



Small Investor Protection Association - A voice for small investors

The SIPA Sentinel is issued bi-monthly. From time to time articles and re-prints are included that offer opinions on subjects related to investment and regulation. These are meant to help increase investor awareness, and SIPA may not share these opinions.

Should Investment Advisers be Fiduciaries?

A couple of years ago FAIR Canada was instrumental in organizing a conference on fiduciary standards with participants from the United States and the United Kingdom as well as many Canadians. The consensus seemed to be that investment advisers should have a fiduciary responsibility to their clients.

Since then there has been much discussion and posturing with industry in solid opposition to the imposition of a fiduciary standard and stating that the current system provides sufficient protection for investors. The numbers of victims who suffer loss indicates that investors are not protected as the sellers of financial products pass themselves off as financial advisers leading investors to believe they can be trusted. Of course there are some individual cases where the adviser does have fiduciary responsibility but this generally must be proven in court. There is no legal requirement for Dealers Representatives to have a fiduciary duty or even to look after clients' best interests.

There are some industry representatives who do look after their clients' best interests but there are also many who do not. The status quo is really Caveat Emptor or "Buyer Beware". Unfortunately the public is being deceived into thinking it is something different. The regulators are failing to properly inform the public with regard to financial representatives legal responsibilities.

While the regulatory rules are fine they are not always followed. When they aren't bad things happen for investors and there is nothing (no legal requirement) to fall back on except civil litigation or the Ombudsman for Banking Services and Investments (OBSI). Civil litigation can be a long and costly solution and indeed may not even be possible for some investors, and OBSI may not be possible in some cases. Therefore it seems logical that the imposition of a fiduciary responsibility for financial advisers is indeed necessary.

The former chair of the OSC Investor Advisory Panel, Anita Anand, recently published an article and says: *"A default fiduciary standard for investment advisers is the best way to protect investors and needs to be explicitly enacted - now."* The complete article follows.

Yes, Investment Advisers Should be Fiduciaries

Anita Anand

Wednesday, September 25, 2013

Co-authored with John Chapman, JD student, University of Toronto Faculty of Law.

Did you know that your investment adviser is not bound by an explicit legal duty to act in your best interests? Surprising? Yes, but more curious is the intense debate about whether this duty should be made explicit in the law. Those who represent investors should be bound by an express fiduciary duty. Alas, such is not the case.

First, let's be clear that the relevant law is a mess. The standard of conduct is cobbled together from provincial securities regulations, common-law principles and industry requirements, so it is difficult to



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say when a fiduciary duty applies without evaluating each relationship on a case-by-case basis, which often requires a full trial. Another reason that a national securities regulator is a good idea.

Second, the IEF found that while 70% of investors believe that they are protected by a best interest standard, only 1% of them actually are. OSC Rule 31-505 requires dealers and advisers to deal "fairly, honestly and in good faith" with their clients. Some commentators believe that this is the same as a best interest standard. But no court has recognized this argument so far, and the CSA takes this to mean that the current standard falls short of a best interest standard. Even if the Rule establishes a best interest standard, there is no apparent drawback to acknowledging this fact explicitly. The law would be clearer and easier to understand.

Some argue that establishing a uniform fiduciary standard will increase the costs of providing advice, negatively impacting certain business models. It is true that more stringent regulations carry greater compliance costs and some of these costs may be passed on to investors.

But investors pay a price for investments that may not be in their best interests, given that advisers are required only to recommend a suitable investment rather than the best one. We believe that most investors would be willing to pay a higher up front cost for the imposition of an explicit fiduciary standard that requires their advisers to place the client's interest ahead of their own in all circumstances. Regardless, costs should be transparent, and shared amongst investors generally, rather than concentrated amongst the unlucky that have been steered into bad investments. And, while cost is an important consideration, it alone should not drive the discussion.

In implementing the standard, Canada can look to examples from other jurisdictions to minimize the cost to the investment industry. The EU, US, UK and Australia have all implemented a higher standard of conduct for investment professionals, and some of these countries had higher standards to begin with. International examples also show that a "uniform" standard can be carved to respond to industry concerns as in the UK.

Regardless of whether the standard changes, the law is due up for clarification. Statutory regulations should set forth the current standard, so investors and advisers can turn to one place to determine the relevant standard of conduct. Investors should not need to consult their lawyers before signing on with an investment adviser.

Provincial securities regulators have investor protection as a central mandate. A default fiduciary standard for investment advisers is the best way to protect investors and needs to be explicitly enacted - now.

