

THE
OBSI
SURVIVAL
GUIDE
FOR
RETAIL
INVESTORS



Introduction

This Guide has one purpose: To assist your efforts at obtaining a restitution recommendation from OBSI.

Sometime during the course of your investing life you will, more likely than not, have a complaint. You might blissfully assume that robust mechanisms are in place to promptly and fairly deal with disputes. As John Reynold's book, *the Naked Investor*, makes so abundantly clear, nothing could be further from the truth. The convoluted complaint processes built into the system - internal and external ombudsmen, arbitration, civil litigation and complaints to regulators - are a microcosm of the convoluted nature of the system as a whole. First you have to figure out that something is wrong and it's the fault of your service provider, so that it's even worth for you starting the battle. Then you have to understand the nature and limits of the internal complaint process where your trusted expert adviser becomes your adversary - and the firm's formidable resources are arrayed against you. They know the process and how to game the complaint proceedings that a trusting naive investor is barely even aware of.

It is ironic that Chief Justice of Canada Beverley McLachlin has spoken out about the high costs of litigation precluding access to justice for the middle class while securities regulators continue to rely on the fiction of investor self-help remedies, in particular civil remedies as a realistic route to compensation. While there's always Small Claims Court, the claim limits are relatively small, typically around \$10,000. Costs typically run several hundred dollars depending on a number of factors. You'll also have to give up the amount of money over the claim limit in your province, as well as any future right to get this money in any other court.

The financial services provider (FSP) knows the rules of the complaints game and you don't. You start out at a real disadvantage. The investment firm will drag you through the ringer before it gives you back a dime. It's not a process you'll enjoy as they Deny, Delay Defend and even intimidate. Most of the usual suspects, the provincial securities commissions, the IDA and the MFDA will remind you they're not set up to provide restitution. At this point you'll likely be frustrated and disillusioned with the "system".

So, after you've been exhausted by the firm and its rejection of your complaint they'll refer you to a non-profit entity named the Ombudsman for Banking Services and Investments (OBSI) www.obsi.ca. OBSI was formed in October 2002 when the financial services industry "graciously" offered up OBSI for "free" by expanding the mandate of the then existing Canadian Banking Ombudsman. The turf-protecting insurance industry didn't want to join in so Segregated funds didn't fall under OBSI's mandate. OBSI recommends financial compensation for you if your firm has acted unfairly, made an error or given you bad advice, and you lost money as a result. A regulator, such as the IDA determines whether a firm broke any of its rules, bylaws or laws, and typically doesn't order compensation for clients.

While the word *Ombudsman* might conjure up an image of a friendly group that will hold your hand when facing the powerful, well resourced investment industry, this is not exactly the case. OBSI makes it clear it is not an advocate for investors.

OBSI is not a court of law. Their approach is incongruent with the costly and adversarial legal system, where the tactics of the fight can be as important as the merits of a case to the outcome. As such, the appeals, cross-examinations, strategic delays, procedural straightjackets are not part of the OBSI modus operandi. However, this implies that firms will be cooperative and responsive, a situation some feel is far from reality.

OBSI is part of a collaborative arrangement with regulators.

http://www.obsi.ca/images/document/up-2Framework_with_the_Regulators_EN.pdf

They have agreed to a number of Guidelines including one that requires that at least every three years the Board of Directors should appoint an independent third party evaluator to conduct a review of the operations of the OmbudService since the last evaluation (or in the case of the first evaluation, to set a baseline for future evaluations). OBSI has not yet been exposed to this assessment.

Backgrounder on OBSI

OBSI supports more than 600 participating firms across the banking services and investment sectors <http://www.obsi.ca/UI/ParticipatingFirms/ParticipatingFirms.aspx>. This includes IFIC, IDA and MFDA member firms. It is basically the only national organization that offers a chance for retail investors to get some of their hard-earned money back in cases of financial assault. OBSI investigate through what are called “inquisitorial” procedures, asking questions and reviewing material provided to them. It’s not adversarial, and OBSI doesn’t conduct hearings involving lawyers or cross-examinations.

