



Client Complaints Against EMD Firms and Dealing Representatives

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Avenues for Complaints

- Internal complaint to the EMD
- Ombudsman for Banking Services and Investment (OBSI) when internal complaint to the EMD is unsuccessful
- Ontario Securities Commission (OSC)
- Courts

Internal Complaints to EMDs

- National Instrument 31-103, s. 13.15:
 - A registered firm must document and, in a manner that a reasonable investor would consider fair and effective, respond to each complaint made to the registered firm about any product or service offered by the firm or a representative of the firm
- Companion Policy to NI 31-103:
 - Firms must maintain records which demonstrate compliance with complaint handling requirements
 - Firm's complaint system should include standards allowing for objective factual investigation and analysis of the matters specific to the complaint
 - Firms should not limit their consideration and handling of complaints to those relating to possible violations of securities legislation
 - The firm's complaint handling policy should provide for specific procedures for reporting the complaints to superiors, in order to allow the detection of frequent and repetitive complaints in respect of the same matter, which may indicate a serious problem

Internal Complaints to EMDs, cont'd

- Companion Policy to NI 31-103, Responding to Complaints:
 - All complaints relating to one of the following matters should be responded to by the firm by providing an initial and substantive response, both in writing and within a reasonable time:
 - A trading or advising activity
 - A breach of client confidentiality
 - Theft, fraud, misappropriation or forgery
 - Misrepresentation
 - An undisclosed or prohibited conflict of interest
 - Personal financial dealings with a client
 - For other types of complaints, it is up to the firm to decide whether a reasonable investor would be expecting a written response to their complaint
 - Verbal complaints, other than those referred to above, do not need to be responded to in writing
 - Firms are entitled to expect the complainant to put unclear verbal issues into written format; if a verbal complaint is clearly frivolous, firms do not have to offer assistance in putting the complaint in writing

Internal Complaints to EMDs, cont'd

- Companion Policy to NI 31-103, Timeline for Responding to Complaints:
 - Initial response: 5 business days
 - Substantive response: 90 days from receipt of complaint

Internal Complaints to EMDs: Referral to Dispute Resolution Services

- The written acknowledgement of a complaint must include the description of the firm's obligations with respect to complaint-handling and describe the steps that the client must take in order to use an independent dispute resolution service
- The substantive response to the complaint must notify the client again of the steps that need to be taken to use an independent dispute resolution service
- The client has 90 days from submitting the complaint (if no substantive response is received), or 180 days from the receipt of the decision, to escalate the complaint to an independent dispute resolution service
- If the client provides a notice that he or she wants to have the complaint considered by an independent resolution service, the firm must arrange for that service to be available to the client at no cost, unless the complaint is for an amount no greater than \$350,000, in which case the firm must refer the client to OBSI
- Limitation period for complaints to OBSI: 6 years from the date the complainant knew, or ought to have known, about the event that caused the complaint

Internal Complaints to EMDs: Things to Keep in Mind

- Having legal counsel oversee the investigation and handling of the complaint ensures that the documents created during the investigation are protected by solicitor-client privilege – i.e., they are protected from disclosure in subsequent proceedings and cannot be used against the firm
 - Documents subject to privilege should be identified and protected from the outset
 - Experts, if any, should be retained by legal counsel to establish privilege over their reports

He Said/She Said Complaints against Dealing Representatives

- The determination of a complaint often comes down to straight credibility assessments (i.e., whom does the firm believe)
- As the firm is under a regulatory obligation to investigate and respond to complaints, the firm's response may be later evaluated by the OSC. This means the firm will be conservative in its approach to determining credibility
- While the firm will ask the dealing representative for his or her side of the story, the documentary evidence will be the most important evidence in a credibility dispute
- To "win" a credibility dispute, it is crucial for a dealing representative to have detailed notes of client communications. The notes will show, for example, that the dealing representative did, in fact, explain the risks of the exempt product to the client. Dealing representatives should not simply rely on the filled out Know Your Client or other mandatory forms, as regulators may take a view that the clients did not understand them when signing
- To have evidentiary weight, notes should be taken at the time of the event or within a reasonable time after. A delay in transcribing the event may put the accuracy of notes into question

Ombudsman for Banking Services and Investment (OBSI)

- Non-government organization mandated to provide independent dispute resolution services and compensation at no cost to consumers
- Receives complaints from consumers who are dissatisfied with the response of their banking service or investment firm to their complaints

OBSI: Is it Right for EMDs?