Anita Anand is a Professor of Law and John Chapman is a JD Student at the Faculty of Law, University of Toronto.

The Ontario Securities Commission Investor Advisory Panel

The Investor Advisory Panel (IAP) established by the OSC is continuing to represent investors concerns to the OSC with influencing the OSC in their policy and rule making. The first panel several years ago was ground breaking and revealed the weaknesses of the established format. Although it was not continued it served as the basis for establishing a new improved format.



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The current IAP, which appoints members for two years but had also provided for members to extend their time, has recently appointed its third Chair, Connie Craddock. I have known Connie for many years and was pleased when she first became a member of the panel while I was still a member. She is well aware of investor issues and I am sure she will continue to guide the good efforts of the panel.

Earlier this year Ken Kivenko, Chair of SIPA's Advisory Committee, was appointed as a member. Ken is well aware of small investor issues, produces a monthly newsletter "*Fund OBSERVER*", operates a great website with information for small investors "*CanadianFundWatch.com*", and contributes articles to the media with particular regard to mutual funds.

The new chair Connie Craddock has issued a letter to Stakeholders which is posted on the OSC website and is reproduced below:

Investor Advisory Panel

Dear Stakeholders:

Welcome to the homepage for the Ontario Securities Commission's Investor Advisory Panel. Formed in August 2010, the Panel is an initiative by the OSC to enable investor concerns and voices to be represented in its rule and policy making process. Our mandate centres upon our written submissions to the OSC that we will provide regarding various regulatory initiatives including proposed rules and policy statements.

We are committed to functioning independently from the Commission and we continue to discharge our responsibilities with this objective in mind. In addition, we are committed to making our process transparent, which we accomplish by posting the agendas and minutes from each of our meetings and posting information notices from time to time to inform the investor community of the issues that we are considering and to request input from you.

The Panel recently added new members Jane Ambachtsheer, Harold Geller, Alison Knight and Ursula Menke. Bios of the nine current panel members are posted. We would also like to thank our former members Stan Buell and Nancy Averill for their contribution to the Panel, and a special thank you to outgoing Chair Paul Bates for all of his efforts in guiding the Panel over the past year.

Investor outreach is a key facet of our mandate. We have convened expert panels and retail investor focus groups, consulting with retail investors, investor advocacy groups, legal experts, and securities regulators to enhance our understanding of investor interests and how these interests can be better served from policy perspective.

We conducted, jointly with the Investor Education Fund with support from the OSC, a research study of over 2000 investors from across Ontario from October to December 2012. The final report is available on the web-site.

We greatly appreciate hearing investors' viewpoints and thank you for your continued participation and support.

*Yours sincerely,
Connie Craddock, Chair, Investor Advisory Panel*



Contacting the IAP

You may contact the Panel by email at: iap@osc.gov.on.ca or by writing to:

*Investor Advisory Panel
c/o Lisa Enright, Advisor, Office of the Investor
Ontario Securities Commission
20 Queen Street West, 22nd Floor, Toronto, ON M5H 3S8*

The Investor Advisory Panel consists of nine members, including the Panel Chair. Each member of the Panel has been appointed for a two-year term.

The current members are: Jane Ambachtsheer, Paul Bates, Connie Craddock (Chair), Harold Geller, Alan Goldhar, Ken Kivenko, Alison Knight, Cary List and Ursula Menke.

Office of the Investor

The OSC under Chair Howard I. Wetston recognizes the need for improved investor protection as part of their mandate. In addition to continuing with the Investor Advisory Panel (IAP) a new Office of the Investor has been established that will work closely with the IAP and the Investor Education Fund. The current initiatives of the Office of the Investor incorporate some of the primary initiatives of the IAP and SIPA.

The following is reproduced from their website:

The Office of the Investor leads the effort to identify and understand investor issues and concerns through investor engagement and research. The Office is the voice of the investor internally at the OSC, championing investor protection and ensuring investors perspectives are considered and addressed in policy and operational activities.

The Office coordinates all investor focused initiatives including working with the OSC Investor Advisory Panel and the Investor Education Fund to support their mandates.