OBSI doesn’t automatically take on a case just because a client complains. Section 9(d) of their Terms of Reference gives them the right to refer the case to someone else if they judge that someone else to be more appropriate. There is no appeal [<http://www.obsi.ca/UI/AboutUs/TermsOfReference.aspx>]

OBSI is industry-sponsored and industry-funded. It is not a government agency or regulator. It has a Board of Directors, the majority of which OBSI classifies as independent. The Terms of Reference provide the industry-imposed constraints under which the Ombudsman must function. Before OBSI may conduct an investigation, it will first have you sign and return a release letter. The release letter provides you with detailed information regarding their complaint process and outlines the terms and conditions under which OBSI will investigate. OBSI have disclosed that their ability to assess suitability is complicated by the continuing lack of industry-standard terminology in KYC forms, and the subjective nature of assessing the risk of certain securities.

Some of the more important ground rules include, but are not limited to:

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- there is no charge for the dispute resolution service
- the investor must first have made an effort to resolve the case with the firm, a long convoluted, frustrating process [there is no defined time period wherein OBSI will automatically take on a case; as long as the firm insists it's still working the case, they maintain control]
- recommendations are non-binding on either party. However, if a firm does not accept the recommendation of OBSI, OBSI makes public the name of the firm, the recommendation and the circumstances of the case
- the restitution limit is \$350,000- it hasn't changed in four years [Where the amount claimed by you in respect of a complaint exceeds \$350,000, the Ombudsman will not investigate the complaint unless you and the FSP in writing acknowledge the Ombudsman's recommendation limit and you agree to release the FSP from liability for any amount greater than the amount of any recommendation made by the Ombudsman and accepted by both the Complainant and the FSP. However if you have 2 distinct accounts, say one is an RSP, that were subjected to financial assault, you may be able to file 2 separate complaints, each up to \$350,000].
- if you've launched civil litigation, OBSI won't take your case
- only out-of-pocket losses are covered, not opportunity costs; interest is allowed

You might think that these restrictions are not too bad. Let's add a little more detail-112 or 57% of investigations opened in 2006 were related to investments In 2006, only 51% of cases ruled upon resulted in any restitution awards. For those cases where OBSI did not support the client, 66% of those surveyed said that they had excellent or good service according to an OBSI survey. The actual survey questions are not revealed. For all respondents, 83 % [all of 21 **people**] said that they had excellent or good service.

Even those who accept the recommendations may not really be satisfied. Desperate for cash or worn out by the exhausting process, they take what they can and try to move on with their lives. Many do not comprehend the resolution scenario to which they are exposed. The sad fact is that the culture is one in which small investors are conditioned to expect little - they are often not disappointed

In 2006, the number of investment cases completed was a miniscule 67, a shockingly low number given Canada's investing population probably numbers well over 10 million. OBSI does note in its thin 16-page 2006Annual report that even of the people who did use their services, fully 40% had to find out on their own that OBSI exists. OBSI is in fact not well known by the average retail investor

Based on a search of the OBSI website, we could find no obligation for OBSI requiring it to report firm or adviser impropriety or illegalities to the appropriate securities regulator/SRO. It is possible that serious cases are referred but there is no disclosure. There is a strong perception that OBSI does not treat systemic financial abuse like society treats medical well-being abuses, i.e. an epidemic, to contact other potentially abused clients of the particular financial advisor or broker / mutual fund dealer to make them aware of how they may have also been abused. There certainly have not been any Reports

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or general public, frank proclamations of the kind routinely released by the Ontario Ombudsman's office <http://www.ombudsman.on.ca/>.

All provinces have what are called statutes of limitation, which are time frames during which you must file a civil claim or lose your right to a claim. The clock start time criteria and limit periods rules vary by province. One big issue is nailing down when the clock actually starts, normally defined as the point when a reasonable person would have known there is a dispute issue. In Ontario, the limitation period, since 2004, is a short two years, down from 6 previously, thanks to our politicians. In the case of Ontario, and only in the case of Ontario, OBSI explicitly state that the "limitation clock" is stopped while they deal with the case. Outside of Ontario, you'll be told to find out on your own whether or not the clock is halted while they take six months or even two years to make a recommendation -their stated target for resolution is 80% within 180 days. The number of cases that go beyond that is not disclosed in any public documents. When the clock actually started is a judgmental issue depending on differing and legally untested provincial criteria-a real mess.