- Since May 2014 all exempt market dealers are required to maintain membership in OBSI and use it as a dispute-resolution service (CSA Staff Notice 31-338)
- Comments from Exempt Market Dealers Association of Canada (February 15, 2013):
 - EMDs do not engage retail clients. They often rely on a small base of clients returning for subsequent transactions. The volume of complaints from EMD clients will be low, and EMDs will subsidize OBSI as a dispute resolution service that serves mostly high volume complaint matters from IIROC and MFDA dealers
 - OBSI staff is not prepared to manage the complexity or substance of complaints arising from the exempt market

OBSI: Is it Right for EMDs?

Cont'd

- OBSI usually calculates investors' losses in a straightforward context of market indices and publicly traded securities valuations
- OBSI does not have capacity to calculate suitability and loss assessments in the context of EMD complaints:
 - Illiquid exempt market securities
 - Complex suitability assessments behind the sale of exempt market securities
 - No applicable market indexes for analogous performance comparisons
 - No independent price verifications from secondary market trading
- Allowing EMDs to select dispute resolution providers that can provide the level of skill and expertise that exempt market clients may require would have been more preferable

OBSI Powers

- Can receive complaints and make recommendations for amounts not exceeding \$350,000
- Can invite participation in dispute resolution by participating firm, but cannot compel cooperation
- Can make a recommendation for participating firm to make a payment to the complainant, but cannot compel the payment
- The only remedy for non-cooperation in an investigation and/or not following a recommendation is publishing the name of the participating firm and details of the refusal

OBSI Investigations: Guiding Principles

- OBSI does not enforce or specifically investigate compliance with regulations. Its conclusions may be different from the conclusions of a regulator
- While OBSI considers rules and standards developed by other bodies, such as the Canadian Securities Administrators (CSA), Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association (MFDA), its guiding principle in resolving complaints is “what is fair between the parties in the particular circumstances of each case”

OBSI Investigation Process

- OBSI interviews the complainant and the participating firm. Most interviews are conducted over the phone. Staff makes determinations of credibility based on their conversations with the parties and on their review of the evidence
- At OBSI's request, participating firm must provide all non-privileged information relating to the subject matter of the complaint, which may include:
 - Notes; correspondence, including emails; account statements; customer records from internal databases; transaction records; opening agreements; internal policies; and internal security and investigation files or reports

OBSI Investigation Process cont'd

- OBSI is not bound by rules of evidence. Neither party has an opportunity to test the evidence given by the other and has limited ability to make submissions
- OBSI reviews evidence and uses modelling techniques to assess losses suffered by the complainant:
 - Calculate investment performance
 - Compare it against a benchmark, add interest, or recommend straight losses
 - Consider investor responsibility
 - Apportion financial harm
- Rejections of complaints or recommendations made by OBSI are not subject to appeal

OBSI's Decision

- A firm may be found vicariously liable for its advisor's misconduct
- If the firm and/or advisor is found liable, OBSI recommends an amount to be paid to the client; the amount is negotiated between the client and the firm
- Compensation recommendations do not provide a written analysis of what OBSI considered a wrong-doing or the rationale for its compensation recommendation
- If OBSI believes the client is owed compensation but cannot get an agreement from the firm, it prepares an official report with recommendations. The client and the firm have an opportunity to comment on it
- If OBSI finds in favour of the firm, the complainant is offered a choice of receiving a report with reasons or withdrawing the complaint