The current investor initiatives that the Office is focusing on are:

- *Point of Sale Disclosure – Fund Facts*
- *Cost Disclosure and Performance Reporting*
- *Dispute Resolution Service – OBSI*
- *Fiduciary Duty Standard for Advisers and Dealers*
- *Mutual Fund Fees*
- *Considerations for Capital-Raising Prospectus Exemptions*

The Office of the Investor would like to hear your views on these or other investor related initiatives of the OSC as well as your investment stories, ideas and concerns. You can contact that Office at InvestorOffice@osc.gov.on.ca



OMBUDSMAN FOR BANKING SERVICES AND INVESTMENTS (OBSI)

OBSI has been resolving investor issues for many years. It is a low cost approach to dispute resolution and was regularly recommended by SIPA until the limitation periods were reduced to two years. Due to the fact that it takes quite some time to arrive at a resolution and it was not clear how or if the clock could be stopped for the limitation period and apparently consent from the industry participant was necessary, SIPA began recommending that investors first get a legal opinion before proceeding to OBSI.

During the last couple of years there has been industry generated controversy about OBSI as some participants decided to opt out and select their own dispute resolution agencies. Doug Melville was appointed Ombudsman and CEO in 2009 and under his leadership OBSI has made great strides. Many disputes have been resolved by OBSI but there is considerable industry pushback.

OBSI does not have the mandate to enforce recommendations and can only use persuasion. As a last resort if a participating firm will not agree to OBSI's recommended solution, OBSI can publish their name. This does act as a deterrent and should also act as an alert for investors.

Recently OBSI has been publishing names of these firms on their website. We encourage all small investors to visit the OBSI website www.obsi.ca. Portions of the OBSI website are reproduced website below.

HOW WE WORK

Our staff – with a wide variety of experience and training in financial services, law, accounting, dispute resolution and regulatory compliance – review and investigate unresolved complaints from clients about banking and investment products and services.

If we find the firm has caused a loss, we will recommend a settlement that aims to make the client whole. We may also recommend compensation for inconvenience in the appropriate circumstance, or nonfinancial actions such as correcting a credit bureau record. If we find the firm has acted appropriately, we will explain to the client why we came to that conclusion.

When we receive a complaint, our assessment team looks at the file to make sure it falls within our mandate. For instance, the firm has to be one of our participating banks, credit unions, investment dealers, mutual fund dealers and managers, investment counsel/portfolio managers and scholarship plan dealers. We also look for a final answer from the firm to the client, which allows us to start our review knowing the positions of both firm and client. OBSI will look at complaints where the client is either unsatisfied with their firm's final response, or at least 90 days have passed since the client first complained to their firm and the complaint remains unresolved, as long as the client raised the complaint with their firm within six years of when they knew or should have known of the problem.

During an investigation, we gather information from the parties and review the facts of the case. We make decisions based on what's fair to both the client and the firm, taking into account general principles of good financial services and business practices, the law, regulatory policies and guidance, and any applicable professional body, standards, codes of practice, or codes of conduct.



If we believe that the facts of the case do not warrant further review, we will let the client know quickly. We always make sure that we explain our reasons, just as we do when we are recommending compensation.

If we believe compensation is owed to the client, we try to settle the dispute through a facilitated settlement between the client and firm that aims to address the complaint quickly with a fair outcome to both parties.

If we can't facilitate a settlement but we continue to believe the client should be compensated, we will complete our investigation and prepare an investigation report. We will send a draft investigation report to the firm and the client for a brief comment period. Following the comment period, we will send the client and the firm a final report that sets out our recommendation.

Neither a court nor a regulator, OBSI does not fine or discipline firms or individuals. Our recommendations are not binding on either party, but we have an excellent record of acceptance of our recommended settlements from both firms and clients.

While we do not handle matters that have already been through a court or an arbitration, if a client is not satisfied with our conclusions, they are free to pursue their case through other processes including the legal system, subject to statutory limitation periods.

REFUSALS TO COMPENSATE

Since our organization's inception in 1996, very few participating financial firms have ever refused an OBSI recommendation to compensate a client regarding a complaint we investigated.

OBSI's only interest is in finding fair resolutions to complaints. However, a firm's refusal to compensate their customer means that OBSI must publicize the refusal as well as our investigation's findings under the so-called 'name and shame' requirements of Section 27 of our Terms of Reference.

Refusals to Compensate	
Date	Firm
07/11/2013	Keybase Financial Group
31/10/2013	Union Securities Limited
29/10/2013	De Thomas Financial Corp.
03/04/2013	Connor Financial Corporation



Investors should read the "*Fund OBSERVER*" written by Ken Kivenko and published on his website "*CanadianFundWatch.com*". The Fund OBSERVER monthly contains a wealth of information for investors including developments in regulation, current topics, and essential information on investments. The following is from the website.