The shackles on OBSI limit it to examining your case and making a recommendation. OBSI's processes and Terms of Reference do not require it to conduct an analysis to warn other uneducated and unknowing pattern- advised and/or toxic product sold investors who may also have been abused. OBSI does however provide some interesting case studies on an anonymous basis.

You will be told they offer no legal advice. You won't even be told what the limitation period is for your province of residence or whether OBSI involvement stops the clock. Except for Ontario, you could be flying blind as the precious limitation time clock days and months tick away.

The Ombudsman is not bound by the rules of evidence. There is no appeal process for OBSI recommendations. Trying to contact the Chair or any of the directors is virtually fruitless. Once OBSI's opined, you should understand that none of the documents can be used in court and OBSI cannot be asked to testify in any subsequent legal or other proceedings.

OBSI is committed to the privacy principles of CSA-Q830 which are, in turn, embodied in federal legislation (PIPEDA). In particular, collection, use and disclosure of client data will only be done with your consent and only to the extent required to conduct the investigation.

The contrast with the Ontario Ombudsman's forthrightness is startling. Neither the statistics of settlement amounts are provided nor are there any figures outlining OBSI's annual operating budget. OBSI asserts that in 2007 it encountered the first ever rejection of its recommendations by a firm. That's certainly not the case for investors who over the years have turned down recommended offers. Some went on to achieve satisfying awards after initiating or threatening civil action.

Pitfalls to Avoid

You have up to 180 days after receiving a firm's final response to get in touch with OBSI to submit your complaint. It's therefore vital that you decide how you are going to proceed with your complaint without undue delay.

In most cases, OBSI will conduct their investigation concurrently with a regulator's (a provincial securities Commission, the MFDA or the IDA) if you've also filed a complaint with them. However, in some cases OBSI may choose to delay until the regulatory investigation is completed. This delay could be lengthy and costly for you if it loses valuable limitation clock time.

OBSI may be unwilling to take on a case that includes Segregated funds, a life insurance product, but with a little persuasion they will do it especially if the issues are a blend of Segregated funds and other securities. In this case, they liaise with Insurance dispute resolution services. It's important to frame your case so that they will take on the investigation.

In recent large fiascos, like the Portus and Norshield funds, where investors lost tens of millions of dollars, OBSI takes the position that since bankruptcy proceedings or class actions are in process, they will not take on the case or even log it in to restrain the limitation clock. The latter point is very serious since investors who wait could have their right to sue eliminated. Some recommend filing a letter of complaint anyways to put a stake in the ground.

OBSI may consciously or inadvertently bind your complaint to a KYC document, even though you may know nothing about its existence and did not sign it. Sometimes KYC's are changed by advisors without a client being told. e.g. risk tolerance increased. Too often this correspondence is accepted at face value by the regulators, the firm, the bank ombudsman, and the OBSI. The KYC form, may also exaggerate the amount of assets, even though it signed by the broker, a branch manager, and approved by the firm's Compliance Department. Ensure in your statement of complaint that you clearly articulate your investment profiles and attach relevant documentation such as a signed and dated NAAF.

If you accept the recommendations, you cannot go on to file a civil action. The firm will also require you to sign a confidentiality agreement aka a gag order if you agree to settle. This means you can't warn others that may have been exposed to the same wrongdoing or unsuitable investments. If you reject the proposed settlement, it is removed from the table and you're back at square one. Note also that if you've rejected a recommendation from the firm, OBSI may well come up with a lower figure and that's the one you'll be stuck with unless you proceed to civil litigation.

If you meet with or are called by an OBSI case investigator you may be asked questions that try to reveal your financial literacy, personal situation, level of education, investing experience, financial objectives, employment, annual income, net worth, age and other

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factors that will determine the success or failure of your claim. Be very careful what you say and how you express it. If you don't understand a question, ask for clarification. Your answers could come back to bite you. This is no time for ego.

