errors or concerns listed above. A judicial review will primarily consider procedural fairness, as opposed to focusing on fundamental errors in the OBSI

recommendations. Flagrant errors in the investigation process, or OBSI staff opinion based on unwritten "fairness" principles, are unlikely to be corrected in a judicial review.

6. *Should the proposed framework include a statutory right of appeal to the courts or another alternative independent third-party procedure for disputes involving amounts above a certain monetary threshold (for example, above $100,000)? If so, please explain why.*

   Yes, we feel that the proposed framework should include a statutory right of appeal to the courts or another alternative independent third-party procedure for all recommendations of $50,000 or more. OBSI's 2018-2022 investment cases data demonstrate that the vast majority (91%) of cases are settled at $49,999 or below, which is significant. For the reasons stated in our earlier responses above, we have seen far too many seriously flawed OBSI recommendations for us to accept a binding authority ombudservice without a fair appeal process.

7. *Are there elements of oversight, whether mentioned in this Notice or not, that you consider to be of particular importance in ensuring the objectives of the proposed framework are met? If so, please explain your rationale.*

   We feel that there should be CSA oversight by experienced staff that are familiar with member interactions with retail wealth clients, and complaints filed with them directly in the past. We would expect these CSA staff to apply basic legal principles, rather than follow OBSI staff opinion based on their own undefined "fairness" principles, despite written evidence submitted to them during the investigation.

8. *Do you consider oversight, together with the other aspects of the proposed framework discussed in this Notice, to be sufficient to ensure that the identified ombudservice remains accountable?*

   There are no oversight provisions of the proposed ombudservice tabled in this CSA Notice and Request for Comment. Historically we have seen no evidence that the CSA has ever properly reviewed OBSI's core methodologies, fees and costs, information sharing, or transparency or made those findings public. Our firm has presented flagrant errors in OBSI's processes, even to the point of OBSI conducting investigations in the absence of a written or verbal complaint, to the CSA in the past, only to be told that OBSI operates independently, and does not take instructions from the CSA.
   The notion that OBSI undergo an independent evaluation at least once every five years will not be of any value if it does not dig into current OBSI processes and member complaints about the processes. The last two independent reviews were nothing more than rubber stamps on OBSI processes with almost nonexistent interactions with concerned members. We are unaware of any members being contacted about their experiences with OBSI for the

last review conducted by Professor Puri. Both reviews recommended binding authority for OBSI "just because", which cynics might say was the sole purpose of the review in the first place, confirming an objective of OBSI since its inception. Did they really have to go all the way to New Zealand to find an independent reviewer to confirm that objective the first time around?

9. *Please provide your views on the anticipated effectiveness of prohibiting the use of certain terminology for internal or affiliated complaint-handling services that implies independence, such as "ombudsman" or "ombudservice", to mitigate investor confusion.*

   We have no concerns about a prohibition on the use of certain terminologies that imply independence, such as "ombudsman" or "ombudservice," to mitigate investor confusion. We have never heard of a member firm using such terminology.

Conclusions

The CSA needs to stop harping on their exaggerated claims that OBSI is in crisis because it lacks binding authority, which is similar to many other jurisdictions. Instead, the CSA should give credit where credit is due, to an investment industry that has settled in full with investors 99% of the time for amounts under $10,000 and 91% of the time for all settled amounts under $50,000. We honestly believe that if the CSA or OBSI changed its mandate many years ago to include advisors as OBSI participants, the supposed disappointing current state would be dramatically different – better cooperation from advisors who won't risk being "named and shamed", faster investigations and completed files, advisor participation in financial settlements rather than leaving everything to a dealer member that did not make the actual sale with the complainant.

We do not agree with the proposal to amend CSA rules by replacing the term "complaint" with the term "expression of dissatisfaction". The CSA has not provided sufficient information to justify this change, and we are concerned that it could open the floodgates with nuisance complaints that should not fall under OBSI's mandate, such as timely service complaints, not implementing unsolicited trades given by unexpected email addresses without personal verification etc.

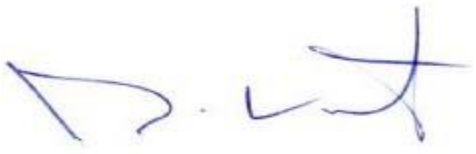
OBSI members need to know what the rules are, so they can operate within them. Principles of law need to be implemented in place of OBSI's unknown and undefined "fairness" principles. Further, OBSI investigators should not be permitted to create their own "imagined" KYC documentation in place of client signed KYC documents collected over many years, to support OBSI's conclusions.

Contested binding decisions must be made by an independent third party, and certainly not by an OBSI senior manager who hired and trained the original investigator. The inherent conflicts of interest are so obvious that we don't think we should have to comment on them. We also feel that a fair and reasonable appeal process be implemented when parties do not agree with the OBSI investigator's conclusions and recommendations to compensate complainants. If a review and decision stage is also conducted, we feel that the decision should be binding for both the complainant and member. Complainants who settle should not be able to take settlement proceeds to start a civil claim. If member firms are not permitted to request a full and final release, where is the incentive to settle?

While many OBSI member firms fear that the CSA will simply ram these proposals through, despite the evidence or issues raised, and OBSI's own statistics of member compliance with recommended settlements, we could probably accept binding decisions for amounts up to and including $50,000. Recall from OBSI's statistics that member firms have willingly paid OBSI's recommended settlements up to $49,999 91% of the time. Given a fair appeals process, instead of a judicial review, we can see that binding decisions up to and including $50,000 should be less problematic. For contested amounts approaching OBSI's upper limit of $350,000 we feel that the CIRO program could be utilized by complainants instead of OBSI.

If you would like to discuss any of the points we have raised in a future discussion, please contact me at markkent@portfoliostrategies.ca.

Yours truly,



Mark S. Kent, CFA, CLU

President & CEO