CanadianFundWatch.com

This web site is dedicated to investment fund investor education and protection. The multi-billion fund industry plays a key role in the savings and retirement plans of millions of Canadians. Many industry practices provide beartraps for the unsuspecting investor and securities regulations have not kept up with the pace of change in the industry.

and from the October Fund OBSERVER:

We issued an INVESTOR ALERT on Segregated Funds re OBSI new rules for complaint handling .Ask us for a copy. It could save you a lot of aggravation. Contact kenkiv@sympatico.ca

Note on Principal Protected Notes: Most PPNs do not offer an income stream, but provide a return to clients at the maturity date, provided certain conditions are met. This makes these investments generally unsuitable for clients with an investment objective of "income".

Do financial advisors add value net of costs?

*Given low financial literacy levels and weak analytical skills , many Canadians need an an advisor they can trust.They do not however need "advisors" who flog expensive products, sell unsuitable investments, encourage unnecessary leveraging ,disguise selling as advice or misappropriate their savings. For an example of what devastation can occur from a Black Hat advisor, google " Ian Thow". Much is at stake for financial consumers, who rely on all kinds of advisors to sort out complex financial issues and ensure that they won't outlive their investments. In this article we will review the potential value-add benefits of a professional advisory relationship. (visit the *CanadianFundWatch.com* website for the full article)*

National Regulator

Although the initial attempt by the Federal Government to establish a national regulator appeared to have stalled, the initiative continues and Ontario and B.C. appear to be going forward. In time it will likely happen. Earlier this year the Canadian Securities Transition Office was closed but Minister Flaherty has continued his initiative in spite of all of the opposition he has encountered.

The Globe and Mail published an article entitled "*Ottawa renews push for national securities regulator*" by [*BARRIE MCKENNA, STEVEN CHASE, JANET MCFARLAND AND SOPHIE COUSINEAU*](#). This article provides a good outline of the status of the Government of Canada initiative to establish a national securities regulator. The complete article is available on the Globe and Mail website. Some excerpts from the article follow:

"The federal government announced a plan to create a national securities watchdog by signing on Ontario and British Columbia, a significant advance in a decades-long power struggle between Ottawa and provincial authorities over who should police the country's capital markets.



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The move comes nearly two years after the Supreme Court of Canada shot down Ottawa's plan to centralize financial market regulation, ruling that securities oversight is a provincial power. That decision supported financiers and provincial authorities outside of Ontario, who argue that their markets are unique and ill-served by decisions made in Toronto.

Two of the four largest provinces, Quebec and Alberta, signaled they would not participate in the new body. However, Finance Minister Jim Flaherty said in an interview that the regulator will also be charged with keeping watch over the derivatives market in Quebec, as part of its mandate to monitor "systemic risk," or risk to the broader economy." ...

"Canada is the only major industrialized country without a single regulator, and its 13-regulator system has long been an irritant to many in the securities industry because of extra paperwork to be processed by small regulators in places like Regina and Halifax." ...

"Instead of trying to reach a national consensus, and having been stymied in an attempt to get Supreme Court authority to force a change, Mr. Flaherty changed tactics. The new agency, slated to become operational in 2015, would be based in Toronto. and have offices in all participating provinces." ...

Finance Minister Jim Flaherty said the proposed new system would help attract more investment, better protect investors, make it easier to prosecute white-collar criminals and contain financial system risks. "This is an historic agreement," Mr. Flaherty told reporters in Ottawa, alongside Ontario Finance Minister Charles Sousa and B.C. Finance Minister Michael De Jong. "This issue has been mooted in Canada for at least 70 years, if not longer, and now we've actually accomplished something." ...

Ermanno Pascutto, executive director of Toronto-based shareholder advocacy group FAIR Canada, said a key part of the announcement is a pledge by the federal government to provide transitional funding for provinces to compensate them for revenue they will lose from the fees charges by their securities regulators. Many provinces do not have strong philosophical concerns about joining a national regulator, Mr. Pascutto claimed, but are unwilling to give up a revenue source.

SIPA Website

SIPA passed its fifteenth anniversary this year and celebrated by launching a new revised website in October. Our website has been under development and re-design for the past year. Ted Meyerscoff, who designed our previous website, redesigned our new website and it is now posted at www.sipa.ca.

TAX FREE SAVINGS ACCOUNTS (TFSA)

Tax Free Savings Accounts are one of the best initiatives for all Canadians. It is truly an investment account where you can hold the same investments as a Registered Retirement Savings Account (RRSP). The annual limit is now \$5,500. The most important advantage of the TFSA is that all gains are accumulated tax free. TFSA withdrawals are not treated as income for tax purposes unlike Registered Plans. All Canadians are encouraged to maximize their contributions to their TFSA.