Never forget that the Ombudsman's decision on the resolution of a complaint is normally based on four basic criteria:

1. Accepted industry standards and practices
2. Standards established by the individual financial services provider, professional associations or industry regulatory bodies
3. Overall fairness as determined by the analyst/investigator
4. Good business practices NOT Best practices (even though you may have been promised BEST practices by the firm and the advisor advertising)

If a firm has a higher standard, OBSI would likely use it especially if you bring it to their attention. Nevertheless, these criteria are troubling and there have been criticisms on how investment complaints have been handled by OBSI and other industry-sponsored organizations. Right now however, it's the cheapest and easiest route to use to obtain redress consideration.

Preparing to file a complaint

The first thing you need to understand is that complaint processes are not user-friendly, often by design. In the case of OBSI it is recommended that you familiarize yourself with processes so you better understand what you will have to deal with and get a grip on terminology. A quick read of suggested books or a visit to one of the recommended websites will open your eyes. Many who have endured the complaint process report that it was an eye-opening and jaw-dropping experience.

As you prepare to file your complaint against the firm you should have a copy of the following documents organized in your file:

- The *Letter of Engagement** if available
- the signed NAAF for each applicable account
- the account statements for the period of interest for each account affected
- transaction confirmation slips
- records of any meetings, correspondence, emails, prior complaints
- copies of investment proposals and the *Investment Policy Statement** (if available)
- copies of ads, brochures and other sales literature pertaining to the investment or situation
- a copy of the relevant Know Your Client (KYC) Form
- handouts or notes from any "educational" seminars attended
- the firm's written complaints procedure.
- notes of who you talked to, when, and any important details of your conversations.

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*absence of these 2 documents is a sign that you may be dealing with an advisory firm or adviser that has not adopted professional best practices

Be sure to include the advisor's professional credentials [usually on the business card]- they could bear on the case . You might also want to check the IDA, OSC and MFDA websites to see if your advisor has had troubles with regulators before.

You will receive the best response, the more accurate and complete the information you provide. If you have a complaint about a fund or a fund salesperson, specific details of how, why, and when you were defrauded, sold unsuitable investments or encountered problems with investments or your broker/ advisor.

The success of many complaints against greedy or incompetent advisors and the firms that employ them hinges on what the client investor told the advisor about the type of investments desired as determined by the New Account Application Form [this should be signed by clients, a copy retained and updated as required; forgeries and adulterations have occurred!] and how the advisor interpreted this instruction when he/she filed out the firm's *Know Your Client* (KYC) form. Few firms provide a copy of the completed KYC form to clients; it seems to suddenly pop up at dispute time. KYC forms are not standardized and vary from Company to Company. Suitability, along with leveraging churning and unauthorized trading make up the bulk of investor complaints.

Before you start on your complaint journey, realize that the odds of a fast and satisfying settlement are not high. The financial services industry didn't get to be so powerful and profitable by easily parting with its money. They are skilled at rebutting claims and seasoned veterans of investor litigation. They have experienced negotiators and lawyers ready and willing to negate your claim. Expect a protracted, emotional and frustrating trip. Even OBSI has difficulty extracting information from firms and that's one reason so many cases takes months or even 2 years to resolve.

A good reference is " A step-by-step Guide to Making a Complaint" available from the Ontario Securities Commission (OSC) .
(<http://www.investored.ca/en/OSCinvestorresources/Brochures/Pages/makingacomplaint.aspx?aid=cgateway>). The document cautions however that the OSC cannot give advice on an investment, unwind a transaction, act as your legal counsel or get your money back. They can however answer your questions about investment products , tell you if your advisor is registered in Ontario and investigate complaints as related to securities regulations.

OBSI itself provides guidance on making a complaint

<http://www.obsi.ca/UI/ComplaintProcess/Step1.aspx> If you have a question, or want more information, you can call OBSI toll-free at 1-888-451-4519 or email them at ombudsman@obsi.ca You might also want to read OBSI's Procedures Guide https://www.obsi.ca/images/document/up-OBSI_Procedures_Guide.pdf If you're a mutual fund owner be sure to read *How to Make a Complaint to the MFDA* <http://www.mfda.ca/enforcement/forms/HowToComplain.pdf>

The elements of claims

To varying degrees you may file claims for the following:

1. actual investment losses due to purchase of unsuitable* investments
2. *excessive* fees paid
3. early redemption penalties to exit unsuitable investments
4. interest charges for *unnecessary* margin or loans
5. *excessive* sales commissions
6. *excessive and unnecessary currency conversions*
7. *misrepresentations of securities or failure to disclose risks and fees*
8. *unauthorized* trading or outright fraud /theft
9. undue income tax liabilities as a result of churning or unsuitable investments
10. the costs associated with preparing the claim/complaint

* some firms may unfairly attempt to reduce your claim by offsetting losses from unsuitable investments with gains from suitable investments

You may find it advantageous to your case to highlight opportunity losses and emotional stress, pain and suffering but don't expect OBSI to compensate you directly for these adverse affects of financial assault. Adding any special circumstances that support your case can't hurt. In one case, a widow was legally blind, yet the firm maintained she read and signed the NAAF! In another , the complainant was in a European hospital under sedation on the date the firm claimed a transaction was authorized.

Be sure to definitize the time period covered by the claim. It's wise to have an investor friend, accountant or lawyer double-check your claim rationale, clarity and figures. You may in fact not have a legitimate or winnable claim or one that's worth the effort. You can also name a trusted person as an intervenor by signing a form that OBSI will provide.

How to write a winning complaint letter

Each complaint situation is so unique that it's virtually impossible to create a prototype letter. Nevertheless there are some basic points about all effective complaint letters:

1. A complaint letter should be businesslike and to the extent practical, avoid emotion
2. the letter should include contact information and be dated-include your full name, mail address, email address and telephone numbers
3. Put "Complaint" at the top of your letter.
4. address your letter to a real person if known
5. begin your letter with a good reason to read it
6. clearly state the problem, time lines, employee names and the specific reason(s) you believe you have a valid complaint
7. back it up with documentation, facts, background, special circumstances and chronological detail

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8. ask for what you want i.e. restitution
9. describe what you expect as a solution.
10. your letter should be courteous and professional; never use profanity -stay civil
11. be careful not to make any libelous comments –attack the problem, not the person

Remember too, that any comments you make can and will be used against you should the case turn ugly. You might want to register the letter to ensure you know it's been received. Their mailing address is:

Ombudsman for Banking Services and Investments
PO Box 896, Station Adelaide
Toronto, ON M5C 2K3

Their toll-free fax number is 1-888-422-2865

The current Ombudsman is David Agnew.

Some persuasive arguments for restitution

Here are some sample arguments that individually and/or collectively have helped recover money from brokers and fund dealers:

- the firm did not advise you of the availability of the OBSI dispute resolution service
- the firm failed to disclose conflicts- of- interest regarding fees leading to unsuitable investments
- the portfolio's asset allocation is wholly unsuitable either because it is inconsistent with your stated needs, temperament, age, marital status and health or physical/ mental disabilities
- the portfolio character is a significant departure from your historical conservative investing pattern and/or risk tolerance
- the advisor failed to deliver a prospectus
- the advisor failed to disclose the investment risks-market risk, currency risk, volatility [high standard deviations and betas are indicators of excessive risk]
- your investment knowledge is demonstrably limited and all buys/sells were based on your advisor's recommendations i.e. you trusted him-**defacto control** granted
- there is no persuasive rationale for the account churning and switching
- the broker accepted payment from the fund company to flog the mutual fund but you were not advised of this
- you were not advised of reduced sales commissions or discounts for large purchases/holdings
- the dealer does not comply with securities regulations, SRO rules, or its own publicly stated policies and principles
- unduly expensive funds were purchased without advising you of alternative equivalent but lower MER funds
- the KYC form is incongruent with the NAAF and/or contains material errors

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- your financial and/or linguistic literacy is such that you were totally dependent on your advisors investment recommendations for buying/selling and the timing of such transactions
- the signed NAAF form was confusing with vague, ill-defined terms that even experts can't agree on or that it's not your signature
- there was ineffective supervision of the advisor/broker
- as applicable, point out that you are a senior, a retiree, a widow or disabled and incapable of making up the losses from the unsuitable investments

Be aware that industry participants have an arsenal of defences that they will put forward to OBSI. If it is favourable to them, they may backtest data to argue that even if the proper asset allocation had been followed, losses would still have been incurred. An argument could be put forward that a non-discretionary account deserves little sympathy even if all buy/sell recommendations came from the broker, fund salesperson or advisor. The firm may argue you received transaction slips and statements but said nothing. The industry promoted concept of *trust* seems to melt away at the time of dispute. They may argue that if an investors' income from all sources, including those outside the account(s) in dispute is "adequate", then a higher proportion of equity/income is justifiable and not inconsistent with the stated objectives of the designated accounts.