OBSI: Some Statistics

- 3,078 banking and investment cases opened between 2012 and 2016
- 18 EMD-related cases opened in 2017, 3 in 2016 and one in 2015
 - In 2017, only one EMD case had outcome in favour of complainant
- approximately 40% of investment complaints end in a compensation recommendation
 - In 2017, 150 out of 382 closed investment-related cases ended with monetary compensation
- approximately 64% of firms subject to OBSI investigations pay at least the recommended amount; 18% pay above the recommended amount
 - In 2017, 15% of the 150 cases with monetary compensation recommendation were settled for an amount less than that recommended by OBSI and 7% - for more than the recommended amount.
- 19 refusals have been published since 2007
 - No refusal publications in 2017

Refusal to Follow OBSI Recommendations

- OBSI's recommendations are not binding
- If participating member refuses to pay, OBSI makes public the name of the firm, its findings, and that the firm refused recommendation ("naming and shaming"). The investigation report is also made public. The name of the client is not disclosed
- The dispute resolution process is confidential to the parties to the complaint and OBSI. However, if a participating firm refuses an OBSI recommendation, or does not cooperate in the investigation, then OBSI must disclose any information, as well as OBSI's recommendation, to OBSI's board and appropriate regulators, and then disclose it publicly

OBSI: Proposal to Make Recommendations Binding

- 2016: OBSI underwent an independent review of its investment mandate
- Report of the independent review: “naming and shaming” is ineffective. Knowledge that OBSI lacks binding powers emboldens participating members and gives them a bargaining advantage, allowing them to negotiate down the compensation amounts recommended by OBSI
- Potential avenues of making OBSI recommendations binding:
 - OBSI has binding authority based on the contract with its members
 - OBSI has no binding authority. Instead, it would cancel membership of a non-compliant member and report it to regulators, who would then take actions against a registrant. Cancelling participating member’s membership would put it in breach of securities regulations

OBSI: Relationship with Regulators

- OBSI must inform CSA of issues that appear likely to have significant regulatory implications, including issues that appear to affect multiple clients of one or more firms
 - In 2017, OBSI referred three matters to regulators as raising systemic issues

OBSI Complaints and Regulatory Proceedings

- Complaints to OBSI may become an issue during the firm's compliance field reviews by the OSC. As part of a compliance review, a firm may be requested to provide information on client complaints or litigation.
- Outcomes of compliance reviews by OSC in 2017:
 - 56% enhanced compliance
 - 34% significantly enhanced compliance
 - 5% terms and conditions on registration
 - 5% referral to the Enforcement Branch

OBSI: Relationship with Regulators

- December 2017, Joint CSA Staff Notice:
 - refusals to compensate clients consistent with OBSI recommendations, repeatedly settling for lower amounts than those recommended by OBSI, or being involved in a disproportionate number of settlements can be risk-based indicators of problems with firms' complaint handling mechanisms
 - Based on these indicators, the regulators may make enquiries with the firms as part of their risk-based reviews and take regulatory actions
 - The regulators may order terms and conditions on a firm's registration or initiate an enforcement investigation within the regulators' existing regulatory framework

OBSI/ Securities Commissions Interactions

- Re *CMS Financial Management Services Ltd.*, 2017 ABASC 61 (Alberta Securities Commission)
 - Application by investors to obtain Staff’s investigation report (the “Report”)
 - “We are of the view that the [Executive Director’s] public interest assessment ... need not include assisting the prosecution of a private dispute resolution process, whether through civil litigation or alternative means. ... It was reasonable for the [Executive Director] ... to disregard the Report’s potential utility to advance the [investors’] private litigation or dispute interests, including the OBSI proceeding.”

Questions?

THANK YOU FOUNDING PARTNERS



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PREMIER PARTNERS

*EXEMPT***EDGE**



CAPITAL PARTNERS



AFFILIATE PARTNERS