Conversely, the financial services regulators bind member firms to some demanding, albeit loosely enforced, rules. It's wise to review the rules industry participants are supposed to play by –often they can be used to your advantage since they don't always follow their own rules. For example, the IDA rule book contains specific rules pertaining to complaint handling and ombudservices that must be followed by IDA members (see IDA By-law 37.1- 37.2 (Alternative Dispute Resolution) -page 160) and standards for the handling of client complaints (see IDA Policy # 2-page 392) procedures for reporting of client complaints (see IDA Policy # 8-page 474)

http://www.ida.ca/Files/Regulation/RuleBook/RuleBook_en.pdf Similarly, the MFDA Policy No. 3 Handling Client Complaints establishes minimum industry standards for handling client complaints for MFDA members.

<http://www.mfda.ca/Policies/policy03.pdf>

Post filing actions

For lots of reasons you shouldn't just sit around and wait. Be sure to follow up with the assigned investigator on the progress of your case within say, one month. Ask if any additional information is required. If there are issues or delays try to find out why. Remember, the limitation clock is ticking and the passage of time dulls memories .

Summary and conclusion

While far from perfect, OBSI represents one of the few routes to dispute resolution without cash outlays for investigation or legal fees. By following the Guidelines provided, you may increase your chances of a favourable settlement.

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Most reports are detailed and contain nuggets of valuable information. The report can be harvested for useful facts in pursuing the case further. Several critical OBSI observers however caution that the recommendations may not be unbiased. One key settlement criteria used is that settlements, if any, are reduced because the hapless investor failed to mitigate the loss at an early enough stage. Investor advocates warn that OBSI's legal position on rejections may not always be on solid footing. The Small Investor Protection Association www.sipa.ca does not endorse OBSI to its members based on limitation period uncertainties, transparency and other issues. [A widely-held conspiracy theory holds that investment firms deliberately drag out the complaint investigation process to consume precious limitation clock time.]

For too many Canadians, OBSI represents their only hope for restitution. The losses may be too small to justify hefty legal expenses or age or ill health may be working against the investor. The bottom line: Look towards OBSI for a recommendation but with a constructively critical eye.

DISCLAIMER

Information contained herein is obtained from sources believed to be reliable, but the accuracy is not guaranteed. The material does not constitute a recommendation to act . The sole purpose of this Document is to assist investors file quality complaints. It is not intended to provide legal, investment, accounting or tax advice and should not be relied upon in that regard. If legal or investment advice or other professional assistance is needed, the services of a competent professional should be obtained.

Some useful websites:

www.investorvoice.ca Lots of material on regulatory matters

www.canadianfundwatch.com Loaded with pro-investor articles on mutual funds

www.sipa.ca The Small Investor Protection Association website

<http://www.robertgoldin.com/bio%20new.htm> A dispute resolvers website

<http://www.stockloss.ca/contact.htm> John Hollander site, a litigation lawyer

http://www.osc.gov.on.ca/About/CSA/csa_20071002_csa-investor-study-full.pdf CSA study on investment fraud in Canada

www.investorism.com Investor advocate's Joe Killoran site

<http://www.fcac-acfc.gc.ca/eng/consumers/Complaints/default.asp> FCAC website

<http://consumerinformation.ca/> A consumer-friendly portal hosted by the Government of Canada which includes a step-by-step complaints guide for several different industries including financial services, with links to provincial government consumer affairs departments

www.investoradvocates.ca Investor Advocate Larry Elford's site –blog

www.InvestorEd.ca OSC education website

Suggested Reading

J. Reynolds, the Naked Investor, Penguin Books, 2007

R. Goldin, INVESTOR BEWARE , MacGold Direct Inc, 1999